

In case 2/77

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Münster for a preliminary ruling in the action pending before that court between

HOFFMANN'S STÄRKEFABRIKEN AG, Bad Salzufflen, Germany,

and

HAUPTZOLLAMT BIELEFELD,

on the validity of Article 1 (1) of Regulation (EEC) No 3113/74 of the Council of 9 December 1974 (OJ L 332 of 12. 12. 1974, p. 1) and on the interpretation of the second subparagraph of Article 40 (3) of the EEC Treaty and of Article 1 of Regulation No 231/75 of the Commission of 30 January 1975 (OJ L 24 of 31. 1. 1975, p. 42),

THE COURT

composed of: H. Kutscher, President, A.M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keefe, G. Bosco and A. Touffait, Judges,

Advocate-General: H. Mayras

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The judgment making the reference and the written observations submitted pursuant to Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in

cereals (OJ English Special Edition 1967, p. 33) lays down in Article 11 (1) that 'A production refund shall be granted:

- (a) for maize and common wheat used by the starch industry for the manufacture of starch and quellmehl;
- (b) for potato starch;
- (c) for maize used in the maize industry for the manufacture of maize groats and meal (gritz) used by the brewing industry'.

According to the first recital in the preamble to Regulation No 371/67/EEC of the Council of 25 July 1967 fixing the abovementioned refunds for the year beginning on 1 August 1967 (OJ English Special Edition 1967, p. 219) the granting of this refund was justified by 'the special situation on the market in starches and, in particular, the need for that industry to keep starch prices competitive with those for substitute products' in order that 'the basic products required for use by that industry may be made available at a lower price than that which would result from the application of the system of levies and common prices'.

In order to attain this objective the refund was calculated so that it would cover the difference between the Community threshold price and a fixed amount of 68 units of account per metric ton considered as the normal 'supply price' for the starch industry. Article 2 of Regulation No 371/67/EEC provided that if 'prices of the basic products... show appreciable and persistent variations on the world market' in relation to the 'supply price' the latter might be altered by the Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission; it is self-evident that this alteration brought about changes in the amounts of the refund.

2. From the end of 1972 the world rates for maize rose constantly, gradually approaching the threshold price which,

indeed, they almost always exceeded between August 1973 and October 1974. This 'appreciable and persistent variation in the prices of the basic products on the world market' led the Council to review the 'supply price' which had been fixed at 68 u.a. since 1967. For the marketing year 1974/75 the price was successively fixed at:

- 82 u.a. from 1 August 1974 by Regulation No 1132/74 of the Council of 29 April 1974 (OJ L 128 of 10. 5. 1974, p. 24);
- 87.45 u.a. from 7 October 1974 by Regulation No 2518/74 of the Commission of 4 October 1974 (OJ L 270 of 5. 10. 1974, p. 1) adopted in implementation of Regulation No 2496/74 of the Council of 2 October 1974 amending the prices applicable in agriculture for the 1974/75 marketing year OJ L 268, of 3. 10. 1974, p. 1);
- 103.10 u.a. from 1 April 1975 by Regulation No 3113/74 of the Council of 9 December 1974 (OJ L 332 of 12. 12. 1974, p. 1).

Accordingly the refund, which amounted to 39.45 u.a. per metric ton before the 1974/75 marketing year went to 24.60 u.a. at the beginning of that marketing year, remained unaltered in October 1974 (since the alteration in the supply price was accompanied by an increase in the threshold price) by degrees reached 30.10 u.a. in March 1975, owing to monthly increases in the threshold price was reduced to 15.55 u.a. from 1 April 1975 and amounted to 18.85 u.a. per metric ton in July 1975.

	world price	threshold price	supply price	refund
June 1974 1974/75	106.25	107.45	68.00	39.45
August 1974	125.71	106.60	82.00	24.60
October 1974	132.91	112.05	87.45	24.60
April 1975	93.39	118.65	103.10	15.55
July 1975	101.42	121.95	103.10	18.85

whilst the production refund on maize starch protects Community processors who produce starch against importers of products processed from starch it is also intended to remedy the disorganization of the market in starch arising from competition from synthetic products derived from oil. Since there is a risk that the starch market may for its part cause imbalance in the market in other products and vice versa a refund bearing a certain relation to that in respect of maize starch is granted in respect of those other products (potato starch, quellmehl, broken rice and maize groats).

