OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 6 JUNE 1972[1]

Mr President,
Members of the Court,

In the present case, in which you are asked to give a preliminary ruling for the Corte d'Appello, Brescia, you will have occasion to confirm, and also to elaborate, the interpretation which you have already given on several occasions of the provisions of Article 20 of Regulation No 19 of the Council of 1962 relating to refunds for exports of cereals from a Member State of the Community to countries outside the common market.

Before recalling the details of this system of refunds, which was in force before 1 July 1967, I must first explain briefly the circumstances which caused the Brescia court to exercise the power granted to it by Article 177 of the Treaty of Rome, and secondly set out the exact wording of the questions which it puts to you.

The Italian undertaking Fratelli Grassi, whose registered office is at Cavatigozzi, (in the province of Cremona) carries on trade in cereals and processed products, particularly for export. During the period from October 1965 to August 1968 it exported flour to countries outside the Common Market. Having requested payment of the refunds relating to these exports from the Cremona Tax Office, the undertaking considered that the delays on the part of the authorities in paying the amounts claimed—delays which compelled it to resort to bank loans and thus to incur interest charges—caused it to suffer damage. The undertaking therefore commenced proceedings before the Tribunale di Brescia on 8 November 1968 for an order compelling the Italian State to pay compensation for this damage.

By judgment of 18 March 1971 the Tribunale dismissed this action on the ground that in view of the Community regulations applicable to the exports in question and of the case-law of your Court (Judgment of 17 February 1970 in Case 31/69, *Commission* v *Italy*, [1970] ECR 25 *et seq.*) Italy, which was not bound to pay the refunds within a specific period, had a discretion in this regard.

Grassi appealed against this judgment to the Corte d'Appello, Brescia. In its judgment of 24 November 1971 that court makes a distinction between refunds relating to exports effected before 1 July 1967, which are governed by Article 20 of Regulation No 19/62 of the Council, and refunds payable for exports effected after that date, that is, after the entry into force of the system instituted by Regulation No 120/67 of the Council on the common organization of the market in cereals.

With regard to this latter category of transactions, the court, subject to possible review by the Corte di Cassazione, has resolved the dispute and decided that the Finance Administration was bound to pay interest at the legal rate on the amount of the refunds granted for exports effected after 1 July 1967, with effect from the date on which the request for payment of the refunds was presented, in due form, to the Tax Office.

On the other hand, in respect of the exports effected before 1 July 1967 it decided to submit the following questions to you for a preliminary ruling:

1. Whether, until 1 July 1967, the provisions of the Treaty and of Community Regulations Nos 19 and 20 of 1962, *in conjunction with Article 16 of Regulation No 120/67*, required the authorities of Member States to grant refunds, or whether they only authorized them to do so.

2. Whether the said provisions of the Treaty and of the regulations cited allowed the said authorities any right to delay payment.

The wording of the first question calls for two observations:

1 — Translated from the French.

First, although the Corte d'Appello, Brescia, thought it necessary to refer to Regulation No 120/67, the grounds of its judgment clearly show that it is only asking you for an interpretation of the Community law applicable to exports before 1 July 1967, that is, the provisions of Article 20 of Regulation No 19/62.

The system temporarily instituted by those provisions for the progressive establishment of a common organization of the market in cereals ceased to apply and was replaced as from 1 July 1967 by the system instituted by Regulation No 120/67, with the result that, whereas it was purely optional before that date, the granting of refunds thereafter fixed by the Commission became compulsory for Member States after the entry into force of the new regulation.

Therefore the question submitted to you regarding that part of the dispute concerned solely with the exports effected by Grassi before 1 July 1967, relates and can relate only to the rules laid down in 1962; the question submitted does not at all concern those laid down in Regulation No 120/67.

Secondly, the Italian court also mentions 'Regulation No *20/62*', which relates to the market in pigmeat. No doubt this reference is a material error, since the exports in question relate solely to cereal products, as can be seen from the statements of the Brescia court itself.

It certainly seems that in reality the Corte d'Appello intended to refer to Regulation No *90/62* of the Commission, a measure implementing Regulation No 19 of the Council of the same year.

However that may be, the questions which the national court submits for your consideration certainly concern the interpretation of provisions of regulations adopted by Community institutions and are therefore within your jurisdiction, and the request for a preliminary ruling, made in accordance with Article 177 of the Treaty of Rome, is admissible.

