JUDGMENT OF THE COURT (SECOND CHAMBER)
11 OCTOBER 1977 [1]

Firma Peter Cremer v Bundesanstalt für landwirtschaftliche Marktordnung (preliminary ruling requested by the Hessisches Finanzgericht)

'Export refunds for compound feeding-stuffs'

Case 125/76

1. *Agriculture — Common organization of the markets — Compound feeding-stuffs for cattle — Export to third countries — Refund — Grant — Conditions — Application to compound feeding-stuffs not containing powdered milk*
   (Regulation No 171/64 of the Commission)

2. *Agriculture — Common organization of the markets — Compound feeding-stuffs for cattle — Export to third countries — Refund — Grant — Conditions — Composition of the product — Minimum content*
   (Regulation No 166/64 of the Council; Regulation No 171/64 of the Commission)

1. Export refunds to third countries may under Regulation No 171/64 of the Commission of 30 October 1964 be granted for compound animal feeding-stuffs containing either cereals or cereal-based products or milk or milk products.
2. Having regard to the objectives of the system of export refunds, an export refund for a compound animal feeding-stuff containing cereals or cereal-based products can be granted under Regulation No 166/64 of the Council of 30 October 1964 and Regulation No 171/64 of the Commission only where cereals or products to which Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the markets in cereals applies are in fact contained in the mixture in significant proportions.

In Case 125/76

Reference to the Court under Article 177 of the EEC Treaty by the Hessisches Finanzgericht (Finance Court, Hesse) for a preliminary ruling in the action pending before that court between:

1 — Language of the Case: German.

FIRMA PETER CREMER, Hamburg,

and

BUNDESANSTALT FÜR LANDWIRTSCHAFTLICHE MARKTORDNUNG (Federal Office for Agricultural Market Organization), Frankfurt am Main,

on the interpretation and validity of Regulation No 166/64 of the Council of 30 October 1964 on the system applicable to certain classes of compound animal feeding-stuffs and on the interpretation of Regulation No 171/64 of the Commission of 30 October 1964 laying down the conditions for the grant of refunds on the export to third countries of certain classes of compound feeding-stuffs,

THE COURT (Second Chamber)

composed of: P. Pescatore, Acting President of Chamber, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, procedure and observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Article 20 of Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the markets in cereals (Journal Officiel, p. 933) in order to facilitate the export to third countries of cereals or processed products based on cereals at the prices prevailing on the world market made provision for the Member States to grant an export refund intended to compensate for the difference between such prices and the prices of the exporting Member State. A refund of the same nature was provided for milk, milk products and preparations based on milk powder used in the feeding of animals by Article 14 (2) of

Regulation No 13/64 of the Council of 5 February 1964 on the progressive establishment of a common organization of the markets in milk and milk products (Journal Officiel, p. 549).

The rules on the grant of export refunds for compound feeding-stuffs for cattle, containing cereals or milk products, were laid down by Regulation No 166/64 of the Council of 30 October 1964 on the system applicable to certain classes of compound animal feeding-stuffs (Journal Officiel, p. 2747) and Regulation No 171/64 of the Commission of 30 October 1964 laying down the conditions for the grant of the refund on the export to third countries of certain classes of compound feeding-stuffs (Journal Officiel, p. 2758).

Between 9 December 1964 and 9 March 1965 'Nordkraft' Kraftfutterwerk C. F. Günther & Co. mbH, whose registered office is in Hamburg, exported from the Federal Republic of Germany to Denmark, at that time a non-Member country, 2 928 935 kg of a product described as 'animal feed treated with molasses or sweetened and other 'Nordkraft' prepared animal feed, a feeding-stuff for swine' coming under heading No 23.07 of the Common Customs Tariff.

This product consisted of 73 % tapioca chips, 2 % tapioca flour, 22 % soya oil-cake and 3 % mineral matter; it contained more than 50 % starch.