Since the increase in the world price of cereals caused frequent increases in the threshold price whilst the supply price remained unchanged from 1967 to 1974 the increase in the refund which followed entailed a very heavy burden on the Community finances. This led the Council to abolish the refund on several products, such as quellmehl, and to reduce the refund on maize starch. Furthermore, it became clear in the course of the 1974/75 marketing year that even a reduced refund on maize starch was becoming less and less justifiable, particularly because of the reduction in competition from substitute products; this situation gave rise to Regulation No 3113/74 which is in dispute.

Since the Council was aware that it was no longer a case of mere adaptation to fluctuations in the world price but of a more complex situation calling in question the refund itself, 'the size of which is no longer economically justified', it did not avail itself of the procedure under Article 7 of Regulation No 1132/74, acting in this matter in accordance with the proposal of the Commission, and instead acted by way of a regulation having the same status as the latter regulation, that is to say, founded upon the basic regulation for maize, Regulation No 120/67, Article 11 (3) of which states, 'The Council, acting in accordance with the voting procedure

laid down in Article 43 (2) of the Treaty on a proposal from the Commission, shall adopt rules for the application of this article and fix the amount of the production refund' (first citation in the preamble to Regulation No 3113/74).

First Question (Question 1 (a))

There is no merit in the argument of the plaintiff in the main action to the effect that Regulation No 3113/74 is void because the conditions prescribed by Article 7 of Regulation No 1132/74 (appreciable and persistent variations in the prices on the world markets) are not fulfilled, since Regulation No 3113/74 is 'of the same generation' as Regulation No 1132/74 and has the same citations as the latter.

The reference in the first recital in the preamble to Regulation No 3113/74 to the said Article 7 of Regulation No 1132/74 is a reference to the economic justification for the refund, disputes the size of the refund and states the reasons for altering the fixed amount.

In view of the fact that this was the third reduction of the refund within the same marketing year the Council incorporated two precautionary measures: first, it postponed by five months the date of entry into force (1 April 1975 instead of 1 December 1974) and secondly it made provision for the adoption of transitional measures (Article 2 of Regulation No 3113/74).

Regulation No 3113/74, whereby the Council made a choice of economic policy, is thus in keeping with an intention, desired and expressed from the beginning of 1974, to reduce the refund.

The plaintiff's line of argument amounts to maintaining that since provision was made in Regulation No 1132/74 for review for economic reasons this precludes review for structural ends.

Second Question (Question 1 (b))

According to the Council the right conferred by Regulation No 120/67 is not so clearly defined as the plaintiff in the main action claims. Regulation No 120/67 leaves the Council with a certain discretion in the light of the economic circumstances and this discretion it has properly exercised.

Third Question (Question 1 (c)).

The Council concedes that the annual fixing of agricultural prices indeed constitutes a basic rule in the common agricultural policy but it disputes that this infers that agricultural prices cannot in any circumstances be changed during the marketing year even if it is clear that they no longer fulfil their function.

In any event the fixing of supply prices is irrelevant since they are not fixed annually.

The line of argument based on the judgment in the *Deuka* case (judgment of the Court of 18 March 1975 in Case 78/74 [1975] ECR 421) confirms that an exceptional alteration in the supply price may be effected if legal certainty is ensured, as it was in the present case.

B — Observations submitted by the Commission

First Question (Question 1 (a))

The Commission too emphasizes that the legal basis cited in Regulation No 3113/74 is not Article 7 of Regulation No 1132/74 but the provision in Article 11 (3) of Regulation No 120/67/EEC which merely authorizes and charges the Council in quite general terms, to adopt the rules necessary for the granting of production refunds and to determine on this basis the method of calculation and the amounts of such refunds. The Commission moreover observes that the

implementation of those two provisions (Article 7 of Regulation No 1132/74 and Article 11 (3) of Regulation No 120/67) is effected by identical procedures: the Council must in both cases act by a qualified majority on a proposal from the Commission.

Moreover the measures in dispute were fully justified by the situation of the market.

Because of the refunds it was possible for manufacturers of maize starch to buy their raw materials at a price not necessarily that on the world market but at a competitive price lower than the Community threshold price with reference to which the amount of the levies is established. Because of the increase in world prices and in threshold prices and the consequent increase in the refund manufacturers of maize starch, who initially had to obtain their supplies at a price distinctly higher than the price on the world market in 1974, enjoyed a distinctly unrealistic supply price since it corresponded to approximately 60 % of the world price.

