

OPINION OF ADVOCATE GENERAL ELMER

delivered on 24 April 1997 *

Introduction

1. In the present case the Finanzgericht (Finance Court), Hamburg, Federal Republic of Germany, has referred to the Court questions for a preliminary ruling concerning the validity of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products ¹ (hereinafter the 'milk regulation'), pursuant to which refunds are granted in respect of the milk contained in preparations with a basis of coffee but not in respect of the milk contained in preparations with a basis of coffee extract. The national court has also raised a number of questions relating to the ordering of interim relief under Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ² (hereinafter the 'customs regulation') and to the referral of questions to the Court for a preliminary ruling in connection with a decision on interim relief.

Applicable Community provisions

2. The relevant provisions of the milk regulation are as follows:

* Original language: Danish.

1 — OJ, English Special Edition 1968 (I), p. 176, as last amended by Council Regulation (EC) No 1587/96 of 30 July 1996 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1996 L 206, p. 21).

2 — OJ 1992 L 302, p. 1, as most recently amended by Regulation (EC) No 82/97 of the European Parliament and the Council of 19 December 1996 amending Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1997 L 17, p. 1).

'Article 17

1. To the extent necessary to enable the products ... to be exported ... on the basis of the prices for those products in international trade, the difference between those prices and prices in the Community may be covered by an export refund.'

The annex to the milk regulation sets out the products in which the proportion of milk or milk products may attract a refund:

'Annex'

CN code	Description of goods
ex 2101 10	Preparations with a basis of coffee

3. At the material time Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff ³ (hereinafter the 'Customs Tariff') provided as follows:

3 — OJ 1987 L 256, p. 1, as amended by Commission Regulation (EEC) No 2505/92 of 14 July 1992 amending Annexes I and II to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the common customs tariff (OJ 1992 L 267, p. 1).

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		Rate of duty		Supplemen- tary unit
CN-Code	Description	autonomous (%) or levy (AGR)	conventional (%)	
1	2	3	4	5
...	...			
2101 10	— Extracts, essences and concentrates of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee:			
	— — — Extracts, essences or concentrates:			
2101 10 11	— — — With a coffee-based dry matter content of 95% or more by weight	30	18	—
2101 10 19	— — — Other	30	18	—
	— — — Preparations:			
2101 10 91	— — — Containing no milk-fats, milk proteins, sucrose, isoglucose, glucose or starch or containing less than 1.5% milkfat, 2.5% milk proteins, 5% sucrose or isoglucose, 5% glucose or starch	30	18	—
2101 10 99	— — — Other	20,8	13 + MOB	—
...				

4. The Explanatory Notes of the Customs Co-operation Council to the Harmonized Commodity Description and Coding System, known as the harmonized system, are worded as follows as regards heading 21.01:

(4) Preparations with a basis of coffee ... These preparations include, *inter alia*:

- (a) "Coffee pastes" consisting of mixtures of ground, roasted coffee with vegetable fats and sometimes other ingredients ...

'21.01 ...

...'

The heading covers:

5. The provisions of the customs regulation which are relevant for present purposes are as follows:

(1) Coffee extracts, essences and concentrates. ... They may be in liquid or powder form, usually highly concentrated. This group includes products known as instant coffee. This is coffee which has been brewed and dehydrated or brewed and then frozen and dried by vacuum.

TITLE I

GENERAL PROVISIONS

CHAPTER ONE

SCOPE AND BASIC DEFINITIONS

(3) Preparations with a basis of the coffee, tea or maté extracts, essences or concentrates of paragraphs (1) and (2) above. These are preparations based on extracts, essences or concentrates of coffee ... (and *not* on coffee ... [itself]), and include extracts, etc., with added starches or other carbohydrates.

Article 1

Customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement [it]. The Code

shall apply, without prejudice to special rules Section 4
laid down in other fields

Export

— to trade between the Community and *Article 161*
third countries,

1. The export procedure shall allow Com-
munity goods to leave the customs territory
of the Community.

...