What I have just said with regard to the scope of the first question will enable me, moreover, to reject immediately the argument advanced before the Court by Grassi's representative, to the effect that you are empowered to say whether the systems established both by Regulation No 19 and by Regulation No 120/67 have created, in favour of exporters of cereals in the Member States of the Community, the individual right to be granted export refunds as soon as they have submitted proof that the exports in question have been effected. According to Grassi, despite the wording of the judgment making the reference, which, as we have seen, is limited to the system in force before 1 July 1967, you are empowered to give a wider reply, relating also to the system applicable to exports effected after that date; the undertaking considers that only an overall reply would put the Italian court in a position to reach a proper decision.

However, Gentlemen, it would be impossible for you to follow the undertaking's argument on this point without giving a decision *ultra petita*, without exceeding the scope of the proceedings, which is well defined, and, once again, relates only to that part of the problem concerning the exports effected before 1 July 1967, and which, despite imperfections in the drafting which I have mentioned, has been clearly delineated by the judgment of the Brescia court.

By asking you to decide on the existence, in favour of exporters, of an individual right to the refunds and, as its corollary, of an obligation on the part of Member States to grant them to those exporters both during the transitional period of the progressive organization of the market in cereals and after the definitive implementation of the common organization, the Grassi undertaking is really inviting you to reverse a well-established line of case-law.

In fact, although in Case 31/69 (*Commission* v *Italy*), which the undertaking cites, you held that 'The entry into force on 1 July 1967 of an organization of the markets in various agricultural products [including cereals] with a single price and uniform levies and refunds for the entire Community involves for the exporters concerned the right to receive the said refunds and a duty on the part of the Member States to advance them, and thus recognized both the duty on the Member

States and the individual right of exporters, the situation in however quite different in respect of the previous transitional period, during which the granting of these refunds was purely optional.

In its judgment delivered on 27 October 1971 in Case 6/71 (*Rheinmühlen* [1971] ECR 837) the Court expressly ruled that 'the Member States were free completely to refrain from granting refunds'.

You confirmed this interpretation in your judgment of 15 December in Case 21/71 (*Brodersen* [1971] ECR 1077). You stated on that occasion that although when fixing the conditions for the grant of the refunds 'which they decided freely to award', the Member States were bound to observe a certain number of rules or principles which were necessary to the application of the general scheme laid down by Regulation No 19, 'they had, on the other hand, the power to apply more restrictive criteria than those established by the Community rules'.

Finally, more recently still, your judgment of 23 March 1972—Case 85/71, *Kampffmeyer*—not only confirmed that during the transitional period Member States were free to grant or refrain from granting refunds but also stated that this discretion implied the power 'to add to the conditions for the grant of the refund which were laid down by the Community regulations', and you ruled that the combined provisions of Article 20 of Regulation No 19/62 and of Article 2 of Regulation No 90/62 enabled those States to fix rates of refund differing from one third country to another and lower than those provided for by the Community regulations.

Thus, you have accepted the principle of the Member States' freedom of action with regard to refunds under the system prior to 1 July 1967. It is true that this principle flows from the text of Article 20 of Regulation No 19/62 of the Council itself and from Article 1 of Regulation No 90/62 of the Commission. But its real justification is to be found in the essential features of the temporary organization of the market in cereals at that time, which were as follows:

— the Council had confined itself to laying down the principle of refunds for exports to Member States (Article 19) or third countries (Article 20) and the Member States retained the power to decide whether or not to create the refunds by means of internal legal measures;

— the Community regulations merely fixed maximum figures for the amount of the refunds in relation to the rate of the import levy, without in any way defining the conditions for entitlement to refunds;

— the financial burden of the refunds, which was originally borne exclusively by the Member States, was only assumed by the Community as from the financial year 1963–64, and then only partially and progressively.

The characteristics of this system, while it remained in force, certainly excluded the existence of any Community definition of exports giving entitlement to refunds; moreover, that was merely one of the consequences of the transitional and still embryonic state of a common organization of the agricultural market that included neither an intervention price, nor a threshold price fixed uniformly by the Community for all the Member States, nor a refund system applicable uniformly to exports to third countries, nor, finally, a prohibition on the grant by Member States of refunds for exports to other Member States of the Community.