Günther & Co. received from the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, the predecessor of the Bundesanstalt für landwirtschaftliche Marktordnung, export refunds in the form of import licences for the import free from levy of a quantity of cereal corresponding to the quantity of processed product exported.

Günther & Co. transferred these import licences to the Peter Cremer undertaking, of which Günther & Co. is a subsidiary and the registered office of which is also in Hamburg. An investigation carried out by the German customs investigation authority revealed *inter alia* that a large part of the tapioca chips had been sifted out of the product in Denmark and thereupon sold and delivered to an undertaking in the Netherlands legally associated with Cremer.

The Einfuhr- und Vorratsstelle für Getreide und Futtermittel took the view that the removal of the tapioca chips by sifting did not amount to 'use or consumption or treatment or processing' of the goods in the country of destination within the meaning of the German provisions relating to refunds, which laid down those requirements as a pre-condition for a finding that export to a third country had taken place. Furthermore, the starch content was reduced below 50 % through the sifting so that the remaining product no longer fulfilled the conditions for the grant of a refund.

On 7 September 1971 the Einfuhr- und Vorratsstelle therefore revoked the licences granted to Cremer to import the goods free from levy.

Cremer brought an action against this decision before the Hessisches Finanzgericht.

By order dated 1 December 1976 the VIIth Senate of the Finanzgericht stayed the proceedings 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 kinds of cereals on the basis of the quantities used' 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 used' 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 flour, 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?
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 95/76 [1976] ECR at p. 369 with regard to fixing of a levy)?

The order of the Hessisches Finanzgericht was received at the Court Registry on 22 December 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 14 February 1977 by the Commission of the European Communities, on 1 March 1977 by the Council of the European Communities, on 10 March 1977 by the Cremer undertaking, the plaintiff in the main action, and on 18 March 1977 by the Bundesanstalt für landwirtschaftliche Marktordnung, the defendant in the main action.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By order dated 27 April 1977 the Court referred the case to the Second Chamber in accordance with Article 95 (1) of the Rules of Procedure.

II — Written observations submitted to the Court

Firma *Peter Cremer,* the plaintiff in the main action, first of all submits that the reference for a preliminary ruling is unnecessary and therefore inadmissible: the question whether tapioca flour was added to the product in question is a question of fact which it is for the national court alone to judge. It is

apparent from the judgment of the Court of 27 October 1971 in Case 6/71 *(Rheinmühlen* [1971] ECR 823) that the starch content of the compound feeding-stuff after the processing in Denmark is irrelevant since the criterion is at what date the product is put into free circulation. Finally, the Einfuhr- und Vorratsstelle has never contested that a compound feeding-stuff which contains only 2 % of a product falling under Regulation No 19 may qualify for a refund; the same view is obtained from the provisions of the German refund regulations.

Additionally, the plaintiff makes the following observations on the questions referred to the Court by the Hessisches Finanzgericht:

(a) Article 1 of Regulation No 171/64 shows clearly by reference to Regulation No 166/64 that the first-mentioned regulation applies in particular to preparations used in feeding-stuffs 'containing cereal or products to which Regulation No 19 or Regulation No 16/64/EEC applies'; it thus applies to compound feeding-stuffs for cattle which does not contain milk powder.

(b) With regard to the first paragraph of the second question it should be observed that the term 'compound feeding-stuffs based on cereals' is not contained either in Regulation No 171/64 or in Regulation No 166/64. The words 'for each of the three kinds of cereals on the basis of the quantities used' in Article 1 (1) (a) of Regulation No 171/64 relate solely to the computation of the amount of the refund which again is based on the computation provided for in Articles 4 and 9 (2) of Regulation No 166/64 of the variable component on the basis of the maize, barley and sorghum. The three kinds of cereals (maize, barley and sorghum) are mentioned as an abstract criterion for calculation only because they contain starch and are the raw material most frequently used in the manufacture of compound feeding-stuffs. Accordingly, a product not containing cereals may also be regarded as a compound feeding-stuff.

