OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 14 JULY 1977 [1]

Mr President,
Members of the Court,

The parties in the main action are disputing whether the plaintiff has acquired in respect of exports to third countries in 1965 of a compound animal feeding-stuff made of cereals the right to a refund in the form of a licence for the importation, with exemption from the levy, of barley, maize and millet. The defendant had revoked a series of such licences when it was shown that of the products which come within the common organization of the market in cereals the exported mixture had only contained 2 % of tapioca meal and was once more separated into its constituents abroad so as to reimport into the Community the main component, tapioca chips. The defendant contests that the exported mixture is one of the products subject to a refund in accordance with Regulation No 19, Regulation No 166/64/EEC and Regulation No 171/64/EEC and that from the point of view of the law on refunds the exportation was unimpeachable.

The Hessisches Finanzgericht stayed the proceedings by order of 1 December 1976 and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1. Does Regulation No 171/64 of the Commission of the EEC apply also to compound animal feeding-stuffs without the addition of powdered milk?
2. If the answer is in the affirmative, are the words in Article 1 (a) thereof 'for each of the three cereals and in proportion to the quantities thereof' to be interpreted as meaning that (a) only a product in the preparation of which cereals had in fact to be used is to be regarded as a compound animal feeding-stuff made of cereals; or (b) is the expression 'the quantities thereof' to be regarded as notional for calculating the amount of cereals to be taken as the basis for the refund (in the same way as in Article 4 of Regulation No 166/64 of the Council of the EEC for the charging of the levy)?
3. If Question 1 is answered in the negative or Question 2 (b) is answered in the affirmative, then with reference to the possibility of granting a refund for compound animal feeding-stuffs (Article 1 (d) of and the Annex to Regulation No 19/62 of the Council of the EEC; Article 1 of Regulation No 166/64 of the Council of the EEC) did such a grant depend upon the extent to which the animal feeding-stuff 'contained products' to which Regulation No 19 applied, and, in particular, did the admixture of 2 % of a product upon which a levy was chargeable, such as tapioca meal, suffice to demand in this way a refund amounting to 100 % exemption from the levy for imports of cereals from third countries?
4. If the first part of Question 3 is answered in the negative, are the coefficients which, pursuant to Article 10 together with Article 4 of Table A of the Annex to Regulation No 166/64, are to be applied according to the starch content of the animal feeding-stuff with due regard to Article 15 thereof ('Cereals ... actually used in compound feeding-stuffs') to be interpreted as meaning that the starch content of a product which determines the coefficient had to be derived from products to which Regulation No 19/62 applied?

1 — Translated from the German.

5. If the first part of Question 3 is answered in the negative, the second part thereof in the affirmative and if Question 4 is also answered in the negative, are not the relevant provisions of Regulation No 166/64/EEC invalid to the extent to which they fix for products listed under tariff heading 23.07 of the Common Customs Tariff a standard refund applicable irrespective of the quantity, whether negligible or substantial, of products upon which the levy is chargeable contained in those products (which was the ruling given by the Court in its judgment of 9 March 1976 in Case 95/75, [1976] ECR at p. 369 with regard to fixing of a levy)?

II — Before I examine the individual questions, I would like to give a short survey of the legal situation at the time of the exportation in question.

Article 20 (2) in conjunction with Article 1 (d) of and the Annex to Regulation No 19/62 on the progressive establishment of a common organization of the market in cereals of 4 April 1962 (Journal Officiel 1962, p. 933) and Article 14 (2) in conjunction with Article 1 (2) (f) of Regulation No 13/64 on the progressive establishment of a common organization of the market in milk and dairy products of 5 February 1964 (Journal Officiel 1964, p. 549) provided for the possibility of granting refunds on exports to third countries of compound animal feeding-stuffs coming under tariff heading 23.07 of the Common Customs Tariff, in so far as those compound animal feeding-stuffs contained products coming within the abovementioned organizations of the markets. Regulation No 166/64/EEC of the Council of 30 October 1964 on the levy system applicable to certain kinds of compound animal feeding-stuffs (Journal Officiel 1964, p. 2747) and Regulation No 171/64/EEC of the Commission of 30 October 1964 defining the terms for granting refunds on exports to third countries of certain kinds of animal feeding-stuffs (Journal Officiel 1964, p. 2758) defined the range of compound animal feeding-stuffs in respect of which refunds could be granted and laid down maximum limits for the amounts of refund granted in individual cases. However, the Member States were alone responsible for determining in their legislation and administrative regulations whether amounts of refund should be granted at all, when, in what form, of what amount up to the maximum limit and in respect of which products and which exports.

Article 1 of Regulation No 166/64/EEC defined the products subject to refund as all animal feeding-stuffs coming within tariff heading 23.07 of the Common Customs Tariff containing 50 % or more of powdered milk or, without restriction to a certain minimum proportion, containing products coming within the cereals and rice sector or, if neither of these cases applied, those to which molasses or certain other products from the milk sector had been admixed.

