authorizing, in respect of exports to third countries, free-of-levy imports of smaller quantities of the same product than the quantities exported.

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 23 March 1972.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 15 MARCH 1972[1]

Mr President,
Members of the Court,

To facilitate the export 'to third countries on the basis of world market prices' it was provided in the first sentence of Article 20(2) of Regulation No 19/62 (JO 1962, p. 933 *et seq.*) on the gradual establishment of a common organization of the market in cereals that 'the difference between these prices and the prices in the exporting Member State' could under certain conditions be the subject of a refund. Accordingly Article 1 of Regulation No 90/62 of the Commission (JO 1962, p. 1902) on export refunds for cereals (as amended by Regulation No 163/62 of the Commission of 20 December 1962, JO 1962, p. 2944) provided: 'Subject to the conditions in Articles 2, 3, 4, 5 and 5(a) of this regulation Member States may grant a refund on the export to third countries of the products (which included maize) mentioned in Article 1(a) and (b) of Regulation No 19 of the Council'. Regulation No 90 further provided that 'the refund on export to third countries shall not exceed the amount of the levy applicable to the product on the day of export in respect of third countries'. Article 4 of Regulation No 90 provided 'In derogation of Article 2 the refund may be granted in the form of levy free import of the same quantity of the same products as are exported ...'.
These rules also applied in the Federal Republic of Germany. The relevant authority with regard to the present proceedings was the Law implementing Regulation No 19 of 26 July 1962 (as amended by the Law of 30 June 1965) in conjunction with the Cereals and Rice Refunds Regulation of 24 November 1964 (as amended by the Regulation of 3 February 1966). According to Article 5(4) of the Refunds Regulation, however, only 90% of the maximum rates prescribed in Community regulations for refunds applied to exports of maize to Switzerland, Austria, Czechoslovakia, Hungary and Yugoslavia, whereas the maximum rates of refund

1 — Translated from the German.

applied to exports to other third countries. A refund authorization issued to the Kampffmeyer undertaking by the appropriate German authority, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, on 1 March 1966 was made out on this basis. The authorization stated that for exports of 1 000 kg of maize in each case to Switzerland, Austria and Yugoslavia, a free-of-levy import of only 900 kg was permitted. Kampffmeyer, however, considers this to be illegal. It takes the view that Community law did not permit refunds to be at rates below those laid down in Community regulations; in particular, it was not permissible to differentiate. Therefore it lodged an objection against the refund authorization and subsequently brought the matter before the Hessisches Finanzgericht. In view of the argument based on Community law that the national provisions conflict with Community law the Finanzgericht by order dated 21 September 1971 stayed the proceedings and submitted the following question for a preliminary ruling:

'Did the provisions of Article 20 of Regulation No 19/EEC in conjunction with those of Article 2 of Regulation No 90/EEC enable Member States of the European Economic Community to fix, in connexion with the export of cereals to third countries, different rates of refund in respect of exports to certain of the said third countries?'

We must now deal with the problem raised now that the parties to the main action and the Commission of the European Communities have submitted their written and oral observations. In so doing, in view of the arguments put forward by the parties concerned we shall of course have to go into the problem more deeply than is strictly required by the question raised.

1. You will remember that the plaintiff in the main action forcefully argued that, as from the first organization of the market in cereals under Regulation No 19, the Member States were in principle no longer free in the field of refunds and that, on the contrary, they were *obliged* to make refunds. In this respect it referred to the, in its opinion, necessary interaction between levies and refunds with regard to the stabilization of prices in the Common Market and claimed that the refunds were an indispensable export outlet when surpluses existed. The plaintiff further maintained that if it could be accepted that any freedom at all was left to the Member States in this field it was perhaps because the Member States had to provide the necessary funds that is, they retained financial sovereignty. Since, however, there was no question of this with regard to the so-called refunds in kind (exports against levy-free imports) which were all that were granted in the Federal Republic and since refunds in kind served another purpose from that of refunds in cash (namely that of making it possible to exchange cereals and save transport costs), a departure from the rates fixed in the Community regulations could in no way be tolerated for refunds in kind.

