(3) Only objective criteria can be taken into account in answering the question whether goods have reached the market at their destination so that it is not necessary to ascertain whether the exporter who made the application knew at the date in question that the goods would ultimately be transported to another country.

Lecourt Kutscher O'Keeffe Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart Capotorti

Delivered in open court in Luxembourg on 3 June 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERÀL REISCHL DELIVERED ON 19 MAY 1976 [1]

Mr President,
Members of the Court,

As in other organizations of the market it is provided in the common organization of the market for milk and milk products (Regulation No 804/68 of the Council of 27 June 1968, OJ English Special Edition 1968 (I), p. 176) that to enable the products, including butter, covered by the organization of the market to be exported the difference between the prices in international trade may be covered by an export fund (Article 17). The refund according to Article 17 (2) may be varied according to use or destination.

General rules for granting refunds on the export of milk and milk products and criteria for fixing the amount of such refunds were laid down in Regulation No. 876/68 of the Council of 28 June 1968 (OJ English Special Edition 1968 (I), p. 234). I shall return to these in detail later. At present I mention only Article 5 according to which the refund may be fixed in advance if the party concerned so requests when applying for the export licence. Further, Article 6 should be mentioned, according to which, where the refund is varied according to the destination, it is paid upon proof 'that the product has reached the destination for which the refund was fixed'.

In addition, the detailed rules for the application of export refunds should be mentioned which the Commission laid

1 — Translated from the German.

down in Regulation No 1041/67 of 21 December 1967 (OJ English Special Edition 1967, p. 323). Article 4 provides that in certain cases Member States may require

'as a condition for payment of the refund, proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country and, where appropriate, proof of the conditions under which it was imported.'

Article 8 as amended by Regulation No 499/69 (OJ English Special Edition 1969 (I), p. 114) provides that the applicant must produce certain documents confirming arrival at the destination. Further it is provided:

'The competent national authorities may recognize other documents as equivalent and may require additional forms of proof. They shall forthwith so inform the Commission which shall without delay inform the other Member States thereof.'

These provisions are relevant in an action pending before the Finanzgericht Hamburg, brought by Milch-, Fett- und Eierkontor GmbH against the Hauptzollamt Hamburg-Jonas relating to the export refund for butter. In particular the following should be said on the facts:

In September 1970 the said company entered into a so-called pooling arrangement with three other undertakings including the Belgian firm Corman for the purpose of exporting a large quantity of butter held by the German intervention agency. All the participating firms, which retained their legal and economic independence, were to endeavour to sell butter in third countries. It was the plaintiff's task to acquire butter from the German intervention agency, to arrange for the necessary export licences, to procure the advance fixing of the export refunds, to carry out the exports and obtain payment of the refund to itself. Profits and losses from the export transactions were to be shared among the members of the pool.

Accordingly, on 2 September 1970 the plaintiff obtained an export licence and a refund fixed in advance for certain quantities of butter to be exported to Morocco, Tunisia or Algeria. On 12 January 1971 it sold a certain quantity of butter to the firm Corman, the Belgian member of the pool, subject first of all to the conditions 'destination Afrique du Nord (Maroc)' and 'la livraison ne pas effectuer que sur quai Tanger'. On the same day the contract was altered from fob Hamburg to cif Casablanca or Tangier and the charterparty with the shipping firm charged with the transport was altered by substituting the plaintiff for Corman. The goods left the territory of the Community on 15 February 1971. On the same day the plaintiff made the declaration under Article 1 (1) of Regulation No 1041/67 in respect of a quantity of 750 tons of butter, that is, it stated its intention to export the butter and qualify for a refund. The goods were unloaded in Casablanca on 21 February 1971 which was proved to the Hauptzollamt on 2 March 1971 by the production of the documents mentioned in Article 8 of Regulation No 1041/67.

The goods, however, did not remain in Morocco but apparently left Casablanca on 12 March 1971 in another ship destination Gdynia (Poland). On 31 December 1970 Corman had sold a quantity of butter 'ex quai Casablanca ou Tanger' to another Belgian undertaking. The latter for its part had already on 23 December 1970 sold a certain quantity of butter to a Prague firm cif Gdynia.