These are the facts and the law which have been reiterated before you by the Commission's representative and with which you are already too familiar for me to have to go into them at greater length. Thus I will immediately draw a preliminary conclusion from them, namely, that on the basis of Regulation No 19/62, which was the only measure applicable to the exports effected by Grassi before 1 July 1967, to which the first question submitted by the Brescia Corte d'Appello relates, no duty was imposed upon the Italian State.

I must now examine the second question. The origin of the proceedings before the Italian courts by Grassi is the delay, un-

doubtedly injurious, caused by the Finance Administration in the payment of the refunds, and we have seen that, with regard to the refunds relating to the exports effected after 1 July 1967, the Brescia Corte d'Appello, on the basis of domestic Italian law, ordered the Finance Administration to pay the undertaking the legal rate of interest on the total amount of those sums, without however finding any fault on the part of the Amministrazione and even excluding the idea of interest for default.

On the other hand, regarding the refunds relating to previous exports, the Corte d'Appello asks you whether Community law 'allowed the authorities any right to delay'.

Here again, the question is really formulated in terms which are explained by the attitude adopted by the court in question but which are somewhat inadequate, since the wording used seems to imply that in principle payment of the refunds should have been immediate, or at least have occurred as soon as proof of exportation had been submitted by the trader, *unless* Community law conferred on Member States the 'right to delay' making payment. It seems to me that the intellectual approach should be the converse. Since the absence of any *duty* on the State to grant refunds, during the transitional period, is an accepted principle, what must be ascertained is whether, in a case where a State has exercised the power that was given to it to grant refunds to its exporters, the relevant administration is bound to make payment of the amount due within any particular period.

Here again I agree with the Commission and the Italian Government in urging you to give a negative reply to this question at the level of Community law.

In fact it is necessary to reiterate the fundamental distinction between the two successive refund systems. With regard to that laid down by Regulation No 120/67, you held in Case 31/69 (cited above) that payment of the refunds constituted a duty upon the Member States, but you admitted that the Community rules still allow them a certain area of discretion, in particular in regard to the fixing of the documents establishing the right to a refund, adding that this system involves a duty for the Member States to make payment 'within a reasonable period' which, in the case in question, nevertheless did not lead you to find that there had been a failure to act, as requested by the Commission, since you did not think that there had been excessive delay on the part of the Italian Government.

Thus you at least stressed that the new refund system, having its origin solely in Community law, could not tolerate a total lack of uniformity with regard to the period for payment, the necessity for which you recognized without determining it in a precise manner.

On the other hand, with regard to refunds under the 1962 transitional system, the problem of the period for payment cannot, in my opinion, be posed in terms of Community law.

The absence of any provision binding Member States with regard to the very creation of refunds precludes *a fortiori* the requirement of any such period which would have its origin in Community rules. Such a requirement, if it existed, could only be found in national law.

It might indeed have been conceivable that the Council should have adopted provisions whereby, if a Member State exercised the power to grant refunds to its exporters (as was the case, it seems, with Italy), that State would have been bound to make payment of the amount due within a specific period. However, we have seen that even under the system in force after 1 July 1967 no express provision of Community law laid down such a period for payment. You yourselves only insisted on the obligation on the part of Member States to make payment of the refunds 'within a reasonable period' by invoking the idea that it was necessary to avoid unequal treatment of exporters depending on the frontier through which their products are exported. This preoccupation, which is prompted by the existence since 1967 of a genuine common system of refunds, could not in any event be usefully invoked in respect of the legal situation before 1967, when the granting of refunds depended on the will of each of

the Member States, subject only to the maximum rates laid down by Regulation No 90/62 of the Commission. Thus, even when a Member State had decided to grant refunds it was free to determine the conditions for their application and, in particular, to make payment solely within any periods which may have been required by its own legislation or rules.

The Court of Justice cannot further substitute itself for the national courts, who alone have jurisdiction to decide whether a debt owed by the State to one of its nationals must be paid within the period laid down by the national law, or in the absence of such a period.

I am therefore of the opinion that you should rule that:

1. The combined provisions of Article 20 of Regulation No 19/62 of the Council and of Article 1 of Regulation No 90/62 of the Commission did not impose a duty on Member States to pay refunds to their nationals in respect of the exports to third countries of cereals or processed products mentioned by those provisions;

2. If a Member State exercised the power vested in it by Article 20 of Regulation No 19/62 to grant such refunds, no period was imposed on it by Community law within which it was to make payment.