TITLE IV

Exportation shall entail the application of
exit formalities including commercial policy
measures and, where appropriate, export
duties.

CUSTOMS-APPROVED TREATMENT
OR USE

2. With the exception of ... all Community
goods intended for export shall be placed
under the export procedure.

...

...

TITLE VIII

CHAPTER 2

APPEALS

CUSTOMS PROCEDURES

Article 243

...

1. Any person shall have the right to appeal
against decisions taken by the customs

authorities which relate to the application of customs legislation, and which concern him directly and individually.

Article 244

Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) shall also be entitled to exercise the right of appeal.

The lodging of an appeal shall not cause implementation of the disputed decision to be suspended.

The customs authorities shall, however, suspend implementation of such decision in whole or in part where they have good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

The appeal must be lodged in the Member State where the decision has been taken or applied for.

Where the disputed decision has the effect of causing import duties or export duties to be charged, suspension of implementation of that decision shall be subject to the existence or lodging of a security.

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

Procedure before the national court and questions referred to the Court

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialized body, according to the provisions in force in the Member States.

6. Krüger GmbH&Co. KG (hereinafter 'Krüger') is the producer of 'Cappuccino Tasse', which is manufactured with a basis of coffee extract and contains, *inter alia*, skimmed milk. In respect of exports of that product in 1993 Krüger received export

refunds for the proportion of skimmed milk/skimmed milk powder in the exported product amounting to DM 89 411 (ECU 46 155). Of this Krüger passed an amount of DM 68 457.02 (ECU 35 338) on to its customers.

7. By letter of 3 February 1994 Krüger enquired of the Hauptzollamt (Principal Customs Office) Hamburg-Jonas why its subsidiary had not received a refund on the export of the same product. By letter of 11 February 1994 the Hauptzollamt Hamburg-Jonas replied that export refunds were only granted in respect of skimmed milk contained in preparations with a basis of coffee and not in respect of skimmed milk contained in preparations with a basis of coffee extract.

8. By decision of 30 May 1994 the Hauptzollamt Hamburg-Jonas demanded repayment of the DM 89 411 paid to Krüger in connection with the export of Cappuccino Tasse in 1993 on the ground that this amount had been paid in error, since the product had been manufactured with a basis of coffee extract and not with a basis of coffee.

9. By letter of 30 June 1994 Krüger lodged a complaint against that decision. It appears from the papers before the Court that no decision has yet been given on that complaint.

10. On 18 July 1994 Krüger applied to the Hauptzollamt Hamburg-Jonas for suspension of implementation of the decision of 30 May 1994 demanding repayment. That application was rejected on 3 August 1994.

11. Krüger then brought an action before the Finanzgericht Hamburg for suspension of implementation of the decision. By decision of 21 September 1995 the Finanzgericht Hamburg, by reference to Article 244 of the customs regulation, granted Krüger's application for suspension of implementation, on the ground that there was some doubt as to the validity of the milk regulation. The Finanzgericht Hamburg also granted leave to appeal against the decision to suspend implementation of the decision and referred the following questions to the Court for a preliminary ruling:

1. Does [the milk regulation], read in conjunction with the Annex thereto, infringe the second subparagraph of Article 40(3) of the EC Treaty, and is it consequently invalid, inasmuch as it does not provide for the grant of an export refund for milk and/or milk products contained in edible preparations falling within Combined Nomenclature Code No 2101 10 and produced with a basis of extracts, essences or concentrates of coffee?
2. Does a breach of the prohibition of discrimination preclude the recovery of an export refund granted in respect of milk and/or milk products contained in

edible preparations falling within Combined Nomenclature Code No 2101 10 and produced with a basis of extracts of coffee?

grant by the Finance Court of leave to appeal pursuant to the second sentence of Paragraph 128(3) of the Finanzgerichtsordnung (Code of Procedure before the Finance Court) read in conjunction with Point 1 of Paragraph 115(2) thereof?’