The expression 'quantity used' must by analogy with its use in Article 4 of Regulation No 166/64 be regarded as a fictitious concept for the quantities of cereals to be taken as a basis for the calculation of the refund.

(c) Regulation No 166/64 contains no mention of the proportion of a product coming under Regulation No 19 which must be added. Accordingly, even the smallest amounts suffice. According to the case-law of the Court classification of goods in the Common Customs Tariff must be made according to objective criteria. Such an objective criterion is the intended use as a feeding-stuff and likewise the addition of one of the products coming under Regulation No 19, irrespective of the quantity added.

This is also the criterion adopted as the basis for the German regulation on refunds for cereals and rice of 24 November 1964 (Bundesgesetzblatt 1964 I p. 917).

(d) It is apparent from Regulation No 166/64 and in particular from Table A in the Annex thereto that for the computation of the amount of the refund only the starch content of the compound feeding-stuff as a whole and not that of its individual components is the criterion. This view is shared by the Government of the Federal Republic of Germany.

The starch content of the preparation as a whole must be considered in determining the coefficients dependent on the starch content of the compound feeding-stuff applicable under Article 10 in conjunction with Article 4 and Table A in the Annex to Regulation No. 166/64.

(e) The Court stated in its judgment of 9 March 1976 (Case 95/75 *EFFEM*

[1976] ECR 361) that the fixing of a standard export levy applicable irrespective of the quantity, whether negligible or substantial, of cereals contained in the compound feeding-stuffs for cattle listed under heading No 23.07 of the Common Customs Tariff does not comply with the provisions of Community law. That decision cannot, however, be applied to the present case. The levy at that time was compulsory whereas the grant of a refund lay in the discretion of the Member States. The Member States were accordingly free to impose more extensive conditions for the grant of the refunds than provided for in the Community rules. The findings in the judgment of 9 March 1976 cannot therefore be applied to the refund.

The validity of Regulation No 166/64 cannot be contested: it left the Member States to determine the criterion according to which the refund must be calculated.

The *Bundesanstalt für landwirtschaftliche Marktordnung*, the defendant in the main action, stresses that in answering the questions referred to the Court for a preliminary ruling guidance must be obtained from the case-law of the Court which explained and confirmed the relevant principles of Community law on refunds for the transitional period to 1967.

(a) Article 1 of Regulation No 171/64 refers in respect of its field of application to Regulation No 166/64; the list contained in Article 1 of that regulation of particular classes of compound feeding-stuffs giving rise to a refund must be interpreted in the alternative so that Regulation Nos 166/64 and 171/64 apply also to mixed feeding-stuffs not containing milk powder.

(b) In so far as the right to a refund exists in respect of compound feeding-stuffs owing to their containing cereals or products to which Regulation No 19 or Regulation No 16/64 is applicable, the calculation of the maximum amount in accordance with Article 1 (1) (a) of Regulation No 171/64 cannot be understood as meaning that the compound feeding-stuff must actually contain the three kinds of cereals referred to. The rule in question is more in accordance with the rule on levies in Article 4 of Regulation No 166/64: the 'quantity used' of the 'three kinds of cereals' is nothing other than a formula for ascertaining the quantity of cereals to be taken as a basis for the calculation of the refund.

(c) Article 1 of Regulation No 166/64 contains no express reference to any minimum proportions in respect of such compound feeding-stuffs, the right to a refund for which depends upon the addition of cereals or products within the meaning of Regulation No 19. The entitlement to refund for such products should not therefore in principle depend on the proportion of the components to which Regulation No 19 applied. Of course it must be possible to establish clearly and with certainty that these components are in the product; this is not the case where the proportion is only 2 % of a product subject to levy such as tapioca flour. The components subject to the levy must have been added to the compound feeding-stuff in the process of manufacture. The grinding down of the tapioca chips which took place automatically on the loading or transport of the 'mixture' certainly did not bestow a right to a refund in respect of goods for which such a right did not otherwise exist.