In view of these facts the competent Hauptzollamt took the view that the refund of DM 501·42 per 100 kg fixed in advance for Morocco, Algeria and Tunisia, could not be granted since there was no proof of a buyer in Morocco or marketing in Morocco and since from the outset it was clear that the goods

were intended for Poland. Since moreover the validity of the licence which had been issued to the plaintiff with an advance fixing for European third countries — the basic refund amounted to DM 486·78 per 100 kg — had already expired at the relevant time, the Hauptzollamt granted only a refund in accordance with the rate of DM 347·70 per 100 kg obtaining on 15 February 1971.

This resulted in an action being brought before the Finanzgericht Hamburg.

In the statement of claim the Firma Milch-, Fett- und Eierkontor took the view that all that was necessary under Article 6 of Regulation No 876/68 for a special refund to be granted was that the goods should have reached the destination in the sense of arrival in the sovereign territory of the relevant state. The special refund is granted because of the higher transport costs as appears from Article 2 of the said regulation. The necessary proof has to be given in accordance with Article 8 of Regulation No 1041/67. Under that article only the arrival of the goods has to be proved and customs clearance and proof of a buyer in the territory of destination concerned are not relevant. Article 4 of Regulation No 1041/67 cited by the Hauptzollamt is in truth not relevant. The proof of importation for which it provides cannot be required in addition to proof of arrival. Further it must be recognized that Article 4 is not sufficiently precise, the proofs referred to in it can be required only on the basis of an EEC Regulation and in no event does it make proof of marketing a condition.

The defendant Hauptzollamt on the other hand adheres to its position. It takes the view that it was right in requiring proof of importation under Article 4 of Regulation No 1041/67, that is, proof of a sale to a buyer established in the country of destination or proof that the goods had reached the market of the country of destination. There is no such proof because the goods had merely passed through Morocco and therefore the special refund provided for this country cannot be granted.

By order dated 13 November 1975 the Finanzgericht stayed the proceedings and referred the following questions for a preliminary ruling under Article 177 of the EEC Treaty:

1. Must Article 4 (1) of Regulation No 1041/67 in the version in force in 1971, whereby in certain cases, *inter alia* by reason of the nature of the exported products or of export markets, Member States may require proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country, be interpreted to the effect that the destination of the products as mentioned in Article 4 of Regulation No 876/68 in respect of which an export refund has been varied may also be regarded as a third country?
2. If the answer to the first question is in the affirmative:
   Does the requirement laid down in Article 4 (1) of Regulation No 1041/67 'that the product in question has been imported into a third country' mean that that product must have been released into free circulation in accordance with the customs regulations or is it sufficient for the goods, which have been shipped, to be unloaded in a port at a destination outside Europe and after storage and transhipment to be transported to a third country within Europe?
3. If the answer to the first question is in the negative:
   Must the subordinate clause in the first sentence of Article 6 (2) of Regulation No 876/68, whereby, where Article 4 applies, the refund shall be paid under the conditions laid down in paragraph (1), 'provided it is proved that the product has reached the destination for which the

refund was fixed', be interpreted to the effect that the goods must have been released into free circulation there in accordance with the customs regulations or is it sufficient for the goods, which have been shipped, to be unloaded in a port at a destination outside Europe and after storage and trans-shipment to be transported to a third country in Europe?