3. Is Article 244 of [the customs regulation] applicable to the suspension of implementation of decisions ordering the recovery of an export refund which has been granted?

First question

4. If the answer to Question 3 is in the affirmative: in cases in which there exists doubt as to the validity of the Community legislation on which the decision is based, is the suspension of implementation to be determined in accordance with Article 244 of [the customs regulation] or in accordance with which other criteria?

12. By its first question, the national court seeks to ascertain whether the fact that an export refund is granted in respect of the milk and milk products contained in preparations having a basis of coffee but not in respect of the milk and milk products contained in preparations having a basis of coffee extract constitutes an infringement of the prohibition in the second subparagraph of Article 40(3) of the Treaty of any discrimination between producers or consumers within the Community such as to render the milk regulation invalid.

5. If the answer to Question 3 is in the negative: in cases in which there exists doubt as to the validity of the Community legislation on which the decision is based, what are the criteria according to which the suspension of implementation falls to be determined?

13. Krüger maintains that the milk regulation infringes the second subparagraph of Article 40(3) of the Treaty, since two identical or comparable products are treated differently for no reason. Both products are used as foodstuffs and semi-finished products in the food-manufacturing industry. Consumers make no distinction between coffee drinks made from coffee extract and those made from roasted coffee. The food-manufacturing industry chooses between

6. Is the second paragraph of Article 177 of the EC Treaty to be interpreted as precluding, in cases such as this, the

those two raw materials or semi-finished products purely on the basis of price. The amount of refund plays a significant role in the wholesale market and unequal treatment of preparations with a basis of coffee and preparations with a basis of coffee extract therefore leads to a distortion of competition. Such unequal treatment is not purely theoretical, since, Krüger claims, preparations with a basis of coffee with added milk, and hence eligible for a refund, do exist.

with the total price of those products. The risk that producers will replace the skimmed milk/skimmed milk powder with another product is therefore small and, accordingly, it was not considered appropriate to grant an export refund in respect of the skimmed milk/skimmed milk powder in preparations with a basis of coffee extract. On the other hand, the value of the skimmed milk/skimmed milk powder constitutes a significant part of the total price of preparations with a basis of coffee and it was therefore considered appropriate to grant an export refund in respect of those products.

14. The Commission and the Council state that the products in question are not identical and point in that regard to the Explanatory Notes of the Customs Cooperation Council, which refer, as examples of preparations with a basis of coffee, to coffee pastes and, as examples of preparations with a basis of coffee extract, to instant coffee. The ingredients, manufacturing processes and prices are different. Moreover, preparations with a basis of coffee are served in certain types of establishment, while preparations with a basis of coffee extract are served in other types of establishment. Preparations with a basis of coffee have a different flavour from those with a basis of coffee extract and leave a sediment after use; they are therefore not interchangeable with preparations with a basis of coffee extract.

The Association des Fabricants de Café Soluble des Pays de la CEE (Afcasole, Paris), the Fédération Européenne des Associations de Torréfacteurs de Café (EUCA, Brussels) and the Kaffeerösterverband, Hamburg, informed the Commission that no preparations with a basis of coffee with added milk or milk products currently existed.

Furthermore, the value of the skimmed milk/skimmed milk powder in preparations with a basis of coffee extract is low in comparison

15. The Council has further pointed out that, according to the case-law of the Court, discrimination can only be established on the basis of a specific comparison of the actual effects of different treatment of two groups of traders and not on the basis of a purely theoretical deduction from the provisions of the regulations. Krüger has failed to demonstrate the existence of traders who have been treated more favourably than itself. It follows from the case-law of the Court that the fact that the products might be interchangeable does not preclude different treatment from being justified.

16. I would point out that a linguistic analysis of the wording of tariff heading 2101 10 shows that the Customs Tariff draws a clear distinction between preparations 'with a basis of ... extracts, essences or concentrates' of coffee and preparations 'with a basis of coffee'. From the linguistic point of view, that distinction follows from the repetition of the words 'with a basis of' after the word 'or'. At the time, it was not considered appropriate for the Customs Tariff to classify each of those products under separate subheadings, since by subdividing the preparations between headings 2101 10 91 and 2101 10 99 those two principal groups of preparations were instead crossdivided.