The Commission points out that even after the first reduction in the refund in October 1974 the supply price of 87.45 u.a. per metric ton was still approximately 15 u.a. per metric ton lower than the price ruling on the world market. Only Regulation No 3113/74 made it possible to re-establish relatively reasonable prices. According to the plaintiff in the main action the supply price should have been constantly adapted to the short-term and purely seasonal variations in the world prices of maize. This is not the function of the supply price: its function is independent and this independence corresponds to its objective: it is not required to provide a mere guarantee that the starch industry may obtain maize on the conditions prevailing on the world market since it would have been much easier to attain this objective by suspending the levies.

procedure which, in accordance with Article 11 (3) of Regulation No 120/67 already empowered the Council to improve in general implementing Regulation No 1132/74. This contradiction between the extremely strict material conditions for altering the refunds and the formal conditions for the wholesale alteration of Regulation No 1132/74 can only be resolved as follows:

- The Council is bound by the conditions in Article 7 when only the supply price of maize has to be adapted to the altered conditions and the rules as a whole relating to the refunds remain unchanged;
- On the other hand the general power to adopt regulations altering the amount of the refund by a *modification of the system of refunds* is not affected by Article 7 (for example, alteration of the system of refunds to a fixed amount from the 1975/76 marketing year, Regulation No 1955/75 of the Council of 22 July 1975, OJ L 200 of 31. 7. 1975);
- Regulation No 3113/74 merely alters the 'supply prices' appearing in Articles 1, 4 and 5 of Regulation No 1132/74 and does not affect the other provisions of the regulation, including Article 7.

It was thus adopted within the framework of the limited power to enact regulations contained in this provision.

The fact that the first citation in the preamble to Regulation No 3113/74 mentions Article 11 (3) of Regulation No 120/67 is not conclusive since this provision restriction the general power is not an enabling provision. It is sufficient that the enabling provision should be mentioned in the recitals in the preamble to the regulation, as it was in this case.

The plaintiff in the main action maintains that the Council is thus bound by the conditions laid down in Article 7 of Regulation No 1132/74. According to the plaintiff the Court checks only marginally the fulfilment of the

conditions laid down in Article 7 of Regulation No 1132/74: the Court merely checks whether Regulation No 3113/74 was not based on a manifestly false appraisal of the fulfilment of those conditions or whether the regulation was not vitiated by misuse of powers. In the present case strict compliance with the criteria in Article 7 is essential.

The plaintiff in the main action has submitted for consideration by the Court a table showing the prices of maize on the world market during the years 1974 and 1975, the threshold price, the limits of the refund, the refund and the levy on the first of each month in the course of the same period. This table shows that the conditions laid down by Article 7 were fulfilled neither during the period of validity of Regulation No 3113/74 nor at the time when it was adopted.

The plaintiff in the main action notes more particularly:

- The aim in view in rendering alteration of the refunds subject to the existence of *appreciable and persistent* variations in world prices was a regard for the *stability* of the system of refunds. The object of the system was not to carry out adaptations intended only to remain in force for a short period. With regard particularly to the provisions of Regulation No 3113/74 it was clear at the time when they were adopted that, independently of the development of the price on the world market, they were intended to apply for four months only, from 1 April 1975 until the beginning of the new marketing year.
- The criterion to which reference must be made in order to establish variations in prices on the world market must be the world price of maize at the time when the price of maize intended for processing into starch was last fixed. At the time when Regulation No 3113/74 was adopted the rates for maize on the world market were at the same level

as they were at the entry into force of the last adapting measure at the beginning of the 1974/75 marketing year and a tendency to fall was already clearly perceptible.

- With regard to the concern to reduce the heavy financial burden entailed by the refunds the plaintiff in the main action considers that this concern alone is not such as to justify of itself the reduction of the refund: a refund which had remained unaltered throughout the 1974/75 marketing year did not exceed half of the average refund granted during the years subsequent to 1966. Furthermore in the four months concerned (1 April 1975 to 31 July 1975) the levy was higher than at any other time in the year 1974.

The plaintiff in the main action maintains that the Council and the Commission have diverted Article 7, and the margin of discretion which was conferred upon them under this provision, from its objective in order gradually to abolish the refund, an objective which was not covered by Article 7 and which could not be justified having regard to the conditions laid down by Article 7.