4. If the answer to the second or third question is in the affirmative:
   Are the requirements that the product shall have been imported into a third country (Article 4 (1) of Regulation No 1041/67) and that the goods shall have reached their destination (Article 6 (3) of Regulation No 876/68) also fulfilled if the goods were, by virtue of the relevant contracts of sale, already destined ultimately before completion of the customs export formalities within the meaning of Article 1 (2) of Regulation No 1041/67, not for the destination outside Europe laid down in Article 6 (2) of Regulation No 876/68 but for another third country in Europe with a lower refund rate and were in fact transported thence in accordance with the detour via the third country outside Europe which was stipulated by the export licence?
5. Is it of importance with regard to the interpretation of Article 4 (1) of Regulation No 1041/67 and of Article 6 (2) of Regulation No 876/68 which were referred to in the second, third and fourth questions:
   (a) whether the applicant exporter was aware at the relevant date that goods would ultimately be shipped to the third country in Europe or
   (b) whether one of the purchasers and sellers of the goods who were parties to the contracts of sale and purchase was resident at the destination outside Europe or in the country of such destination or had a branch there?

My view on these questions is as follows:

1. Before I go into the questions in detail allow me to make some remarks of a general nature on the meaning and objective of the refund rules, features which characterize them and the general system which emerges from these features. In my view they are relevant in an interpretation of individual provisions even if the provisions in question appear at first sight to give rise to no difficulties of interpretation.

It is apparent from Article 17 of Regulation No 804/68, which I have already mentioned that the function of the refunds is to enable exports to be made on the basis of the prices applying in international trade. The objective of the refund rules, as can be seen from the recitals to Regulation No 876/68, is to make Community products competitive as to price and to secure their sale on the markets of third countries. The reason why the refund may vary according to the destination is, having regard to particular market situations, to encourage the marketing of products from the Community where the Community has a trade interest in being present on particular markets.

This argument, that the refund depends on the market conditions, is in fact supported by reference to the basic aim of the refund law to achieve an equalization of prices. As the Commission rightly stressed, what is concerned cannot of course be prices in the abstract, but those which in fact obtain on the markets, on the one hand on the market of the Community and on the other in international trade. This becomes particularly clear when considering the individual provisions applying to the assessment of the refunds. Thus Article 3 of Regulation No 876/68 provides that when prices in international trade are being determined particular account shall be taken of 'prices ruling on third country markets' and 'the most favourable prices in third countries of destination for third country imports'. The producer prices recorded in exporting third countries are also relevant, account being taken, where

appropriate, of subsidies, that is, such measures which serve the encouragement of sales aimed at. With regard to varying the refund according to the destination it is expressly provided in Article 4 that this may be done where 'the specific requirements of certain *markets* make this necessary'. In my view it is clear from this that in this connexion it is not only, as the plaintiff thinks, the amount of the transport costs which is relevant.

This view moreover accords with the recitals to Regulation No 1620/70 of 14 August 1970 (OJ L 181, p. 14), that is, the regulation in which the refunds relevant to the case in the main action were fixed. They likewise clearly show that in this field a comparison of markets and an assessment of market factors are of decisive importance.

2. If against this background we proceed to the interpretation of the provisions of Community law which are relevant to the court making the reference, we must first consider Article 6 of Regulation No 876/68. It provides that where Article 4 applies, that is, where the refund is varied according to the destination, the refund shall be paid 'provided it is proved that the product has reached the destination for which the refund was fixed.'

A literal interpretation of 'reach' means at least 'arrive at'. After what has just been said about the meaning and objective of the refund rules, their system taken as a whole and the Community interests, there can be no doubt in my view that it is not only this literal meaning which is relevant, but that it is necessary to go further: 'reach' must necessarily relate to the *market*. It is thus necessary that the goods in question have an effect on the relevant market, that they are dealt with on the market and that they are subject to the laws of the market according to the criterion of which the refund was fixed.

This is certainly not the case — this much may be said immediately — when the goods are only reloaded in the harbour of a particular country, when the most that can be said is that they are in transit. It is the Commission's view, namely that the decisive condition is the *importation* into the particular country, which must rather be acknowledged as the correct one.

In this respect — I shall return once again to this factor in another connexion — reference may be made to Article 3 of Regulation No 876/68, according to which the refund depends on 'the most favourable prices in third countries of destination for third country *imports*'. It is also relevant that in the recitals to this regulation, namely in relation to varying the amount of the refund according to the destination, it is stated that 'special conditions apply to *imports* in certain countries of destination'.