Let us ask ourselves first what is to be made of this argument. The plaintiff is obviously attempting in this way to mount a challenge to the existing relevant case-law. As is known it was emphasized in the judgment in Case 6/71 that the Member States were free 'to forego making any grant of refunds' and also the judgment in Case 21/71 clearly spoke of discretionary refunds and that the Member States were free to forego making any refunds. However, after carefully considering all the factors involved, in my opinion it is difficult to follow the course advocated by the plaintiff. In saying this I do not by any means wish to content myself with a reference to the clear wording of the relevant provisions, namely to the fact that the word 'may' is used both in Article 20 of Regulation No 19 and in Article 1 of Regulation No 90 and that therefore an authorization was clearly indicated. In fact there are more weighty arguments, inherent in the system of the organization of the market, and derived from the state of development of the Community at that time. In this respect it is important that the first organization of the market in cereals involved no uniformity of price levels within the Community so that

different conditions of competition existed in the Member States. Moreover there were only the beginnings of a common trade policy and it may also be observed that surplus production did not exist in all Member States. As far as surpluses were concerned, the grant of refunds, that is export subsidies, as we have heard, were by no means the only aid. Surpluses could also be reduced in other ways (food aid, other uses) so that refunds did not represent an indispensable export outlet for the stabilization of prices.

In my opinion the Community legislature has properly taken account of these facts by making refunds only permissible, by creating a framework for them and laying down minimum requirements and also by leaving the Member States free in principle to decide whether or not to use this instrument. No distinction can be made between refunds in cash and in kind because it is not just financing which is at issue but also essentially considerations of trade and economic policy which are important quite apart from the form of refund.

It may thus be concluded in the first place that the basic proposition of the plaintiff that there was an *obligation* to grant refunds is not correct.

2. Going on from this, that is, because the idea of a power conferred on the Member States in the field of refunds was obviously paramount, it is logical to assume in addition that the rates laid down by the Community represented simply an upper limit and that they could not be understood to exclude smaller refunds. Various arguments lead to this conclusion.

It must first be observed that this assumption is on the same lines as that in the judgments in Cases 6/71 and 21/71. As we know, according to these judgments the Member States were entitled 'to add further conditions to the conditions for a grant provided for by the Community rules' and they are free 'to adopt criteria more restrictive than those provided for by the Community rules'. Reference may then be made to the *wording* of the relevant provisions. In all the implementation rules (Article 2 of Regulation No 90, JO 1962, p. 1902, Article 1 of Regulation No 91, JO 1962, p. 1904, Article 1 of Regulation No 164, JO 1962, p. 2945) reference is made only to the fact that the refund should not *exceed* a particular amount. Moreover Article 20 of Regulation No 19 merely states that the export to third countries should be facilitated 'on the *basis* of world market prices'. It may be inferred from this that it could not be the only standard. In the present context too, the requirements of economic and trade policy and the interests of the common organization of the market are important. Considerations of trade policy could, as may easily be seen, cause the Member States to have regard to the particular situation of the export markets (price structure, import provisions applicable, transport routes) and therefore to fix lower amounts of refund. As far as the interests of the common organization of the market are concerned, it should not be forgotten that there may have been certain shortcomings in its operation (the Federal Government has referred to these in respect of the fixings of the free-at-frontier price for certain Member States). Seen in this light, it might have seemed perfectly proper for the purpose of avoiding deflections of trade and endangering the whole supply of the Common Market to fix refunds below the maximum limits permitted by the Community rules. In this connexion it is again obvious that these considerations apply equally to refunds in kind as to refunds in cash and it would thus be wrong to base the former solely on budgetary criteria. With regard to refunds in kind it should also be borne in mind that they were provided as *facilities* for certain Member States which had previously made use of this practice. It would certainly not accord with the intention of the legislature to infer *stricter* conditions and in particular to hold that the rates laid down by the Community legislature were absolutely binding. Therefore the plaintiff's references to an interpretation in support of its argument suggested the wording of Article 4 of Regulation No 90 can be of no assistance in relation to refunds in kind. We know from variep

experience what the value of such arguments is in Community law. In addition in the present case there is the fact that Article 4 of Regulation No 90 certainly permits the interpretation that the words 'in derogation from' relate only to the *form* of the refunds and not to the decisive principles, which justifies the argument that Article 4 introduced only an additional *procedure* for refunds.