Second Question (Question 1 (b))

Since Regulation No 3113/74 constitutes a regulation in implementation of Article 11 of Regulation No 120/67 it had to be compatible with the latter. Article 11 of Regulation No 120/67 grants a right to the production refund and the regulation in dispute detracts from that right. The existence of a right to the refund pursuant to Regulation No 120/67 is confirmed by the fact that, under Regulation No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ L 281 of 1. 11. 1975, p. 1), Article 11 (1) becomes, an optional provision.

Third Question (Question 1 (c))

The plaintiff in the main action concedes that from a formal standpoint only the

upper limit of the refund, the threshold price of maize, is linked to the marketing year for maize and that the lower limit, the supply price, is not expressly so linked.

Nevertheless the plaintiff observes:

- With regard to the 1974/75 marketing year the Council expressly stated that the refund would be maintained at the level at which it stood on 7 October 1974. In Regulation No 2496/74 of the Council of 2 October 1974 (OJ L 268 of 3. 10. 1974, p. 1), which effects a general increase in agricultural prices, it was carefully specified in Article 1 (2) that the supply prices would be increased so that ... 'for the remainder of the 1974/75 marketing year, the refunds to producers laid down in that regulation [No 1132/74] shall be maintained at the level resulting from the implementation of the rules which were valid when the present regulation entered into force'. This provision shows that the Council intended to recognize that the refund could not be changed as, if this were not so, the Council could have simply fixed the amount of the refund without stating that the refunds would be maintained 'for the remainder of the ... marketing year'. From the time when, in the wording which it has adopted, the Council referred so clearly to the marketing year it was bound to keep to the marketing year.

- The Court of Justice has also ruled in its two judgments in the *Deuka* cases (judgment of 18 March 1975, Case 78/74 [1975] ECR 421; judgment of 25 June 1975, Case 5/75 [1975] ECR 759) that whilst the principle that no alteration may be made during the marketing year does not entirely rule out alterations adversely affecting the persons concerned provisions of this nature are exceptional. In those circumstances the interest of the Community in effecting rapid alterations in the course of the

justified by objective considerations, the plaintiff in the main action further considers whether considerations of this nature may justify the different treatment of the potato-starch industry and the maize-starch industry. It also arrives at a negative conclusion and puts forward the following considerations:

- (1) The fact that producers of starch from potatoes have a vested right is not sufficient to justify the unequal treatment meted out to producers of starch from maize even if it is assumed that the latter did not possess a vested right.
- (2) Nor does the fact that this inequality of treatment was merely temporary provide any ground for declaring it of no account from the legal point of view. For the plaintiff maintenance of the inequality of treatment would have meant something like an extra 1 000 000 DM in refunds.
- (3) Finally, the unequal treatment cannot be justified by relying upon different conditions of production since Article 2 of Regulation No 1132/74 is particularly clear on this point. The principle that amounts of the refunds shall be the same infers that it is essential to avoid differences in the refunds even by reason of differences in the conditions of production.

The plaintiff in the main action concludes that:

— Regulation No 231/75, indicating that there was no need to take account of the alteration brought about by Regulation No 3113/74, was superfluous since even without this regulation, the principle that measures shall not be retrospective and that existing rights shall be protected has this effect.

— Article 1 (1) of Regulation No 3113/74 is inapplicable in so far as it entailed a reduction in the production refund granted for maize starch for the period 1 April 1975 to 31 July 1975. The only means of observing the principle of the prohibition on discrimination is to annul the system of rules which is at odds with that principle or, to adopt the wording of Regulation No 231/75 of the Commission, to say that it 'shall not be taken into account'.

At the hearing on 18 May 1977 the plaintiff in the main action, represented by Barbara Rapp-Jung of the Bar of Frankfurt am Main, the Council of the European Communities, represented by its Agents, Mr Vignes and Mr Frohn and the Commission of the European Communities, represented by its Agent, Mr Kalbe, submitted their oral observations.

The Advocate General delivered his opinion at the hearing on 22 June 1977.