It is clear in fact that the market of a particular country is opened to imported goods only on the completion of customs import formalities. It may thus be assumed that they represent important evidence of the marketing which is required under the refund rules. The Commission has, however, rightly added that it is only rebuttable evidence. Moreover, it is probably right that it cannot be said in a general and abstract manner what conditions must be fulfilled for the market of a particular country to be reached. It depends on the particular circumstances of the individual case; for example it may be important whether the export is made to an undertaking with a place of business in the particular country of destination.

This argument that importation and marketing are essential criteria, an argument to which the considerations voiced so far have led, cannot be rebutted, as the plaintiff has tried to do, by referring to an answer which the Commission gave to a Question in Parliament with regard to frauds committed in the course of exports from the Community (OJ C 38 1970 p. 1). As

is known mention is made in this answer of the proof 'that the goods have in fact reached the country of destination' and following on from this it is stated further: 'after that the Commission can no longer follow what becomes of the goods exported.' In the view of the plaintiff this observation is an authentic interpretation of the refund rules in question here. It infers from this that according to the legal position then obtaining customs clearance into free circulation and reaching the market of the relevant country of destination and the corresponding proofs did not have any crucial significance because they were not mentioned by the Commission. It is scarcely possible to accept this. In this way manifestly far too much importance would be attached to a very brief answer by the Commission to one of several subsidiary questions, an answer which could not cover all the legal problems which concern us here.

On the other hand it is pertinent to refer to the judgment in Case 6/71, *Rheinmühlen Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ([1971] ECR) which was concerned with the refund rules applying at first and with the distinction between the concepts 'export to third countries' and 'export to other Member States'. The judgment states:

'Both the provisions of Regulation No 19 and the recitals in the preamble thereto show that the refunds prescribed by the regulation were intended to offset the price differences between the markets in question. It follows that exports to third countries within the meaning of that regulation presupposed that the goods were offered for sale on the market of a third country, that is to say, that they must at least have been put into free circulation there.'

It must indeed, as the Hauptzollamt has stressed, appear noteworthy that customs clearance into free circulation and contact with the market in the third country are the criterion for the concept 'export to third countries' where the accent is rather on *leaving* the territory of the Community. If this was correct for the wording used at that time it is surely impossible to see how lesser requirements could obtain in respect of the refund rules valid in 1971 which are essentially founded on the same idea but in which there is reference to *reaching* the destination.

3. Articles 4 and 8 of Regulation No 1041/67 with their rules concerning requirements as to proof in the law on refunds are also relevant to the main action.

(a) Article 8 (1) which expressly refers to Article 6 (2) of Regulation No 876/68, that is the provision on refunds varying according to destination, is, as amended by Regulation No 499/69 of the Commission, as follows:

'For the application of... the first subparagraph of Article 6 (2) of Regulations (EEC) No 876/68 and (EEC) No 886/68 ... the party concerned must submit one copy of the transport document and, at the discretion of the competent national authorities, one or more of the following documents certifying arrival in the country of destination or for the use in question:

a copy of the customs or port document made out in the country of destination, a certificate issued by the official services of one of the Member States established in that country, a certificate by an international control and surveillance company. The competent national authorities may recognize other documents as equivalent and may require additional forms of proof. They shall forthwith so inform the Commission which shall without delay inform the other Member States thereof.'

From this it is clear that in principle the arrival of the goods must be proved by means of certain documents which are

expressly mentioned or by means of equivalent documents. The fact that this is stated as a principle is significant. As a rule goods are brought to a third country to be marketed there. Further, it was necessary to take into account the difficulties arising, with regard to the requirements of proof, from the many countries of destination with their different stages of development. Reference is made to this in the recitals to Regulation No 1041/67 as follows:

'Whereas, since uniform methods of proof cannot at present be laid down because of the different rules applied by importing third countries, documents should be accepted which establish beyond doubt, while interfering as little as possible with trade, that the exported goods have reached their destination.'

Thus it is quite understandable that in principle the intention is to make *arrival* the essential point, for this in every case can be easily proved whereas subsequently keeping track of the goods can in certain circumstances lead to considerable difficulties.