17. According to the Council and the Commission, when drawing up the milk regulation the Community legislature considered it necessary to grant an export refund in respect of the milk products in preparations 'with a basis of coffee', since the value of the milk products contained in them was relatively high. On the other hand, it was not considered appropriate to grant an export refund in respect of the milk products in preparations 'with a basis of extracts, essences or concentrates' of coffee, since the value of the milk products in those goods was relatively low.

18. Since the Customs Tariff contained no separate subheadings for preparations 'with a basis of extracts, essences or concentrates' of coffee and preparations 'with a basis of coffee', the milk regulation could not adopt the

normal legislative technique of simply referring to a particular Customs Tariff heading. It was therefore necessary when drafting the milk regulation to state, when referring to the relevant tariff heading, heading 2101 10, that only the milk products in preparations 'with a basis of coffee' were eligible for aid, while the fact that only one part of that heading was meant was apparent from the insertion of the prefix 'ex' before the heading number, which shows that the reference was to a group of goods taken 'from' that tariff heading.

19. It must make no difference whether any preparations with a basis of coffee with added milk actually existed, exist at present or will exist in the future. In principle, such products are conceivable, for example for use in espresso machines. There is no reason to question the accuracy of the observation of the Council and the Commission that the value of the milk content of preparations 'with a basis of extracts, essences or concentrates' of coffee is less than that of the milk products in preparations 'with a basis of coffee'. No reason for that difference in value is given. Perhaps it lies in the fact that, all else being equal, the value of the coffee in preparations containing milk products is higher in the case of preparations 'with a basis of extracts, essences or concentrates' than in the case of preparations 'with a basis of coffee', since the former product presupposes that the latter product has been processed.

20. In that regard, it is irrelevant that the Combined Nomenclature was subsequently amended, by Commission Regulation (EC) No 3115/94 of 20 December 1994,⁴ so that there are now two subheadings⁵ for preparations, one covering preparations with a basis of coffee extract and the other concerning other products. That regulation entered into force on 1 January 1995, but the Hauptzollamt Hamburg-Jonas had already decided on 11 February 1994 that refunds should not be granted in respect of the milk and milk products in preparations with a basis of coffee extract. In my opinion there is no reason to suppose that the decision taken by the Hauptzollamt Hamburg-Jonas on 11 February 1994 was affected by the amendments to the Customs Tariff made by the regulation of 20 December 1994.

21. It is therefore necessary to consider whether the fact that refunds are granted in respect of the milk products in preparations with a basis of coffee but not the milk products in preparations with a basis of coffee extract constitutes discrimination within the meaning of the second subparagraph of Article 40(3) of the Treaty.

22. In order to determine whether there is discrimination, it is necessary in principle to establish whether preparations with a basis of coffee extract with added milk or milk products and preparations with a basis of

coffee with added milk or milk products are interchangeable. The Court has little evidence on which to base its decision, and the situation is not improved by the fact that at present it is possible that no preparations with a basis of coffee with added milk or milk products exist. Krüger has failed to demonstrate the existence of a specific product which might serve as a reference point for an analysis of interchangeability. To my mind, however, there is no need to form a view on whether the products are interchangeable.

23. As stated above, the value of the milk/milk products in preparations with a basis of coffee extract and so forth represents a relatively smaller proportion of the final price than the value of the milk/milk products in preparations with a basis of coffee. As the Council and the Commission pointed out, there is greater risk that the milk will be replaced by another product when the milk represents a more significant proportion of the price of the finished product. It is for that reason that it was only considered necessary to grant export refunds in respect of the proportion of milk in preparations with a basis of coffee. To my mind that is a valid objective reason for treating preparations with a basis of coffee with added milk or milk products differently from preparations with a basis of coffee extract with added milk or milk products.