Decision

1. By an order of 20 December 1976 which reached the Court Registry on 4 January 1977 the Finanzgericht Münster referred to the Court, pursuant to Article 177 of the EEC Treaty, two questions, the first of which relates to the validity of Article 1 (1) of Regulation No 3113/74 of the Council of 9 December 1974 (OJ L 332 of 12. 12. 1974) amending Regulation No 1132/74 on production refunds in the cereals and rice sectors, and the second, referred as an alternative, concerns the interpretation of the second subparagraph of Article 40 (3) of the EEC Treaty in relation to the methods of calculating the production refund on potato starch and maize starch.

Those questions were referred in the course of a dispute between the plaintiff in the main action, the Hoffmann's Stärkefabriken undertaking, and the Hauptzollamt, Bielefeld concerning the amount payable by way of production refund to the plaintiff in respect of maize intended for the manufacture of starch.

- 2 Article 11 of Regulation No 120 of the Council of 13 June 1967 on the common organization of the market in cereals (OJ English Special Edition 1967, p. 33), as amended with effect from 1 August 1974 by Article 5 of Regulation No 1125/74 of the Council of 29 April 1974 (OJ 128 of 10. 5. 1974, p. 12), provides that a production refund shall be granted:

- '(a) for maize and common wheat used in the Community for the manufacture of starch;
- (b) for potato starch;
- (c) for maize groats and meal (gritz) used in the Community for the manufacture of glucose by direct hydrolysis;
- (d) for maize used in the Community by the maize industry for the manufacture of maize groats and meal (gritz) used in the Community brewing industry for the production of beer.'

According to the tenth recital in the preamble to Regulation No 120/67 the granting of that refund was, with regard to maize intended for the manufacture of starch, justified by the circumstance that 'because of the special situation on the market in starches and, in particular, the need for that industry to keep prices competitive with those for substitute products, it is necessary to ensure by means of a production refund that the basic products used by the industry are made available to it at a lower price than that which would result from applying the system of levies and common prices'.

According to the same recital: 'for similar reasons and because of the interchangeability of starches with quellmehl and maize groats and meal, production refunds should also be granted in respect of the latter products'.

Pursuant to Article 11 (3) of the said regulation the Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission, shall adopt rules for the application of this article and fix the amount of the production refund.

- 3 Pursuant to Article 11 (3), Article 1 of Regulation No 371/67 of the Council of 25 July 1967 fixing production refunds on starches and quellmehl, laid down that the production refund on maize for the manufacture of starch should be equal to the difference per 100 kg between the threshold price of maize and a 'supply price', a fixed sum of 68 u.a. per metric ton corresponding to the price at which it was considered desirable and usual for manufacturers of maize starch to acquire maize, taking account of their competitive position with regard, on the one hand, to producers of synthetic starches and, on the other hand, to producers of potato starch.

According to Article 2 of the same regulation if the prices of the basic products mentioned in Article 1, which include maize, 'show appreciable and persistent variations' in relation to the supply price the amount of the latter may be altered by the Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission.

Regulation No 371/67 was repealed and replaced by Regulation No 1132/74 of the Council of 29 April 1974, Article 7 of which repeats Article 2 referred to above.

It is clear from these considerations that the essential objective of the system in question was to allow starch manufacturers, in order to ensure that they remained competitive, to purchase their raw materials at a price nearer to prices on the world market than the price obtained simply by applying the threshold price.

- 4 After the 1974/1975 marketing year the Council, or the Commission in implementation of a regulation of the Council, successively increased the supply price, bringing it to 82 u.a. per metric ton in August 1974 by Regulation No 1132/74 (OJ L 128 of 10 May 1974), to 87.45 u.a. per metric ton in October 1974 by Regulation No 2518/74 (OJ L 270 of 5 October 1974) and to 103.10 u.a. per metric ton from 1 April 1975 by the regulation the validity of which is called in question, whilst also reducing the amount of the refund, except in the second instance, where the increase in the supply price was matched by a like increase in the threshold price.

The plaintiff in the main action disputed the legality of the last reduction and claimed from the Hauptzollamt Bielefeld payment of a refund calculated on the basis of the supply price as previously fixed.

I — The validity of Article 1 (1) of Regulation No 3113/74 of the Council of 9 December 1974

- 5 The first question asks whether: 'Article 1 (1) of Regulation No 3113/74 of the Council is invalid or inapplicable
- (a) because the requirements of Article 7 of Regulation No 1132/74 of the Council of 29 April 1974 (OJ L 128 of 10. 5. 1974, p. 24) are not fulfilled;
 - (b) because Article 11 of Regulation No 120/67 of the Council of 13 June 1967 (OJ English Special Edition 1967, p. 33) has been infringed;
 - (c) because of the violation of the principle, established in Regulation No 120/67, that agricultural prices shall not be changed during the marketing year.'