Finally the prohibition on quantitative restrictions contained in Article 18 of Regulation No 19 and the fact that it was expressly provided (Regulation No 90/62 and Regulation No 163/62) in certain cases that the maximum rates of refund could be *exceeded* do not contradict the view that Community law simply laid down maximum rates of refund below which refunds could be granted. With regard to the second of these arguments it must be said that it was necessary to provide such derogations expressly because the function of the maximum rates was to prevent the levy system from being undermined by the reduction of export prices. However, as far as Article 18 of Regulation No 19 and the prohibition on quantitative restrictions are concerned, the argument derived from them is quite obviously beside the point. It must certainly be conceded that the reduction of the rates of refund could have meant making exports more difficult. If, however, an incomprehensible contradiction between the provisions of Article 18 and the clear enabling provision of Article 20 of Regulation No 19 is not to be imputed to the Community legislature there remains in fact no alternative but to accept that refunds come within the special category of export aids and thus that the term 'quantitative restrictions' must be more narrowly defined so as to exclude refunds. Thus we arrive at the second essential conclusion that according to Regulation No 19 and the implementing regulations issued under it the Member States were still in principle free to fix rates of refund lower than those provided for in the Community regulations (a conclusion to which the Bundesfinanzhof, independently interpreting the Community provisions, apparently also came in its judgment of 14 February 1970).

3. Accordingly it only remains to deal with the question which forms the crux of the matter referred to the Court, namely whether the Member States were allowed, in fixing the amounts of refunds, to make *distinctions* according to the third countries involved. As we know the plaintiff in the main action considers this unlawful. The defendant and the Commission on the other hand have no hesitation in answering the question raised in the affirmative.

On this point too it will not be possible, and I say this immediately, to share the plaintiff's view. In view of all that has previously been said, the contrary view is supported by the better arguments. First, it is important to bear in mind that Community law merely provided a framework for third-country refunds. If as a result the Member States are in principle free to fix the rates of refund below the maximum limits laid down by the Community, they are also able to differentiate between countries of destination, especially as no corresponding prohibition against discrimination has been expressly laid down anywhere in Community law. Further, the grounds that have already been mentioned for a reduction of refunds for considerations of trade policy and the requirements of the organization of the market (preventing deflections of trade) must not be overlooked.

If in situations where such considerations are relevant the national authorities were merely entitled to use the opportunity to reduce the rates of refund *generally* this would obviously burden the economy more than the circumstances justified. It cannot reasonably be assumed that the Community legislature could have intended such a result. Finally, it is also of interest in the present context that on occasion provision was made in the Community regulations applicable at the time for derogations from the maximum rates in the form of higher rates, thus that differentiations upwards were made and that differentiations such as those to which the plaintiff has objected were practised also in other Member States. The phenomenon was accordingly well known; it might even justifiably be said that all the national authorities concerned shared a common

view of the law. The said practice was later continued at a Community level in the context of the final organization of the market in cereals. Many distinctions were also made here (as may be seen in Regulations Nos 139/67 and 694/67, OJ, English Special Edition 1967, pp. 88 and 276 respectively). In the Commission's view there may be said to be a continual practice of this nature. In considering the problems raised in the present case this factor must certainly not be disregarded.

What remaining objections are there? Basically there is only the reference by the national court to the form of the obligatory declaration relating to the refunds. In this connexion you should remember that under Article 7 of Regulation No 90 the Member States were obliged to give particulars of export transactions with third countries as a total amount whereas with regards to export transactions with other Member States particular had to be given of exports to each country of destination individually. However it may certainly not be inferred from this that refunds in respect of third countries were necessarily to be assessed *uniformly*. The said distinction is due rather to the need for declarations containing a classification according to each country, that is, for an accurate view of trade patterns, only in the case of intra-Community trade. On the other hand for trade outside the Community information on a *global* basis of the relevant amounts was sufficient for statistical purposes because the Community powers were not very developed in this sphere, there was no machinery for directing external trade and the refunds in respect of third countries were not yet handled on a uniform Community basis. The form of the obligatory declaration under Regulation No 90 is therefore irrelevant in considering the present questions.

4. After all these considerations it may be said in conclusion that the question from the Hessisches Finanzgericht should be answered as follows:

The Member States of the EEC were entitled under Article 20 of Regulation No 19 to fix rates of refund for exports of cereals to third countries below the maximum rates laid down by Community law and varying between particular third countries.