(d) It is apparent from Article 10 in conjunction with Article 4 and Table A of the Annex to Regulation No 166/64 that the relevant coefficients for calculation were determined on the basis of the starch content of the product being exported. For preparations these coefficients vary according to the starch content of the product irrespective of whether or not the starch content is derived from ingredients to which

Regulation No 19 applies. There is no sufficiently clear textual or conceptual relationship between the starch content of the products as a basis for calculating the coefficients and the ingredients falling under Regulation No 19. Moreover, the refund coefficients were subject to the same rules as the levy coefficients; the protective purpose of the levies simply required that the levies be related to the starch content of the imported preparations.

(e) The compound feeding-stuffs normally available on the market when Regulations Nos 166/64 and 171/64 were adopted derived their starch content basically from products to which Regulation No 19 applied. Opportunities for abuse were revealed only when individual exporters went over to adding to their preparations manufactured in the Federal Republic of Germany ingredients having a high percentage of starch to which Regulation No 19 did not apply. The determination of the maximum amounts of refund was thus brought into question; it became possible for refunds to rise far above the amount necessary to compensate for the price differences between the Member States or the differences in relation to those on the world market. The Court must decide whether the relevant provisions of Community law must be regarded as invalid because in certain circumstances they admitted abuse.

The *Council* restricts its observations to the fifth question concerning the validity of Regulation No 166/64.

The facts at issue in the main action are not comparable with those in Case 95/75. Case 95/75 was concerned with the validity of regulations of the Commission which were adopted in implementation of a regulation of the Council in which it was laid down that in determining the export levies on compound feeding-stuffs based on cereals 'account shall be taken in particular of the quantity of cereals necessary for the manufacture of the products under consideration'. The Court declared the implementing regulations of the Commission invalid because they made no provision for the amount of the levies to be scaled according to the cereal content.

The present case is concerned with the relationship between a regulation of the Council and the implementing measures of the Member States; the national court is enquiring whether the first measure is defective. In fact it is a question here of an authorization to the Member States to grant export refunds and reference is made to maximum amounts in Regulation No 171/64 of the Commission implementing Regulation No 166/64 of the Council. How far the Member States have made use of this power does not have to be considered in the present case.

Article 10 (1) of Regulation No 166/64 however provides that 'in trade with third countries ... the amount of refund which a Member State may grant shall be fixed after taking account in particular of the situation of the world market and the market prices of the products relevant for the computation of the variable component'. The computation of the variable component is governed by Article 3 of the regulation; the varying starch content of the feeding-stuffs or the varying milk content of the milk products is relevant according to Table A in the Annex to the regulation. The Council has thus varied the refunds according to the starch content of the cereal feeding-stuffs; no flat rate has therefore been laid down.

Consideration of the fifth question discloses no factor of such a kind as to affect the validity of Regulation No 166/64.

The *Commission* observes in general that Regulations Nos 166/64 and 171/64 were limited to specifying the compound feeding-stuffs on which a refund might be granted and to co-ordinating the

policies of the Member States with regard to refunds by laying down maximum limits. Within the limits so drawn the Member States have retained the power to determine according to their own legal and administrative provisions whether, when and in what form which refunds should be granted for which products and for which exports. The regulations were in the nature of authorizations in favour of the Member States restricted as to their subject-matter.

Refunds were payable in respect of all compound feeding-stuffs for which refunds were provided either under Regulation No 19 or Regulation No 13/64. Article 1 of Regulation No 166/64 listed these products in a single list and in an alternative and not a cumulative manner.

That provision was an enabling rule and as such did not lay down any particular minimum content for cereal ingredients.

Article 1 of Regulation No 166/64 thus did not make entitlement to the refund dependent upon the presence of one of the kinds of cereals on which the calculation under Article 1 (1) (a) was based; it simply required that one of the products referred to in Regulation No 19 should be an ingredient. In determining the flat-rate amount of the refunds this calculation was thus not based on the actual content of maize, barley, sorghum or other cereal products. The sole criterion was the common factor 'starch'. Should the normal rules prove insufficient to prevent the feeding-stuffs market from being disturbed, Article 15 of Regulation No 166/64 provided possibilities of adaptation; no such derogative rules with regard to the calculation had however been adopted.

