**Although the criteria in Regulation No (EEC) 204/69, and particularly in Annex C, for calculating the amount of export refunds for ovalbumin refer to lactalbumin, this does not imply that the provision of a refund available on export of ovalbumin extends also to export of lactalbumin, in the absence of a special provision in a regulation of the Commission made under Article 17 of Regulation No 804/68 of the Council.**

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 13 December 1973.

A. Van Houtte
Registrar

R. Lecourt
President

## OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 5 DECEMBER 1973[1]

*Mr President,*

*Members of the Court,*

The questions to which we have to give our attention are mainly concerned with the interpretation of Regulation No 204/69/EEC of the Council of 28 January 1969, which lays down the general rules for granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty. The questions have been referred in the course of proceedings, pending before the College van Beroep voor het Bedrijfsleven, concerning the validity of the refusal by the competent Netherlands authority to grant the applicant refunds on export to third countries of products designated as lactalbumin and coming under subheading 35.02-A-II-1-b) of the Common Customs Tariff. The said products were exported in the period between 30 December 1971 and 29 November 1972.

In dealing with a product derived from milk, reference must be made to Article 17 (1) of Regulation No 804/68, which provides as follows: 'To the extent necessary to enable the products listed in Article 1 to be exported either in the state referred to therein or in the form of goods listed in the Annex in the case of products listed under Article 1 (a), (b) (c) and (e), on the basis of the prices for

1 — Translated from the Italian.

those products in international trade, the difference between those prices and prices in the Community may be covered by an export refund'. This provision applies, *inter alia*, to fresh or preserved milk which is included under Article 1 (a) and (b) of the Regulation. Among the derivatives set out in the Annex, of this basic product, to which, under Article 17, the export refund applies, appears lactalbumin, listed under tariff heading 35.02-A-II-a).

Article 9 of Regulation No 122/67/EEC of the Council of 13 June 1967 on the common organization of the market in eggs contains a provision corresponding to that already quoted in Article 17 of Regulation No 804/68 on the common organization of the market in milk and milk products. The Annex to Regulation No 122/67, which lists the goods which can be the subject of export refunds under Article 9 of the Regulation, also includes ovalbumin, which falls under tariff heading 35.02-A-II (a), i.e. under the same tariff heading as the lactalbumin covered by Regulation No 804/68.

Regulation No 204/69/EEC of the Council of 28 January 1969 set out in precise terms the general rules for granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II of the Treaty, and also laid down the criteria for fixing the amount of the said refunds.

The competent authority for fixing the refunds is the Commission, which must act on the basis of the so-called management committee procedure and in accordance with the rules and criteria laid down in Regulation No 204/69. However, rules and criteria come into play only when the Commission decides to use its discretionary power to grant an export refund on a given product in exercise of the authority given it in regard to milk and milk products by Article 17 (4) and Article 30 of the basic Regulation, No 804/68, and in regard to eggs, by Articles 9 and 17 of Regulation No 122/67.

During the material period (30 December 1971 to 29 November 1972), the Commission issued Regulations Nos 2304/71, 216/72, 854/72, 1018/72, 1619/72 and 2278/72, each remaining in force for a period which varied in accordance with market variations affecting the products in question, and these Regulations laid down the export refunds for eggs and derivatives covered by Regulation No 122/67, which included ovalbumin.

Neither in these nor in other Regulations on the actual refunds to be paid is there any reference to lactalbumin.

The questions referred by the Dutch Court are all directed to establishing whether (and if so, how) during the material period the export refund fixed for ovalbumin should also have applied to lactalbumin.

If (and only if) the question concerning the applicability of these refunds is answered in the affirmative, the national court questions the validity of Regulation No 204/69, on which the refunds for lactalbumin would be based, in view of the fact that there is no reference to this product in Annex II of the EEC Treaty and that the Regulation was not adopted in the manner laid down under Article 235 of the Treaty.

The Dutch court asks first 'whether Annex C of EEC Regulation No 204/69 must be interpreted as meaning that the reference (4) in the vertical column 'eggs in shell' after the goods 'ovalbumin and lactalbumin' (appearing under tariff heading 35.02-A-II (a)) refer likewise to lactalbumin.'

In this connexion, it should be noted that, under the heading No 35.02 of the Common Customs Tariff, the said Annex C places ovalbumin and lactalbumin on the same footing as regards the coefficient for calculating the amount of the export refunds to be paid on these products. Since the basis of this coefficient is the 'eggs in shell' from

which ovalbumin is produced, it can be stated that for the purpose of determining, in order to calculate the refund, how much of the primary product has been processed into the derivative, lactalbumin is in theory placed on the same footing as ovalbumin. As the Commission declared in the explanation which accompanied the draft which was to replace Regulation No 204/69, and which subsequently, as Regulation No 2682/72, came into force on 1 January 1973, assimilation of the two was justified pending the entry into force of the latter Regulation because, on account of their identical technical properties, it had in the past been difficult to differentiate between them, a situation which, thanks to new examination techniques, nowadays no longer obtains. This fully explains why, under the previous system of rules, the decision was taken to place the two products, for the purpose of determining the amount of refunds, on exactly the same footing as regards the criteria of calculation, which were applied to the basic product underlying that product which is of greater importance for the economy of the Community, viz. ovalbumin.

This indicates that the first question from the Dutch Court should be answered in the affirmative.