24. For the foregoing reasons, I would propose that the Court answer the first question to the effect that examination of that ques-

⁴ — OJ 1994 L 345, p. 1.

⁵ — Subheadings 2101 10 92 and 2101 10 98.

tion in the light of the order for reference and the other evidence before the Court has revealed nothing capable of casting doubt on the validity of the milk regulation.

implementation of a decision ordering the repayment of export refunds.

Second question

25. By its second question, the national court seeks to ascertain whether the breach of the prohibition of discrimination set out in the second subparagraph of Article 40(3) of the Treaty precludes the recovery of export refunds granted in respect of the milk and/or milk products contained in edible preparations with a basis of coffee extract.

26. That question presupposes that it has been established, in answer to the first question, that the second subparagraph of Article 40(3) of the Treaty has been infringed. As stated above, however, there has been no such infringement. Accordingly, I consider that there is no need to answer the second question.

Third question

27. By its third question the national court seeks to ascertain whether Article 244 of the customs regulation covers the suspension of

28. Krüger maintains that a decision ordering recovery of export refunds is a decision taken by the customs authorities which relates to the application of customs legislation, in accordance with Article 243(1) of the customs regulation. Admittedly, the first sentence of Article 1 of the customs regulation only defines the customs rules as the Code established therein and the provisions adopted to implement them, but according to the second sentence of Article 1 its scope extends to trade between the Community and third countries in goods covered by the Community Treaties. Since export refunds necessarily relate to the export of goods to non-member countries they fall within the scope of the customs regulation. Articles 161 and 162 of the customs regulation confirm that the customs rules also include the export procedure. The export refunds procedure forms an integral part of the export procedure, or is at least directly linked with that procedure, and therefore falls under the customs rules in the broad sense.

29. The Commission and the Hauptzollamt Hamburg-Jonas contend that, under Article 244 of the customs regulation, suspension of implementation is possible only in the context of the scope *ratione materiae* of the customs regulation, which covers export duties

and import duties. The repayment of refunds paid in error does not fall within its scope.

30. The Commission further states that export refunds are based on special rules adopted under the various market organizations. In the words of the customs regulation, these are 'special rules laid down in other fields' (see Article 1). The fact that export refunds are granted only where goods are actually exported and are therefore linked to the export procedure defined in Articles 161 and 162 of the customs regulation does not mean that the scope *ratione materiae* of the customs regulation is extended. The second paragraph of Article 244 of the customs regulation authorizes suspension of implementation of a decision only where there is good reason to believe that the decision is inconsistent with customs legislation or that irreparable damage is to be feared, but not where there is reason to doubt the validity of the Community law on which the decision is based. Moreover, the criteria governing suspension of implementation apply, according to the wording of Article 244, only to the customs authorities. On the other hand, Article 244 contains no criteria governing suspension decided by a judicial authority or an equivalent specialized body, see Article 243(2)(b). Article 244 is not therefore capable of serving as a general rule applicable to interim relief.

31. I should point out that Article 243(1) of the customs regulation provides that any person is to have the right to appeal against

decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually. Article 244 further provides that such an appeal is not to cause implementation of the decision to be suspended but that the customs authorities are to suspend implementation of the disputed decision where they have good reason to believe that the decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

32. It follows expressly from those provisions that what may be suspended is the implementation of decisions relating to the application of customs legislation. Pursuant to Article 1 of the customs regulation, the customs rules are to consist in the Code established therein and the provisions adopted to implement them. The customs rules concern the collection of import and export duties. Export refunds are amounts paid out and by definition are not customs duties or taxes. Nor is a decision relating to the repayment of export refunds adopted on the basis of the customs rules: it is adopted on the basis of the provisions relating to export refunds under the market organization in question. The requirement in the second paragraph of Article 244 that there should be good reason to believe that the disputed decision is inconsistent with customs legislation before implementation of the decision may be suspended cannot therefore be fulfilled in cases relating to demands for repayment of export refunds.