6 As to (a)

The plaintiff in the main action maintains that the condition of an appreciable and persistent variation in the price of maize on the world market, in particular an increase in relation to the supply price, was not fulfilled in December 1974 when the Council, by means of the contested regulation, increased the supply price to 103·10 u.a. per metric ton.

On the contrary, it is clear from the figures produced that world prices remained stable in relation to those prevailing at the date of the previous fixing of the supply price at 87·45 u.a. per metric ton by Regulation No 2518/74 of 4 October 1974, and indeed that they subsequently showed a tendency to fall which was already discernible, or at any rate foreseeable, in December 1974.

- 7 After the beginning of 1973 and until the beginning of November 1974 world prices, of maize rose constantly, and the figures produced by the plaintiff in the main action show that they increased from US\$87·20 to US\$167·25 and subsequently fell gradually to US\$124·80 in June 1975 and then rose again to US\$141 in August 1975, returning to US\$120 in January 1976.

On 9 December 1974, the date of the contested regulation, the world price was still at US\$161.

During this entire period the increase in world prices was such that at certain times, in particular from January to the end of May 1974, and from August to October 1974, world prices were higher than the threshold price.

Despite this situation, which meant that manufacturers of maize starch in the Common Market did not have to obtain supplies at prices above those on the world market, payment of the production refund continued.

This circumstance shows that the level of world prices for maize was not the only criterion for fixing the supply price.

This is also confirmed by the fact that in any case the refund only compensated for part of the difference between the threshold price and the world price since the latter was lower than the former.

This finding is completely in accordance with what is to be inferred from consideration of the tenth recital in the preamble to Regulation No 120/67 in accordance with which the supply price (the difference between the latter price and the threshold price determines the amount of the refund) required to be fixed, taking account of all the factors which determine the competitive position of starch manufacturers in relation to producers of synthetic substitutes on the one hand and manufacturers of potato starch on the other.

- 8 It is clear from those considerations that the appreciable and persistent variations in the price of basic products referred to in Article 2 of Regulation No 371/67, which was replaced by Article 7 of Regulation No 1132/74, do not constitute the sole legal basis for an alteration of the supply price and that alterations of the supply price based on other reasons are justified in law by Article 11 (3) of Regulation No 120/67.

In addition it must be emphasized that the specific alteration of the supply price referred to in Article 2 of Regulation No 371/67 and Article 7 of Regulation No 1132/74 and the more general alteration referred to in Article 11 (3) of Regulation No 120/67, must be enacted in accordance with strictly identical procedures, since in both those instances the Council acts in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission, so that the relevant provision in Regulations Nos 371/67 and 1132/74 in fact only constitutes a specific application of a more general power which the Council already possessed under Articles 11 (3) and 26 of Regulation No 120/67.

It cannot be conceded that, when the Council adopted the specific provision in the abovementioned Articles 2 and 7, it intended to restrict the exercise of a general power which it had expressly conferred upon itself and which it required to exercise freely for the proper administration of the relevant organization of the market.

9 Furthermore the two earlier alterations in the supply price were not adopted because of the existence of appreciable and persistent variations in the price of maize on the world market in relation to the supply price but, in the first case (Regulation No 1132/74 of the Council of 29 April 1974), in view of 'a precise assessment of the situation resulting from the level of common prices and from the competition between, on the one hand, maize starch, rice starch, potato starch and, on the other, the substitute chemical products ...', and, in the second case by the Commission (Regulation No 2518/74 of 4 October 1974, OJ L 270/1 of 5. 10. 1974) in implementation of Regulation No 2496/74 of the Council of 2. 10. 1974 raising from 7 October 1974 all prices applicable in the agricultural sector for the 1974/1975 marketing year.

10 Nevertheless the plaintiff in the main action claims that in the first recital in the preamble to the contested measure, Regulation No 3113/74, the Council has referred to Article 7 of Regulation No 1132/74 by its reliance, in order to justify increasing the supply price to 103.10 u.a. per metric ton, on the circumstance that: '... prices of these products [*inter alia* maize] have become very high' and 'are likely to remain so'.