With regard to the question whether the relevant starch content under the Annex to Regulation No 166/64 must have originated exclusively from the cereal products which were added it should be observed that no such limitation can be deduced from Table A of the Annex in spite of its heading. No such limitation was necessary for the purpose of flat-rate maximum rules since the Member States could have regulated these matters themselves in fixing the individual amount of the refund.

The questions referred to the Court for a preliminary ruling should be answered as follows:

(a) As a regulation implementing Article 10 of Regulation No 166/64, Regulation No 171/64 applied to all compound feeding-stuffs in respect of which in accordance with that regulation export refunds could have been granted in trade with third countries. These products were defined in Article 1 of the regulation and also include compound feeding-stuffs without the addition of powdered milk.

(b) Regulation No 171/64 does not use the concept 'compound feeding-stuffs based on cereals'. Article 1 thereof contains a flat-rate model computation to determine the maximum refund allowable which by means of the coefficients in the Annex to Regulation No 166/64 took account of the starch content but not of the proportion of a particular cereal in the products being exported. The expression 'the quantities used' referred to the standard quantities taken as a basis in Article 4 of Regulation No 166/64 for the computation of the levies.

(c) For entitlement to the refund under Article 1 of Regulation No 166/64 the addition of only 2 % of a product coming under Regulation No 19 such as tapioca flour sufficed for example. Similarly for the computation of the maximum amount of the refund under Article 1 (1) (a) of Regulation No 171/64 the decisive factor was as a rule not this proportion but the starch content.

(d) Such starch content was the starch content of the products exported. The normal rules contained no limitation on

the contents to the effect that such starch content should derive from products to which Regulation No 19 applied. There were no special provisions under Article 15 of Regulation No 166/64.

(e) Under Regulations Nos 19 and 13/64 it was not the Community but the Member States alone which laid down the refunds. Community law was limited to making the power of the Member States to grant export refunds subject to certain conditions.

Accordingly, Regulation No 171/64 was limited to supplementing the general guidelines of Article 10 of Regulation No 166/64 by more precise criteria for calculating the maximum refunds which the Member States must observe in trade with third countries.

Doubt cannot be cast on the validity of such enabling rules by reference to the judgment of the Court in Case 95/75: that case was concerned simply with the question whether the Commission in fixing the export levies as it was required to do had or had not respected the criteria for calculation laid down for it in the enabling rules. There was no similarity to the present case.

III — Oral procedure

The plaintiff in the main action, Firma Peter Cremer, represented by Barbara Festge, Rechtsanwältin, Hamburg, the defendant in the main action, the Bundesanstalt für landwirtschaftliche Marktordnung, represented by Albrecht Stockburger, Rechtsanwalt, Frankfurt am Main, the Commission, represented by its Legal Adviser, Peter Kalbe, and the Council, represented by its Legal Adviser, Bernhard Schloh, submitted oral observations at the hearing on 9 June 1977.

The Advocate General delivered his opinion at the hearing on 14 July 1977.

Decision

1 By order dated 1 December 1976 received at the Court Registry on 22 December 1976 the Hessisches Finanzgericht submitted to the Court four questions on the interpretation of Regulation No 166/64 of the Council of 30 October 1964 on the system applicable to certain classes of compound animal feeding-stuffs (Journal Officiel 1964, p. 2747) and Regulation No 171/64 of the Commission of 30 October 1964 laying down the conditions for the grant of refunds on exports to third countries of certain classes of compound feeding-stuffs (Journal Officiel 1964, p. 2758) and a question on the validity of the aforesaid Regulation No 166/64.

2 Before the questions put by the national court are considered it appears appropriate to set out the provisions of Community law relevant to the case.