33. For the rest, I agree with the Commission's observations.

where there is doubt as to the validity of the Community measure pursuant to which the administrative decision was taken.

34. Accordingly, I would propose that the Court answer the third question to the effect that Article 244 of the customs regulation is to be interpreted as not applicable to demands for the repayment of export refunds.

Fourth question

35. The fourth question is formulated in such a way that it arises only if the third question is answered to the effect that Article 244 of the customs regulation is to be interpreted as governing suspension of implementation of decisions ordering the repayment of export refunds. Having regard to the proposed answer to the third question, I do not believe that there is any need to answer the fourth question.

37. The Commission refers to the general principles established in the case-law of the Court on the suspension of implementation of a domestic administrative decision based on a Community regulation (see Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*⁶ and Case C-465/93 *Atlanta Fruchthandels-gesellschaft (I)*⁷). In the Commission's view there is no need to adapt that case-law to Article 244 of the customs regulation. That provision allows implementation to be suspended where there is either doubt as to the validity of the relevant decision or a risk of irreparable damage. There may be justification for granting such wide powers to the national courts in customs matters, but that cannot be done in all areas. In order to protect the rights of defence of the Community institutions, it is necessary to supplement the conditions to which the abovementioned judgments subject interim relief with a requirement that the national court allow the Community institution which adopted the measure whose validity is in doubt to express its views.

Fifth question

36. By this question the national court seeks in effect to ascertain the basis on which a national court may order suspension of implementation of an administrative decision

38. Krüger maintains that Article 244 of the customs regulation may be applied by analogy, in accordance with the case-law of the

6 — [1991] ECR I-415.

7 — [1995] ECR I-3761.

Court. The export procedure is closely linked to the export refunds procedure and without such analogous application Community law would contain a lacuna which would amount to discrimination.

— in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.'

39. The Court has set out, most recently in Case C-465/93 *Atlanta*, the conditions under which a national court may order interim relief in respect of a national decision based on a Community regulation. Under the case-law, interim relief may be granted by a national court only if:

— that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

— there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

— the court takes due account of the Community interest; and

40. As stated above, Article 244 of the customs regulation is not applicable to demands for repayment of export refunds paid in error. The collection of customs duties and taxes from individuals and the repayment to them of taxes which have been collected in error are to my mind quite different from the payment of export refunds and the repayment of refunds paid in error to individuals and that difference also manifests itself where the conditions applicable to suspension of enforcement of such decisions are concerned.

41. In my view the national court should therefore have ruled on Krüger's application for suspension of implementation of the repayment decision in accordance with the criteria established by the Court in its case-law, most recently in Case C-465/93 *Atlanta*.

42. The Commission maintains that without the assistance of the Community institutions a national court is unable to assess the

impact of interim relief on the Community interest and that in addition to the conditions laid down in the case-law the national court should be required to give the Community institution which adopted the act whose validity is challenged an opportunity to express its views.

presumably consider it more appropriate to request the parties to the case, and the public prosecutor in criminal cases, to gather the necessary information on the views of the Community institutions in a particular field where that proves necessary to enable the national court to assess the Community interest. I do not consider it appropriate in a case such as this to specify how the national courts must ensure that the interests of the Community are properly protected.

43. It follows from the passage in the judgment of the Court in Case C-465/93 *Atlanta*, cited above, that a national court which orders interim relief in respect of a national decision based on a Community regulation is required to take due account of the Community interest. The reasons for that condition are set out in paragraphs 42 to 45 of the judgment in *Atlanta*. According to paragraph 43, in order to comply with the obligation to take account of the interest of the Community, the national court must first examine whether the Community act in question would be deprived of all effectiveness if not immediately implemented.