The Council had thus by adopting the contested regulation plainly indicated on 9 December 1974 that it intended on this occasion to subordinate the exercise of its power to the fulfilment of the precise condition laid down in the abovementioned Article 7, whilst it is clear from the evidence submitted that world prices of maize had already begun to fall so that it cannot be maintained that there were appreciable and persistent variations, but merely short-term variations which did not justify adjusting the supply price.

11 World prices of maize, which from 1967 to the end of 1972 had never reached US\$87.20, varied between July 1973 and July 1975 as follows, according to the information supplied by the plaintiff in the main action:

<i>Date</i>	<i>World price in US dollars</i>
1 October 1973	124.00
1 January 1974	136.50
1 April 1974	141.25
1 July 1974	139.25
1 October 1974	164.50
1 January 1975	156.00
1 April 1975	138.30
1 July 1975	130.25

Accordingly, at the date when the contested regulation was adopted, prices were still at US\$161 and at US\$156 on 1 January 1975.

When the Council asserted that prices remained very high, and that, in relation to the period before 1 January 1973, there was an appreciable and persistent variation in world prices, it did not exceed the margin of discretion which it possesses in this sphere.

It is true that a similar variation cannot be found at the date of the previous fixing of the supply price at 87.45 u.a. per metric ton on 7 October 1974 but this circumstance only arises because the Council wished progressively to adapt the supply price to the normal situation and did so by degrees.

- 12 If world prices remained at such a high level this would inevitably have affected the fixing of the supply price since this level did away with all justification for the refund in that the refund was intended to compensate for the handicap entailed for maize-starch producers by the fact that their raw material was unobtainable at prices approaching those on the world market.

The retention of the refund was justified only to the extent that, taking account of the general increase in world prices, in particular in the price of raw materials for competing products, the refund remained necessary to ensure balanced competition between maize starch, synthetic starch and potato starch.

In the first recital in the preamble to Regulation No 3113/74 the Council sufficiently, albeit succinctly, gave as its reason for reducing the refund in relation to this second factor in its fixing that 'the maintenance of the amounts specified in the said Articles 1, 4 and 5 at their present levels could lead to the granting of a production refund the size of which is no longer economically justified and the financial burden of which could become excessive'.

At no point was it claimed, still less proved, that the reduction in the refund jeopardized the competitive situation of maize-starch producers, *vis-à-vis* producers of synthetic starch or potato starch.

13. As to (b)

The first question further asks whether in the contested regulation the Council infringed Article 11 of basic Regulation No 120/67 by reducing, with the aim of progressively abolishing it, a refund to which maize-starch manufacturers were entitled.

14. In accordance with Article 40 of the Treaty common organizations of the market can only include the allocation of aids for production in so far as such aids are necessary to attain the objectives set out in Article 39.

The allocation of Community financial resources for aids which have ceased to be necessary as defined above constitutes an infringement of Article 40.

Although the wording of Article 11 of Regulation No 120/67, in the version in force at the time, does not appear to make the granting of the refund optional, it nevertheless confers upon the Council power to appraise the amount of the refund in the light of the objectives of common interest listed in Article 39 of the Treaty.

15. As to (c)

The first question finally asks whether the validity of Article 1 (1) of Regulation No 3113/74 is affected because it violates the principle that agricultural prices shall not be changed in the course of the same marketing year.

16. Whilst the annual fixing of agricultural prices indeed constitutes a basic economic feature of the common agricultural policy as it is at present implemented such fixing implies neither that those prices cannot be changed in any circumstances nor, in consequence, does it prohibit the Council from adjusting them in the course of the marketing year, when such adjustments are justified.

Furthermore, whilst the fixing of the level of the 'supply price' is partly linked to the level of agricultural prices it is also determined by the competitive situation referred to in the tenth recital in the preamble to Regulation No 120/67 and alterations in this situation are not linked to the terms of the agricultural marketing years.

Finally, in order to provide traders with sufficient time to adapt to the new situation Regulation No 3113/74, although adopted on 9 December 1974, provides in the second paragraph of Article 3 that it shall only apply on 1 April 1975.

