

JUDGMENT OF THE COURT  
OF 2 JUNE 1976<sup>1</sup>

**Milch-, Fett- und Eier-Kontor GmbH  
v Hauptzollamt Hamburg-Jonas**  
(preliminary ruling requested by the Finanzgericht Hamburg)

Case 125/75

Summary

1. *Agriculture — Products subject to a single price system — Export refund — Regulation No 1041/67, Artikel 4 (1) — General application*
2. *Agriculture — Products subject to a single price system — Export refund — Variation — Grant — Conditions — Regulation No 1041/67, Article 4 — Interpretation*
3. *Agriculture — Products subject to a single price system — Export refund — Grant — Conditions — Market of destination — Arrival of the goods — Proof — Objective criteria — Powers of Member States (Regulation No 1041/67, Article 4)*

1. Article 4 (1) of Regulation No 1041/67 is a provision of general application and applies in all cases where there is a refund, even if the refund has been varied according to the destination.
2. Article 4 of Regulation No 1041/67 must be interpreted in conformity with Article 6 of Regulation No 876/68 and, where the refund is varied, means that the goods must have been given customs clearance

and put into free circulation at the destination.

3. Only objective criteria can be taken into account in answering the question whether goods have reached the market at their destination. The Member States — that is to say the agency of each Member State entrusted with paying the export refunds — have been lawfully authorized to require proof that the product in question has been imported into a third country.

In Case 125/75

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

<sup>1</sup> — Language of the Case: German.

MILCH- FETT- UND EIER-KONTOR GMBH

and

HAUPTZOLLAMT HAMBURG-JONAS (Principal Customs Office, Hamburg-Jonas) on the interpretation of Article 4 of Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system,

## THE COURT

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

Advocate-General: G. Reischl

Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Facts

The judgment containing the reference and the written observations presented 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 procedure

A — Article 4 (1) of Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system (OJ, English Special Edition 1967, p. 323) provides:

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

Article 17 (1) 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 (OJ,

English Special Edition 1968 (I), p. 176) provides:

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

The second sentence of Article 17 (2) provides that the refund 'may be varied according to use or destination'.

The same provision is made in Article 4 of Regulation (EEC) No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (OJ, English Special Edition 1968 (I), p. 234).

The first paragraph of Article 6 (2) of Regulation No 876/68 provides:

'Where Article 4 applies, the refund shall be paid under the conditions laid down in paragraph (1), provided it is proved that the product has reached the destination for which the refund was fixed.'

B — 1. In 1970 the plaintiff in the main action entered into a pooling agreement for the export of German intervention butter. On the basis of this agreement it sold 3 000 metric tons of this butter to the Belgian company Corman (a party to the agreement) naming, when the sale was confirmed on 12 January 1971, Morocco as the country of destination. The Corman company, by contract dated 31 December 1970, sold this butter in turn to the Belgian company Brabania (another party to the agreement) delivery to be made at Casablanca or Tangier. The Brabania company, for its part, had undertaken on 23 December 1970 to deliver the load at Danzig to a Czechoslovakian company. This was in fact done.

2. With regard to this delivery the defendant in the main action paid the basic amount of the export refund

applicable on the day of export in respect of all third countries, since in its opinion it was not clearly shown that the goods had been 'marketed' in Morocco. The plaintiff in the main action was able to show that the load exported had arrived in Morocco and had been unloaded at Casablanca and therefore asked for payment of the difference between the refund given and the higher amount which had been fixed in advance for it on 2 September 1970 in an export licence for deliveries to Morocco, Algeria and Tunisia.

C — By order dated 13 November 1975 the Finanzgericht Hamburg referred the following question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1. Must Article 4 (1) of Regulation No 1041/67 in the version in force in 1971, whereby in certain cases, *inter alia* by reason of the nature of the exported products or of export markets, Member States may require proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country, be interpreted to the effect that the destination of the products as mentioned in Article 4 of Regulation No 876/68 in respect of which an export refund has been varied may also be regarded as a third country?