45. For the above reasons, I propose that the Court's answer to this question should be that a national court may suspend implementation of a national decision based on a Community regulation only if:

- that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

44. The case-law of the Court on interim relief entrusts the national courts with very wide powers. It is for the national courts to exercise those powers with care and restraint. Of course, it cannot be completely precluded that it may in certain cases be appropriate for the national court, where national procedural law permits, to contact the Commission, for example, in order to obtain information on the reasons for a particular provision. As a general rule, however, the national court will

- there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

- the court takes due account of the Community interest; and

— in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.

leave to appeal against a decision granting interim relief must be granted. In that way the Finanzgerichtsordnung allows the question as to whether the conditions for the grant of interim relief are met to be examined by a higher court, which is in the interest of Community law.

Sixth question

46. By the sixth question the national court seeks to ascertain whether the second paragraph of Article 177 of the Treaty is to be interpreted as precluding a court which has ordered suspension of implementation of an administrative decision and referred questions to the Court for a preliminary ruling from granting leave to appeal against its decision.

47. The Commission maintains that a court would not fail in its duty to refer a question for a preliminary ruling in connection with a decision on interim relief if it granted leave to appeal against its decision. Should the court dealing with the appeal set aside the decision granting interim relief, the basis of the duty to seek a preliminary ruling would lapse. Neither does the fact that leave to appeal is granted adversely affect the right to seek a preliminary ruling. According to German case-law, a case which gives rise to a reference for a preliminary ruling is always of fundamental importance, which means that

48. I would point out that a national court which orders interim relief on the ground that there is doubt as to the validity of Community law is required, pursuant to the case-law of the Court of Justice (see, most recently, Case C-465/93 *Atlanta*), to refer a question for a preliminary ruling if the validity of the measure is not already in issue before the Court of Justice.

49. That duty also applies to national courts against whose decisions an appeal lies to a higher court. The duty to refer the matter to the Court of Justice is explained by the fact that in reality the national court is provisionally encroaching on a Community measure, with the aim of ensuring that the final decision of the Court of Justice on the interpretation of Community law will be fully effective. If national courts were able to grant interim relief in respect of a national measure based on a Community regulation without referring the matter to the Court of

Justice, that would in reality amount to allowing it to set aside measures of Community law without the Court being able to give a definitive ruling on the validity of the Community measure in question. It follows that the duty to refer the matter to the Court of Justice is inextricably linked to the decision of a national court ordering interim relief in respect of a national measure based on Community law. If the decision ordering interim relief is set aside on appeal, the associated duty to refer a question to the Court of Justice for a preliminary ruling also lapses.

50. For those reasons, I would propose that the Court rule, in answer to the sixth question, that the second paragraph of Article 177 of the EC Treaty is to be interpreted as not precluding a national court which suspends implementation of a national administrative decision based on a Community regulation and refers to the Court for a preliminary ruling a question on the validity of the Community regulation on the ground that it entertains serious doubts in that regard from granting leave to appeal against its decision ordering suspension.

Conclusion

51. For the foregoing reasons, I would propose that the Court answer the questions referred by the Finanzgericht Hamburg as follows:

- (1) Examination of this question, in the light of the order for reference and the other evidence before the Court, has revealed nothing capable of casting doubt on the validity of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products, as last amended by Council Regulation (EC) No 1587/96 of 30 July 1986 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products.
- (2) Article 244 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as last amended by Regulation (EC) No 82/97 of the European Parliament and the Council of 19 December 1996 amending Regulation (EEC) No 2913/92 establishing the Community Customs Code, is to be interpreted as not applicable to the question of suspension of implementation of decisions relating to the repayment of export refunds.

- (3) Article 189 of the EC Treaty is to be interpreted as meaning that a national court may suspend implementation of a national administrative decision based on a Community regulation only if:

- that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
- there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
- the court takes due account of the Community interest; and
- in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.

- (4) The second paragraph of Article 177 of the EC Treaty is to be interpreted as not precluding a national court which suspends implementation of a national administrative decision based on a Community regulation and refers to the Court for a preliminary ruling a question on the validity of the Community regulation on the ground that it entertains serious doubts in that regard from granting leave to appeal against its decision ordering suspension.