Having regard to this legal situation I adopt the following point of view on the questions which have been referred to the Court for a preliminary ruling:

1. With regard to *Question 1* it is necessary to state that Regulation No 171/64/EEC merely contains the implementing provisions provided for in Article 10 of Regulation No 166/64/EEC and is thus applicable to all compound animal feeding-stuffs which are defined in Article 1 of Regulation No 166/64/EEC. However, as I have shown, compound animal feeding-stuffs without the addition of powdered milk also come thereunder.

2. With regard to *Question 2:* Under Article 1 of Regulation No 166/64/EEC the possibility of the grant of a refund was not made conditional upon the presence of one of the cereals referred to in Article 1 (a) of Regulation No 171/64/EEC but upon the admixture of

any of the products coming within Regulation No 19. The expression 'the quantities thereof' was not intended to refer to actual quantities of one of the three types of cereal mentioned but only to lay down a basis of calculation by referring to the sum of the cereals laid down in the first indent of Article 4 of Regulation No 166/64/EEC and to the average refunds applicable to the quantities mentioned there. This was quite normal in the case of an enabling provision which merely laid down the maximum limits of the refunds.

3. With regard to *Question 3:* The enabling provision of Community law laid down in Article 1 of Regulation No 166/64/EEC did not provide for any minimum content of substances from the cereals sector. The admixture of only 2 % of tapioca meal was therefore sufficient to justify the right of the exported goods in question to a refund. The rules contained in Community law likewise, contrary to the view of the defendant in the main action, contain no indication that the admixture must reach a certain minimum percentage in order if necessary to be detectable and to avoid abuses. If the Community legislature had intended this it would have adopted an appropriate percentage in the rules.

4. With regard to *Question 4* it is necessary to state that the provisions of Regulation No 166/64/EEC to which reference has been made give no indication that the starch content of the product which determines the coefficient for the calculation of the refund had to be derived from the products to which Regulation No 19/62 applied. The addition in the heading of Table A of the Annex to Regulation No 166/64 of 'containing grain or products to which Regulations Nos 19 or 16/64/EEC apply' is merely intended to distinguish the products which come within Table A from the preparations which come within Table B. On the other hand, the starch content indicated in the table quite obviously refers to the whole product regardless of which admixed product it is derived from. If the legislature had intended something different, it would have expressed this in the wording of the table by an appropriate addition to the words 'starch content'. Nor do Articles 4 and 10 of Regulation No 166/64/EEC give any indication in favour of a different interpretation. Moreover, the Commission and the defendant correctly point out the fact that the coefficients for the refund were made subject to the same rules as the coefficients for the levy. However, the protective purpose of the levies made it necessary to calculate the levies purely in accordance with the starch content of the imported preparations regardless of what admixed components this starch content was derived from.

5. With regard to *Question 5:* In the field of application of Regulations Nos 19/62 and 13/64/EEC Community law merely empowered the Member States to grant refunds on exports under certain conditions laid down by the Community. The validity of such enabling provisions cannot be called in question, as the Commission and Council have correctly pointed out, by reference to the judgment of the Court of 9 March 1976 in Case 95/75, *Effem GmbH* v *Hauptzollamt Lüneburg,* [1976] ECR 361, because the case merely concerned the question whether the Commission, in carrying out its duty of fixing the export levies, had observed the criteria of calculation laid down for it in the enabling provision. Therefore that case concerned the misuse of a power, while the fifth question submitted by the court making the reference calls in question the validity of the enabling provision itself. That provision however contains no maximum amounts for any refunds and leaves it to the Member States to decide freely whether such refunds should be granted at all and of what amount. The principles laid down in the judgment in Case 95/75 can therefore not be relied upon in this instance.

III – I therefore suggest that the questions which have been referred to this Court for a preliminary ruling should be answered as follows:

1. Regulation No 171/64/EEC, as the regulation adopted in implementation of Article 10 of Regulation No 166/64/EEC, applies to all compound animal feeding-stuffs within the meaning of Article 1 of Regulation No 166/64/EEC, in other words also to compound animal feeding-stuffs without the addition of powdered milk.

2. Regulation No 171/64/EEC did not use the expression 'compound animal feeding-stuffs made of cereals'. Article 1 thereof contains a standard model calculation for the calculation of the highest permissible amount of refund which, by means of the coefficients laid down in the Annex to Regulation No 166/64/EEC, took into account the starch content but not the proportion of certain cereals in the exported goods. The expression 'the quantities thereof' referred to the standard quantities laid down in Article 4 of Regulation No 166/64/EEC as the basis for the calculation of the levies.

3. The admixture of only 2 % of one of the products which comes within Regulation No 19/62, as for example tapioca meal, was sufficient for the purposes of the right to a refund under Article 1 of Regulation No 166/64/EEC.

4. The starch content which determined the coefficient was the starch content of the whole exported product regardless of what admixtures it was derived from.

5. Consideration of the fifth question submitted by the court making the reference has disclosed no factor of such a kind as to affect the validity of Regulation No 166/64/EEC.