Further it is of course also clear that the said Article 8 empowers the competent national authorities to require *additional* forms of proof'. This cannot, as the plaintiff thinks, relate solely to arrival, for the additional forms of proof are mentioned in connexion with the expressly mentioned proof of arrival and in connexion with the phrase according to which the national authorities may recognize other documents as equivalent proof of arrival. The use of the term 'additional forms of proof' must relate, as the Commission, referring to the sense of the refund rules, has rightly stressed, to *marketing*. It may thus be inferred from Article 8 — and accordingly the view of the Hauptzollamt which emerged in the main action appears well justified — where the refund authorities of the Member States have serious doubts as to whether marketing took place in the territory of destination and have grounds for suspecting that the refund is being improperly obtained, they may instigate special inquiries and require additional proof.

(b) With regard to Article 4 of Regulation No 1041/67, the significance of which is no longer crucial, the following observations should be made.

It provides:

'In certain cases, by reason of difference between the rate of refund and that of the levy, or by reason of the nature of the exported products or of export markets, Member States may require, as a condition for payment of the refund, proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country and, where appropriate, proof of the conditions under which it was imported.'

The recitals to the regulation make the objective of the provision clear: it is to permit action to be taken against abuses which cannot be ruled out in the law on refunds. On the one hand there are abuses connected with the relationship between the rate of refund and rate of levy, that is cases — the plaintiff called it 'circular trade' — in which by means of the refund there is a subsidized, temporary export and then a re-importation with a lesser charge. Then there are abuses made possible by the characteristics of the goods, in particular where the refund is higher than the manufacturing and transport costs and therefore a sale in another country is not sought. But there are also, contrary to the plaintiff's view, abuses in connexion with the rates of refund varying according to destination. This is shown by the express reference to 'export markets' in Article 4. Article 4 is thus, as moreover is clearly shown by the reference contained in Article 8, a provision of general scope.

In accordance with the wording and system of the law on refunds this

provision must be understood as meaning that, where there are doubts and corresponding grounds in relation to the correct application of the law on refunds, it justifies the calling for proof of *importation,* which has already been mentioned as an essential requirement, into another country, that is, proof of release into free circulation. In addition it justifies further inquiries as to the circumstances of the importation and the calling for corresponding proof if, contrary to normal practice, an importation is not being carried out for the purpose of marketing.

In relation to the export refund which varies according to destination this, however, cannot reasonably mean that proof of importation into *any* third country is sufficient. In spite of the general wording of Article 4 which was chosen because it has to apply to all cases of refunds, it must be understood, where varied rates of refund are fixed, in the sense that proof of importation into the relevant country of destination and proof of the conditions of such importation may be required. Indeed, as the Commission says, this sheds more light on Article 6 (2) of Regulation No 876/68. Consideration of these two provisions together makes fully clear what was already apparent from the system of the refund rules, namely that the destination within the meaning of Article 6 of Regulation No 876/68 is only reached with the importation therein.

4. These explanations should provide sufficient material to deal with the problems raised in the main action. It is clear from them that only objective criteria are decisive in answering the essential question whether there has been an import into the country of destination, that is whether its market has been reached. Therefore it does not seem to me necessary to go into those parts of the questions in which there is reference to the knowledge and intention of the exporter and agreements which the exporter has entered into.

5. There is, however, still one last point to be dealt with, namely the validity of Article 4 of Regulation No 1041/67. I can deal with this relatively briefly since this question was raised only by the plaintiff in the main action in its written observations and not by the court making the reference in its order for reference — no doubt because in view of all the circumstances which became known it saw no cause for it.