3 Article 20 (2) of Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the market in cereals

(Journal Officiel 1962, P. 933) empowered the Council to introduce a system of refunds on export to third countries of preparations of feeding-stuffs containing cereals or other products coming under that regulation.

Articles 6 (3) and 14 (3) of Regulation No 13/64 of the Council of 5 February 1964 on the progressive establishment of a common organization of the market in milk and milk products (Journal Officiel 1964, p. 549) contained similar provisions on the grant of refunds on the export of preparations of feeding-stuffs containing milk powder or certain other milk products.

4 On the basis of those provisions Regulation No 166/64 of the Council determined the system applying to the import and export of certain classes of compound feeding-stuffs. Article 1 of that regulation defines such compound feeding-stuffs by reference to certain subheadings of heading No 23.07 of the Common Customs Tariff which at the time read as follows:

Sweetened forage; other preparations of a kind used in animal feeding ...

B: other ...

– containing not less than 50 % by weight of powdered milk;

other:

– containing cereals or products to which Regulation No 19 applies ...

Article 10 of the regulation provides that the Member States may in trade with third countries grant a refund taking into account in particular 'the situation of the world market and the market prices of the products relevant for the computation of the variable component'; according to the first indent of Article 4 that regulation, which governs the computation of the 'variable component' the products are maize, barley and sorghum. Article 10 (2) provides that the detailed implementing provisions on the grant of the refund on export to third countries should be adopted by the Commission according to the so-called 'Management Committee procedure'.

5 On that basis Regulation No 171/76 was adopted. For the determination of the maximum amount of refund Article 1 makes reference to the refund which is granted on the export of the 'three kinds of cereals on the basis of the quantities used for the computation of the variable component' multiplied 'by the coefficient shown in Column 1 of Table A of the Annex to Regulation No 166/64 corresponding to the classification of the compound

feeding-stuff', the coefficient being determined on the basis of the 'starch content'.

6 It appears from the order referring the matter to the Court that between December 1964 and March 1965 the plaintiff in the main action exported to Denmark animal feeding-stuffs consisting of 73 % tapioca chips, 22 % broken soya, 3 % mineral matter and 2 % tapioca flour, though there is no agreement about the addition of the last-mentioned ingredient. It is not contested that this feeding-stuff, apart from the tapioca flour, consisted of products not coming under Regulation No 19/62. It is also agreed that the starch content of the feeding-stuff on export was more than 50 % in all cases.

7 At first the plaintiff in the main action received from the German authority, the defendant in the main action, for the export of the feeding-stuff so made up the refunds calculated in accordance with the Community rules in the form of licences for the import free from the levy of an equivalent quantity of maize, barly and sorghum. The German authorities subsequently established that the greater part of the tapioca chips had been segregated from the product by sifting after the import of the feeding-stuff into Denmark and had been reimported into the Community; thereupon the defendant in the main action by notice dated 7 September 1971 revoked the import licences granted in place of the refunds. That notice is the subject-matter of the main action.

The first question

8 The first question asks whether Regulation No 171/64 of the Commission also applies to compound animal feeding-stuffs without the addition of powdered milk.

9 The reason for this question is that Regulation No 171/64 (like Regulation No 166/64 of the Council on which it is based) is founded both on Regulation No 19 relating to the cereal market and Regulation No 13/64 relating to the milk market so that doubts might arise as to whether the feeding-stuff referred to in the regulation of the Commission must contain in any case products of both of those markets. The answer to this question must be sought in the definition of 'animal feeding-stuff' contained in Article 1 of Regulation No 166/64 which as mentioned refers to particular subheadings of heading No 23.07 of the Common Customs Tariff. It is clear from the context of those subheadings that the rules relate to various classes of

feeding-stuffs, namely such as contain not less than 50 % by weight of powdered milk and such as contain cereals or other products to which Regulation No 19 applies.

10 The answer must therefore be that Regulation No 171/64 of the Commission applies also to compound animal feeding-stuffs not containing powdered milk.