2. If the answer to the first question is in the affirmative:

Does the requirement laid down in Article 4 (1) of Regulation No 1041/67 'that the product in question has been imported into a third country' mean that that product must have been released into free circulation in accordance with the customs regulations or is it sufficient for the goods, which have been shipped, to be unloaded in a port at a destination outside Europe and after storage and transhipment to be transported to a third country within Europe?

3. If the answer to the first question is in the negative:

Must the subordinate clause in the first sentence of Article 6 (2) of Regulation No 876/68, whereby, where Article 4 applies, the refund shall be paid under the conditions laid down in paragraph (1), 'provided it is proved that the product has reached the destination for which the refund was fixed', be interpreted to the effect that the goods must have been released into free circulation there in accordance with the customs regulations or is it sufficient for the goods, which have been shipped, to be unloaded in a port at a destination outside Europe and after storage and transshipment to be transported to a third country in Europe?

4. If the answer to the second or third question is in the affirmative:

Are the requirements that the products shall have been imported into a third country (Article 4 (1) of Regulation No 1041/67) and that the goods shall have reached their destination (Article 6 (2) of Regulation No 876/68) also fulfilled if the goods were, by virtue of the relevant contracts of sale, already destined ultimately, before completion of the customs export formalities within the meaning of Article 1 (2) of Regulation No 1041/67, not for the destination outside Europe laid down in Article 6 (2) of Regulation No 876/68 but for another third country in Europe with a lower refund rate and were in fact transported thence in accordance with the detour via the third country outside Europe which was stipulated by the export licence?

5. Is it of importance with regard to the interpretation of Article 4 (1) of Regulation No 1401/67 and of Article 6 (2) of Regulation No 876/68 which were referred to in the second, third and fourth questions:

(a) whether the applicant exporter was aware at the relevant date that the goods would ultimately be shipped to the third country in Europe; or

(b) whether one of the purchasers and sellers of the goods who were parties to the contracts of sale and purchase was resident at the destination outside Europe or in the country of such destination or had a branch there?

D — The order of the Finanzgericht Hamburg was registered at the Court Registry on 17 December 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 17 February 1976 by the Commission of the European Communities, on 18 February 1976 by the defendant in the main action and on 26 February 1976 by the plaintiff 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.

II — Written observations submitted to the Court

A — 1. The *plaintiff in the main action* first of all supplements the statement of facts

When Regulation No 804/68 was adopted the Community authorities did not foresee at all that the common organization of the market in milk would soon cause considerable surpluses. Since 1969 a 'butter mountain' has been spoken of and this has continued to increase. In spite of measures taken by the Commission there was still no sign of these surpluses' being absorbed.

The plaintiff in the main action which at the time was the Bundeszentrale der deutschen Milchwirtschaft (Federal Central Office of the German Dairy Industry) and the capital of which was entirely held by two bodies governed by

public law, collaborated closely with the national authorities of the Federal Republic competent with regard to food. The latter asked it during the summer of 1970 to make greater efforts to absorb the butter surpluses. Since the clearance of the quantity which had to be dealt with exceeded its own capacity, it joined with other private butter dealers. This was how the famous 'butter pool' was born which did in fact succeed in reducing the butter stocks by some 41.000 metric tons.

The decision to export 10 000 metric tons to North Africa was not taken because the refund granted in respect of this area was apparently the highest, but on an assessment of the sales possibilities. Since the market conditions altered in the meantime, only a small part of the quantity sent to Morocco remained in that country. The annual needs of Morocco, which amount to some 11 000 metric tons, were therefore met in another way.

The questions which have been put relate mainly to provisions of regulations which have meanwhile been amended. The greatest defect in Regulation No 1041/67 lies in the fact that the draftsmen neglected to enumerate completely the conditions giving rise to the entitlement to an export refund. They restricted themselves to speaking of 'proof' which had to be adduced or additional proof which might be required. Further this regulation was not applied uniformly by Member States. The authorities of the Federal Republic imposed the strictest conditions and were guided by fiscal rather than economic considerations (these problems are dealt with in that country by customs officials).