This does not mean, however, that when the competent Community authority which, as we have seen, is the Commission acting through the mangement committee procedure, decides to grant export refunds on ovalbumin, this automatically applies to lactalbumin. Assimilation of the two products has been carried out solely for the purpose of applying the criteria for calculating the refunds. In other words, it is a rule in the form of a regulation on the subject of 'how', not 'whether'. But the practical application of these criteria is based on the assumption that the Commission has, in clear and precise terms, declared its intention to grant an export refund on each product, taken separately, to which these criteria are in theory applicable.

The plaintiff maintains that the provision in Annex C of Regulation No 204/69, which places lactalbumin on the same footing as ovalbumin as regards the criteria for fixing the amount of the refund means that, from the moment the Annex to Regulation No 204/69 laid down that the amount of refund must always be the same for both products, the Commission could not fix a figure for the amount of refund on one product without automatically giving exporters of the other product the right to receive the same amount of refund. To fix a given amount of refund for ovalbumin and not to allow any for lactalbumin would therefore be inconsistent with the provision because it would amount to fixing different refunds for the two products. Even granted that, on the basis of the criteria in force at the material time for making the calculation, the amount of any refund for lactalbumin would have been the same as that fixed for ovalbumin, the contention of the plaintiff, referred to above, would be an obvious sophistry. Though it is true that, in mathematical terms, not to prescribe any refund would be the same as granting one amounting to zero, these alternatives are not in law identical when it comes to applying the principle involved. In terms of the working of the common organization of the agricultural market, the absence of an implementation rule laying down that export refunds shall be granted on lactalbumin is something very different from fixing refunds on lactalbumin which differ from those fixed for ovalbumin. The placing of the two products on the same footing in Annex C of Regulation No 204/69 means only that, whenever the Commission decides to grant a refund on lactalbumin, it must, in fixing the sum to be paid, do so on the basis of precisely the same criteria as those laid down for calculating the refund on ovalbumin. But this obligation laid upon the Commission in reference to the way

in which the refund must be calculated does not constitute an obligation to grant the refund on one product simply because the Commission accepts that the requisite conditions exist for granting it on the other. If the above-quoted provision of the Annex to Regulation No 204/69 meant this, one would have to conclude that the Regulation, which has the character and form of a regulation implementing the basic regulations on the organization of the markets in milk and in eggs, would on this point cover the possibility of export refunds being granted on the derived products listed therein,but only with a view to the sale of the basic products concerned.

In fact, it is clear from Article 9 of Regulation No 122/67 that the refund for ovalbumin has been determined against the background of the position in the egg market, as a means of reinforcing the refund laid down to facilitate export of this basic product, from which ovalbumin is, of course, derived. Similarly the grant of export refunds on lactalbumin would be justified only when this was necessary for the sale of the milk from which it is derived. This is clear from Article 17 of Regulation No 804/68 on the common organization of the market in the other sector, milk, laying down that export refunds may be granted to the extent necessary to enable the products listed in Article 1, i.e., in our case, specifically milk, to be exported either in the state referred to therein or in the form of products shown in the Annex, among them lactalbumin. It is, therefore, clear to me that any decision to grant refunds on lactalbumin must be taken with a view to the sale of the basic product concerned. For this reason, it would be inconsistent with the purpose in law of the refund which can be granted on lactalbumin exports to permit a decision granting an export refund on this product to be regarded as implicitly and automatically covered by a decision specifically affecting only the egg market, as represented by the Regulation in which the Commission laid down the export refund for ovalbumin.

There appears to me to be no basis whatever for the interpretation contended for by the plaintiff.

Contrary to the contention of the plaintiff undertaking in the main action, not even the fact that the same levy has been prescribed for lactalbumin as for ovalbumin imports is any indication that there must be an automatic identification of the two so far as the actual grant of export refunds in respect of these two products is concerned. As a general rule, there is no automatic or necessary connexion of this nature between levy and refund. Moreover, in the case of lactalbumin, there is the additional consideration that, as the applicant undertaking has itself pointed out, the levy on its importation into the Community was fixed with the object not of protecting Community production of lactalbumin, which in the general field of the Community's economy is unimportant, but of protecting Community production of ovalbumin. In fact because lactalbumin can be substituted for ovalbumin, the customs protection of this latter product would have been very imperfect unless it had been extended also to the substitute product i.e. lactalbumin. As, therefore, the duty on lactalbumin imports was introduced in order to protect another product, it cannot be argued that there is a connexion between this and the need to assist the sale of lactalbumin in third countries by means of an export refund. In view of the unimportance, in economic terms, of lactalbumin output in the Community, it was, as the Commission pointed out, not necessary to provide refunds for this products; the only effect of this would have been to encourage an extension of Community production not on the basis of actual market requirements but in the hope of the artificial advantage of refunds, whereas the purpose of the refund was to stimulate already existing economic activity of importance.

To conclude, I therefore propose that the reply to the Dutch court should be a declaration that the fact that Annex C of EEC Regulation No 204/69, and, in the column therein entitled 'eggs in shell', note 4 referring to ovalbumin and lactalbumin, goods under tariff heading 35.02-A-II-(a), also refer to lactalbumin, in order to lay down criteria for calculating the amount of any export refund, does not mean that, because of this, the export refund provided for by Community Regulation on ovalbumin exports must automatically be available on lactalbumin exports, so long as there is no specific provision to this effect by appropriate regulation of the Commission covering milk products.

This being so, it is unnecessary to consider the other questions put by the national court.