Second and third questions

11 The second question asks whether the words in Article 1 (a) thereof 'for each of the three kinds of cereals on the basis of the quantities used' are to be interpreted as meaning that (a) only a product in the preparation of which cereals had in fact to be used or (b) whether the expression 'the quantities used' are 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 for the charging of the levy). The third question, which is closely associated with the previous question, asks whether 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; Article 1 of Regulation No 166/64 of the Council) it depended upon the extent to which the animal feeding-stuff 'contained products' to which Regulation No 19 applied and, in particular, whether the admixture of 2 % of a product upon which a levy was chargeable, such as tapioca flour, suffices to demand in this way a refund amounting to 100 % exemption from the levy for imports of cereals from third countries. Basically both questions are concerned with the question whether export refunds on compound animal feeding-stuffs must bear a particular relationship to the proportion in the mixture of products coming under Regulation No 19 or whether it must be regarded as sufficient for the grant of the full refund if only one product coming under that regulation is contained therein and that only in a very small proportion (for example 2 %).

12 The plaintiff in the main action claims that Regulations Nos 166/64 and 171/64 mean that the full refund must be granted whenever a compound feeding-stuff contains an ingredient coming under the Community rules no matter what the amount is. The Commission supports this view and considers that the said provisions contain a 'model calculation' for determining the maximum amount of refund and lay down no requirements regarding the actual composition of the compound feeding-stuffs. Although the defendant

in the main action admits that the manner of computation is determined by Regulations Nos 166/64 and 171/64 on a flat-rate and largely fictitious basis, it nevertheless takes the view that the application of those provisions cannot be extended to abusive practices involving claims for the payment of refunds for the export of compound feeding-stuffs containing only a very small proportion of one of the products coming under the Community rules relating to the cereal market.

13 Although the provisions of the regulations referred to by the national court are difficult to understand from the point of view of their wording and context, they may be satisfactorily interpreted having regard to the objectives of the system of export refunds as is expressed in the preamble to Regulation No 171/64. According to the first recital in the preamble to that regulation refunds are intended 'to make up for the difference between the prices within the exporting Member State and those on the world market'. It continues: 'That difference may be properly assessed for the Member States on the basis of that applying to the basic products. Accordingly the refund must be calculated for those products on the basis of that which applies to their basic ingredients and in proportions varying according to the quantities involved'. It appears clearly from these recitals that the objective of the refund on export to third countries is to compensate for the effect on the prices of the compound feeding-stuffs of the rules applicable to the ingredients used.

14 From this it follows, as the preamble to Regulation No 171/64 stresses, that the refund must be proportionate to the amount of the basic products subject to an organization of the market in the composition of the compound feeding-stuffs. Although in fixing the amount of the refund the application of flat-rate methods of calculation cannot be avoided, the grant of a refund always presupposes the actual presence in the compound feeding-stuff, in significant proportions, of products coming under Regulation No 19 (cereals) or Regulation No 13/64 (milk products). Since Regulation Nos. 166/64 and 171/64 do not give more precise indication of the criteria for distinguishing between compound feeding-stuffs, the export of which gives rise to an entitlement to the grant of refunds and those for which it does not, it is for the competent national authorities to judge the facts with a view to preventing undue payment of refunds as a result of manipulation by the producers of the proportion of the ingredients of compound animal feeding-stuffs. It appears in any event clear that a compound feeding-stuff which contains only one product coming under Regulation No 19 and that in insignificant proportions cannot give rise to a claim for a refund.

15 The questions referred to the Court for a preliminary ruling should therefore be answered to the effect that apart from compound feeding-stuffs containing not less than 50 % by weight of powdered milk, a refund on the export of a compound feeding-stuff on the basis of Regulation No 166/64 of the Council and Regulation No 171/64 of the Commission can be granted only where cereals or products to which Regulation No 19 applies are in fact contained in the mixture in significant proportions.

The fourth question

16 The fourth question asks whether 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') are 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.