Relying on its experience of Belgian practice the Corman company considered on the contrary that the grant of a refund was simply subject to the condition that the goods actually arrived in Morocco. It had no reason to suspect that the payment of the refund could be

made subject subsequently to proof of 'marketing' of the goods in Morocco, its 'impact on the Moroccan market' and its 'penetration' of this market. Nor did the plaintiff in the main action think that this transaction would create difficulties. Further in answer to a written question the Commission stated on 18 March 1970 (OJ C 38 of 1. 4. 1970, p. 1) that Article 8 of Regulation No 1041/67/EEC:

'stipulates that the part of the refund in excess of the lowest refund rate is paid only if it is proved that the goods have actually arrived in the country of destination. After that the Commission can no longer follow what becomes of the goods exported'.

Serious doubts arise from the chronology of events as to whether the butter sold by Brabania to a Czechoslovak purchaser was the same as that sold by the plaintiff in the main action. First of all Brabania sold 'upon notice' and obtained supplies only subsequently. The plaintiff in the main action knew nothing of these deals. It could moreover have sold directly to the Czechoslovakian company since the refund, less transport costs to the country of destination, was as regards the port of Danzig DM 11 more than the refund relating to the port of Casablanca. The fact that the Corman company and the plaintiff in the main action belong to the same pool does not alter the fact that in international trade a purchaser does not reveal to his supplier the name of the customer to whom he will sell the goods in his turn.

## 2. Admissibility of the questions

(a) Question 1. It is quite clear that since the end of the transitional period the 'destination' within the meaning of Article 4 of Regulation No 876/68 can only be a third country. The question should therefore be reworded as follows:

'Do the words "the product in question has been imported into a third country"

used in Article 4 (1) of Regulation No 1041/67 refer to the same country, that is the destination or country of destination within the meaning of:

- Article 8 (1) of Regulation No 1041/67;
- the second sentence of Article 17 (2) of Regulation No 804/68;
- ...

(b) Questions 2, 3 and 4. The Finanzgericht is in fact asking the Court to apply Regulation No 1041/67 to the actual facts in the case.

As to Question 4, goods can be 'destined for a country' only by their owner or the person who has power to dispose of them. During the course of an export transaction goods pass successively through the hands of several persons who have the right to dispose of them. The destination of the goods can therefore change. The 'ultimate' country of destination of goods is never certain until they are in fact consumed. There was not a 'detour stipulated by the export licence'. The licence was binding only on the plaintiff in the main action who transported the goods to Morocco by the most direct route. Question 4 could therefore be reworded so as to ask in particular:

'Since Regulations Nos 876/68 and 1041/67 speak of "country of destination" and "destination", who determines this destination in fact? Have the concepts "country of destination" and "destination" the same content and meaning in the Community provisions in question?'

The validity of the provisions in question.

Article 4 (1) of Regulation No 1041/67 provides that in certain cases Member States may require additional proof. An enabling provision which is limited to defining by the words 'in certain cases' the conditions which must be fulfilled for it to operate can have no effect

because of ambiguity. This provision does not say clearly whether the power in the regulation in question may be exercised directly by the departments in the Member States which are competent to grant the refund or solely by the Member States themselves, that is to say according to their constitution by their government or by their legislative institutions. It does not enable it to be said whether the additional proof referred to in the first paragraph 'may be made obligatory' in respect of the exporter only by regulations of the Commission or the Council or whether such a decision is for the Member States or until what time this proof may be required.

Finally the combined effect of Articles 4 (1) and 8 (1) of Regulation No 1041/67 is that the national departments can require additional proof only if they also give notice of it to the Commission. Should it be inferred that the notice to the Commission constitutes an additional condition and that if this is not fulfilled the power conferred by Article 4 (1) cannot be exercised? Since the wording, the general structure and the objective of Regulation No 1041/67 do not allow an answer to be given, Article 4 (1) is ineffective for this reason also.

### 3. *Answers to the questions*

(a) Question 1. The phrase 'into a third country', used in Article 4 (1), does not mean the same thing as 'country of destination' or 'destination' etc. This provision is aimed at preventing, first, 'multi-stage movements of goods' (in a closed circuit), that is, exporting goods with the benefit of a high refund and then reimporting them into the Community subject to an import levy lower than the refund and, secondly, cases in which the refund is higher than the total costs of manufacture and transport costs to a place outside the three-mile limit. Article 4 never applies when in accordance with Article 6 (2) of Regulation No 876/68 and Article 8 (1) of Regulation No 1041/67 it is necessary

to prove, in addition to the export, the fact that the goods have arrived in the country of destination. The proof of importation referred to in Article 4 is not complementary to proof of arrival in the country of destination (Article 6 (2) of Regulation No 876/68), but solely complementary to proof of exportation (Article 6 (1) of Regulation No 876/68).