Since the production refund was paid and the amount thereof calculated pursuant to Article 2 (1) and (3) of Regulation No 2012/74 of the Commission of 30 July 1974 (OJ L 209/44 of 31. 7. 1974) at the time when the person entitled to the refund furnished proof that the basic product in question had been placed under supervision by the authorities appointed by the Member States, the traders concerned were free to arrange their purchases of maize during the first quarter of 1975 so that their production qualified in large measure in the course of the following months for an unreduced refund.

- 17 For all those reasons the reply must be that consideration of the first question has disclosed no factor of such a kind as to affect the validity of Article 1 (1) of Regulation No 3113/74.

II — The interpretation of the second subparagraph of Article 40 (3) of the EEC Treaty and of Regulation No 1132/74

- 18 The national court then asks: 'If Question 1 is answered in the negative must the prohibition on discrimination in the second subparagraph of Article 40 (3) of the EEC Treaty and the requirement laid down in Regulation No 1132/74 that the production refunds on potato starch and maize starch shall be the same be interpreted as meaning that, by analogy with the method of calculation of the production refund on potato starch under Article 1 of Regulation No 231/75 of the Commission of 30 January 1975 (OJ L 24/42 of 31. 2. 1975), Article 1 (1) of Regulation No 3113/74 shall not be taken into account in the calculation of the production refund on maize starch?'
- 19 In accordance with the second subparagraph of Article 40 (3) of the Treaty, the common organizations of the market must exclude any discrimination between producers or consumers within the Community.

Having regard to the competitive situation of maize-starch producers and potato-starch producers, Article 2 of Regulation No 1132/74 provides that the production refund per 100 kg of potato starch shall be equal to the average amount of the refund granted during the same marketing year per 161 kg of maize for starch manufacture.

The increase in the supply price from 1 April 1975 and the subsequent reduction of the production refund in favour of maize starch producers pursuant to Article 1 of Regulation No 3113/74 would, if the abovementioned Article 2 had been applied automatically, have been reflected in the same proportions until 31 July 1975 in the amount of the refund granted to potato-starch producers.

- 20 Nevertheless, unlike the refund for maize-starch producers, the refund pursuant to Article 3 of Regulation No 1132/74 is only paid to potato-starch manufacturers when they furnish proof that the producer has been paid the amount of the refund.

The refunds granted before 31 January 1975 to potato-starch manufacturers and passed on through them to potato producers, were calculated on the average of refunds then paid to maize-starch producers which was derived from the difference between the supply price of 82.00 u.a. per metric ton, and subsequently of 87.45 u.a. per metric ton, and the successive threshold prices for maize fixed in advance for the entire 1974/1975 marketing year.

Because of this method of calculation based on an annual average determined in advance the alteration from 1 April 1975 of the supply price was reflected in refunds already paid before 31 January 1975 to potato-starch manufacturers and already passed on by them to farmers which could have resulted in the recovery of the amount already paid to the latter.

In order to avoid this effect, which is capable of affecting many transactions already completed, the Commission, which was so authorized by the Council, adopted the necessary transitional measures, providing in Article 1 of Regulation No 231/75 of 30 January 1975 that: 'The change with effect from 1 April 1975 of the amount specified in the first subparagraph of Article 1 (1) of Regulation (EEC) No 1132/74 shall not be taken into account in the calculation of refunds under Article 2 of that regulation accorded before the date of entry into force of this regulation'.

- 21 There are thus objective grounds for the difference between the treatment accorded potato-starch producers and that accorded maize-starch producers so that the transitional measure enacted in connexion with the production

refund for potato starch does not constitute a discrimination against maize-starch producers.

A reply to this effect must be given to the second question.

Costs

- 22 The costs incurred by the Council and by the Commission of the European Communities which submitted observations to the Court are not recoverable.

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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Finanzgericht Münster, by an order of 20 December 1976, hereby, rules:

- (1) Consideration of the first question has disclosed no factor of such a kind as to affect the validity of Article 1 (1) of Regulation No 3113/74.
- (2) There are objective grounds for the difference between the treatment accorded potato-starch producers and that accorded maize-starch producers so that the transitional measure enacted in connexion with the production refund for potato starch does not constitute a discrimination against maize-starch producers.

Kutscher	Donner	Pescatore	Mertens de Wilmars	Sørensen
Mackenzie Stuart		O'Keeffe	Bosco	Touffait

Delivered in open court in Luxembourg on 12 July 1977.

A. Van Houtte
Registrar

H. Kutscher
President