17 It is apparent from the very heading of Table A: 'Preparations containing cereals or products to which Regulation No 19 or Regulation No 16/64 (EEC) applies', taken in turn from tariff heading No 23.07, that the system of export refunds applies, subject to what has been said in answer to the second and third questions, to all preparations containing cereals and other products falling under Regulation No 19, no matter what the proportions. This provision relates to 'preparations' as such and not simply to certain of their ingredients. The words 'cereals' ... actually used in the product', which the national court has taken from Article 15 of Regulation No 166/64 must be regarded in conjunction with the special purpose of that article, which is intended to apply only where there are disturbances of the market. The use of these words in this quite special connexion therefore confirms that for other purposes the provisions of Regulation No 166/64 and of Annex A thereto are applicable without its being necessary to distinguish, for the determination of the starch content, between the ingredients of a compound feeding-stuff coming under Regulation No 19 and other ingredients.

18 The answer should therefore be that for the purposes of applying the coefficients laid down by Annex A to Regulation No 166/64 the starch content of the preparations referred to therein must be considered in the light of the compound feeding-stuff as a whole and not simply with regard to the ingredients to which Regulation No 19 was applicable.

The fifth question

19 The fifth question asks whether the relevant provisions of Regulation No 166/64 are not invalid to the extent to which they fix for products listed under tariff heading No 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 (as the Court ruled in its judgment of 9 March 1976 in respect of a regulation fixing a levy).

20 The reference by the Finanzgericht to the judgment of the Court of 9 March 1976 (Case 95/75 *EFFEM* v *Hauptzollamt Lüneburg* [1976] ECR 361) shows that the court making the reference has doubts about the validity of Regulation No 166/64 since it might lead to the grant of unjustified advantages since in calculating the export refunds it makes no distinction according to whether the ingredients of a compound feeding-stuff fall under the agricultural rules of the Community or not.

21 With regard to these doubts it should be observed that the Council, having regard to the special nature of the products in question, had necessarily to have recourse, so as to ensure that the rules were practicable, to approximate and flat-rate methods of fixing. Further, it appears from the answers to the second and third questions that the scope of Regulation No 166/64 and Regulation No 171/64 must in no case be extended to cover abusive practices of an exporter in taking advantage of the flat-rate assessment in calculating the refunds especially as at the time it was not a question of adopting a comprehensive set of rules but only of creating a frame-work within which the national authorities were to regulate the market for the products in question at their own discretion.

22 In these circumstances the validity of Regulation No 166/64 is not open to challenge.

Costs

23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Hessisches Finanzgericht, the decision on costs is a matter for that court.

THE COURT (Second Chamber)

in answer to the questions referred to it by the Hessisches Finanzgericht by order dated 1 December 1976, hereby rules:

1. **Regulation No 171/64 of the Commission of 30 October 1964 laying down the conditions for the grant of refunds on the export to third countries of certain classes of compound feeding-stuffs applies also to feeding-stuffs not containing powdered milk.**

2. **Apart from compound feeding-stuffs containing not less than 50 % by weight of powdered milk, a refund on the export of a compound feeding-stuff on the basis of Regulation No 166/64 of the Council of 30 October 1964 on the system applicable to certain classes of compound animal feeding-stuffs and Regulation No 171/64 of the Commission can be granted only where cereals or products to which Regulation No 19 of the Council on the progressive establishment of a common organization of the markets in cereals applies are in fact contained in the mixture in significant proportions.**

3. **For the purposes of applying the coefficients laid down by Annex A to Regulation No 166/64 the starch content of the preparations referred to therein must be considered in the light of the compound feeding-stuff as a whole and not simply with regard to the ingredients to which Regulation No 19 was applicable.**

4. **Consideration of the fifth question has disclosed no factor of such a kind as to affect the validity of Regulation No 166/64 of the Council.**

Pescatore Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 11 October 1977.

A. Van Houtte
Registrar

P. Pescatore
Acting President of the Second Chamber