In the plaintiff's view it is possible to doubt the validity of the said provision from several points of view. First, in its opinion the power contained in Article 4 is not sufficiently precise and certain; moreover, the Commission should not have left the question referred to in Article 4 to the Member States but should have itself framed precise rules thereon. Further, in the plaintiff's view it is not clear — with the result that the article is null and void — whether the power is given to the refund authorities or to the Member States themselves and therefore requires measures from the governments and the legislative bodies. In addition, the plaintiff objects that no limit was placed on the time within which the additional proof may be required. Finally, it takes the view that the reference in Article 4 to Article 8 could be understood as meaning that in the event of additional proof being required the Commission must be informed. It is not, however, in its view completely clear — and this, according to it, also represents a serious defect — whether informing the Commission represents an additional pre-condition.

These arguments call for the following observations:

With regard to the alleged lack of certainty in Article 4 in my view it may be left open whether in this respect criteria are to be applied such as those laid down by the German Bundesverfassungsgericht (Federal Constitutional Court) with regard to enabling powers to take legislative

measures. With regard to provisions such as those contained in Article 4 an essential point is on the one hand that it was not possible exhaustively to list and precisely to specify all the circumstances to be taken into account. On the other hand for the purposes of the application of the provision the reference contained in it to typical cases of abuse and the knowledge of the system in which it is incorporated are sufficient.

With regard to the question whether the Commission could leave it to the Member States to establish the forms of proof to be applied in practice the reference to Article 4 (2) is certainly mistaken, for this clearly shows the procedure according to which the proof provided for in paragraph (1) may be made *obligatory*. It is likewise mistaken in my opinion to refer in this connexion to the judgment in Case 23/75, *Rey Soda* v *Cassa Conguaglio Zucchero* ([1975] ECR 1279). It must not be forgotten that the said case was concerned with much more far-reaching matters, namely the determination of undertakings liable to make payment and the computation of the extent of a levy, matters in respect of which it was, moreover, expressly provided that they should be governed by the Management Committee procedure. On the other hand Article 4 is concerned only with the problem of the specific form which has to be established in the context of a body of rules which make it quite plain that marketing in the territory of destination is an essential condition for the acquisition of the right to a refund.

Further, unlike the plaintiff, I see no harm in the fact — at least in this connexion there cannot be said to be invalidity — that it is not expressly stated whether the power in Article 4 is given to the refund authorities or the Member States as such.

This holds true with regard to the fact that in Article 4 no limit is placed on the time within which the additional proof may be required. It is apparent from the meaning of the rules that the essential factor is that exporters who desire to claim the refund must see to it that the necessary conditions are fulfilled, that is, marketing in a territory for which special rates of refund apply. If this is done in an acceptable manner then the production of appropriate proof causes no particular difficulties even if it is required after the export transaction has been concluded, that is, at a time when the exporter no longer has the goods at his disposal.

Finally the question of informing the Commission if such an obligation is to be inferred from Article 8 should cause no difficulties. Obviously this obligation only serves the purposes of information; it is intended to acquaint the Commission of the form of administrative practice and possibly to put it in a position to seek uniformity. On the other hand there can be no suggestion that informing the Commission is a pre-condition of the effectiveness of the requirement of additional proof. How the invalidity of the provision can be inferred from any possible ambiguity on this point I cannot see.

Should the Court consider it necessary to consider the problem with which I have just dealt in its judgment, it should therefore be observed that no reasons have become apparent in the proceedings which cast doubt on the validity of Article 4 of Regulation No 1041/67.

6. The questions referred by the Finanzgericht Hamburg may accordingly be answered as follows:

(a) Article 4 (1) of Regulation No 1041/67 is a provision of general scope, that is, it also covers cases in which the amounts of refund have been varied according to the destination.

(b) With regard to the application of varied amounts of refund Article 4 of Regulation No 1041/67 complements Article 6 of Regulation No 876/68. It makes clear that 'reached the destination' is to be understood as importation into the territory of destination. In this connexion importation means the irrevocable release into free circulation effective under customs law for it is only this which opens access to the market within the meaning of the law on refunds.

(c) The question whether the market of the territory of destination is reached must be determined according to objective criteria, that is, it does not in principle depend on knowledge and intentions of and agreements made between the dealers concerned. If the export is to an undertaking with a place of business in the country of destination this may be an indication that the goods will be marketed in the country of destination.