According to the last sentence of Article 4 (1) proof of importation into a third country shall be given in accordance with the provisions of Article 8 (1), that is, by evidence which establishes no more than the arrival in a third country and which, in particular, says nothing in principle on the subject of the existence of a purchaser in that country. The words 'the products in question has been imported into a third country' in Article 4 (1) of Regulation No 1041/67 thus mean any third country and not necessarily the country of destination within the meaning of Article 8 (1) of Regulation No 1041/67.

(b) Question 2. The answer suggested for the first question already implies that the goods do not have in addition to be put into free circulation in a third country. The phrase 'has reached its destination' means no more than 'reached'. This word expresses a pure matter of fact which cannot be equated with the legal fact of 'entry into free circulation'.

Neither the defendant in the main action nor the Commission attaches importance to entry into free circulation. The judgment which the Court gave on 27 October 1971 in Case 6/71 [1971] ECR 823 does not relate to the system established by Regulation No 1041/67 but the quite different legal position during the transitional period. The provisions which the Court had to take into account did not include a legal definition of the concept 'export to third countries' and the Court needed in that case to define that concept in relation to that of 'exports to another Member State'.

That judgment cannot therefore be transposed on to the legal provisions to be applied in the present case.

(c) Question 3. Article 6 (2) of Regulation No 876/68 cannot be understood as meaning that the product is regarded as having reached its destination only if it has entered into free circulation at the destination. The word 'reached' means the same as 'arrived' and simply expresses a purely material and physical fact, that is, the end of the transportation.

(d) Question 4. The Finanzgericht does not raise any question with regard to the difference of opinion between the parties to the main action on the subject of the identity of the exporter, obviously because it considers it as certain that the exporter within the meaning of the law relating to refunds can only be the person who applies for the refund, that is to say the person who submits the declaration in accordance with Article 1 (1) of Regulation No 1041/67. Where refunds are fixed in advance the identity of the exporter is determined when the application for an export licence is lodged. The expression 'reached the destination' or 'the country of destination' in Article 6 (2) of Regulation No 876/68 and Article 8 (1) of Regulation No 1041/67 must not be understood by reference to occurrences which take place after the time when the product reaches its destination and which are not under the control of the person entitled to the refund. These concepts have the same content and meaning in Regulation No 804/68 as in Regulations Nos 876/68 and 1041/67.

(e) Question 5. This question, which asks for the application of Community law to the present case, should be reworded as follows:

'Is the condition laid down in Article 8 (1) of Regulation No 1041/67 and Article 6 (2) of Regulation No 876/68, namely that the product must have 'reached the

destination; still fulfilled when the person entitled to the refund knows that his purchaser or the purchaser from the latter or one of the subsequent purchasers of the goods intends to transport or does actually transport the goods after they have reached the country of destination to another third country?'

Until the date of the proceedings before the Finanzgericht the plaintiff in the main action did not know that after the arrival of the butter in Morocco the Brabania company had (so it appears) sold it in Czechoslovakia and sent it to Poland.

It is only the route followed by the goods which can be of importance in the context of the Community provisions in question. In world trade it often happens that dealers are established in various countries of the world, including countries where the goods in a particular case never go at all. The regulations in question speak only of 'country of destination' and not of 'country of the purchaser'.

B — The *defendant in the main action* states that since it is necessary, having regard to the distance of the Community markets from those of the countries of destination and the special import conditions obtaining in certain countries of destination (access charges, prices prevailing on the markets of those countries), to provide for the possibility of differentiating the amount of the refund according to the destination, a refund fixed on the basis of those special conditions fulfils its objective only when the product has actually reached the market of that country. It is not sufficient that the product has been transported merely physically to the country of destination whence, without being integrated into the economy of such country, it is forwarded to another third country where other market conditions prevail. It does not matter whether after reaching the market in question the

product stays in the country of destination (cf. reply of the Commission in OJ C 38 of 1970, p. 2). It is the same both with regard to the interpretation of the concept 'reached the destination' within the meaning of Article 6 (2) of Regulation No 876/68 and the interpretation of the concept 'imported into a third country' within the meaning of Article 4 (1) of Regulation No 1041/67.

If the concept of 'export to third countries' contained in Regulation No 19/62 and in the recitals to Regulation No 804/68 which simply describes the distance in relation to the economic territory, actually implies the arrival of the product on the market of the third country (cf. Judgment of 27 October 1971 in Case 6/71 [1971] ECR 823) it is so *a fortiori* from the wording of Article 6 (2) of Regulation No 876/68 which assumes that the product has reached the destination and thus requires an additional condition. In no circumstances would it thus be possible to require less strict conditions for the concept of 'arrival in the country of destination' than for that of 'export to third countries'.

Where the refund is varied according to the destination the proof required as a condition of payment amounts to establishing importation into the country of destination. The wording of Article 4 (1) of Regulation No 1041/67 'imported into a third country' does not contradict this. It is a general provision covering the three cases set out in this provision in which proof of importation may possibly be required. Importation into a country of destination is a special case of application of importation into a third country.

The object of the additional proof is to prevent abuse; it would be absurd to take into account the distance and the market conditions of various destinations in fixing the amount of the refunds if proof of export to any third country sufficed. It

is a generally recognized principle of law that he who claims a right must establish the conditions to which this right is subject in so far as there are doubts in this respect.

C — The *Commission* makes the following observations:

*1. The conditions giving rise to the right*

'Destination' must be understood to mean the destination of the exports which must be stimulated by means of a differentiated rate of refund. In the export licence issued to the plaintiff in the main action the 'destination' was limited to 'Algeria, Morocco and Tunisia'.

The argument that Community law does not make this concept of a product's having 'reached' its 'destination' depend on any other condition cannot be upheld. It is based on a formal and separate analysis of the provisions in question and disregards the economic objective of variable refunds as a criterion of interpretation.

The possibility of varying the amount of the refund according to the 'destination' was provided for in order to facilitate the sale of Community products on markets which, if they had only the normal amount of refund, they could not penetrate because of the special conditions of competition obtaining there. From this point of view the 'destination' of the goods for which the amount of refund granted has been varied is not the national or customs territory of the country of destination but the market defined by the national or customs territory of the country of destination. It is therefore necessary that the goods actually reach the market. This is moreover the objective of and the ground for the provisions on refunds adopted within the framework of the common organization of the market in milk and milk products. The difference between the prices prevailing in the Community and outside it, which

refunds cover, would mean nothing without reference to the markets for which these prices have been established.

It is no different with regard to the variable refund. The Commission has the option of fixing an amount of refund applicable in a general way in respect of all third countries and leaving to the exporter the freedom to choose the market on which the exported product will ultimately be marketed. However it could also adapt the amount of the refund to the special situation of the market in one or more third countries in order to open or keep this market for Community exports. Since the essential objective of the rules governing the calculation of the refund is thus to stimulate marketing, it would not be logical to interpret Article 6 (2) of Regulation No 876/68 according to other criteria. The requirement that proof must be given that the goods have reached the 'destination' is easily explicable by the Commissions' concern to grant specific aids only when the objective pursued by such aids is attained. Since the objective is marketing in the country of destination, the destination is reached within the meaning of Article 6 (2) when the goods were marketed on this market.

For Community butter to be actually marketed in Morocco it must be imported there. This is what Article 3 of Regulation No 876/68 obviously assumes by requiring that the prices in the countries of destination be determined taking account of 'the most favourable prices ... for ... imports' charged by competitors. Completing the customs formalities for import into the country of destination opens access to the market of that country for Community butter; these formalities cannot however be treated as marketing itself and they constitute at most only superficial and rebuttable evidence. The additional requirements to show that goods have reached the country of destination arise from a consideration of the actual circumstances of each case. It is not always necessary

for the goods to be consumed in the country of destination for the Commission has made this a condition only in certain exceptional cases. In the present case the goods certainly reached Moroccan territory but not the butter market of that country. This concept agrees with that of the Court in Case 6/71 (mentioned above) according to which the export for which a refund is granted does not constitute a succession of formal operations which may be interrupted at any time, but on the contrary represents from the economic point of view and from that of the system of refunds a single process enabling Community goods to be sold on a foreign market to which they have access owing to the refund which makes them competitive.

## 2. Proof

When determining the evidence establishing that exported goods have actually 'been exported' the Commission came up against the difficulty of finding a means of guaranteeing that variable refunds would actually be paid only in respect of the exports for which they were reserved. In order not to impede the functioning of the system of refunds it had moreover to avoid having recourse to impossible requirements. Article 8 of Regulation No 1041/67 requires as proof that the exported goods have, within the meaning of Article 6 (2) of Regulation (EEC) No 876/68, 'reached' the destination for which a variable refund is granted production of certain documents certifying the arrival of the goods in the country of destination. On the other hand proof of consumption in the country of destination is required only in certain exceptional cases. Article 8 (1) of the said regulation has however provided that the competent authorities of Member States may make other inquiries after the goods have arrived in the country of destination and require, where appropriate, additional proof: for example make inquiries and require proof of marketing where there is

evidence of refunds being obtained fraudulently.

The above answers the questions raised. As regards Article 4 (1) of Regulation No 1041/67 it may be added that it appears clearly from the recitals to that regulation that the said article aims to give the competent authorities of the Member States the opportunity of counteracting the abuses to which the system of refunds may give rise when for example the applicable rates of refund and levy in respect of the same product are different or when an attempt is made to use the 'characteristics of the exported products' by declaring on export that they fall under a heading in the tariff of refunds for which a sizeable aid is provided and then reimporting them as products coming under another heading for which the amount of the levy is nil or very small or when there is doubt whether there is any true transaction (Member States are authorized to require proof of the circumstances in which the goods have left the territory of the Community and have arrived in the national territory of the country of destination).

If it were only a question of payment of variable refunds it would have been superfluous to specify the manner of proof required in respect of importation since this matter has already been settled in Article 8 (1). The reference to this provision made at the end of Article 4 (1) was necessary only for other refund applications in respect of which there are no corresponding provisions. In this way all refund applications are subject to the same rules as regards form and substance.

The plaintiff in the main action, represented by Mr Wendt of the Hamburg Bar and the Commission of the European Communities represented by its Legal Adviser, Mr Kalbe, acting as Agent, made oral observations at the hearing on 7 April 1976.

The Advocate-General delivered his opinion at the hearing on 19 May 1976.

## Law

- 1 By order dated 13 November 1975 received at the Court on 17 December 1975 the Finanzgericht Hamburg has referred to the Court under Article 177 of the EEC Treaty certain questions for a preliminary ruling on the interpretation of Article 4 of Regulation No 1041/67/EEC of the Commission of 21 December 1967 laying down detailed rules for export refunds on products subject to a single price system (OJ English Special Edition 1967, p. 323).

These questions have been raised in the context of proceedings relating to the amount of the export refund applicable to a consignment of German intervention butter which was unloaded in Casablanca and then re-forwarded to a Polish port where it was to be delivered to a Czechoslovakian purchaser.

The defendant in the main action paid in respect of this export the basic amount of refund applicable on the day of export for all third countries whereas the plaintiff in the main action had obtained an export licence containing an advance fixing of the refund for Morocco, Algeria and Tunisia, destinations which give rise to a higher refund.

- 2 The first question asks whether Article 4 (1) of Regulation No 1041/67/EEC in the version in force in 1971, whereby in certain cases, *inter alia* by reason of the nature of the exported products or of export markets, Member States may require proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country, must be interpreted to the effect that the destinations of the products as mentioned in Article 4 of Regulation No 876/68 in respect of which an export refund has been varied may also be regarded as a third country.

If the answer is in the affirmative the second question asks whether the requirement laid down in Article 4 (1) of Regulation No 1041/67 'that the product in question has been imported into a third country' means that that product must have been released into free circulation in accordance with the customs regulations or whether it is sufficient for the goods, which have been shipped, to be unloaded in a port at a destination outside Europe and after storage and transshipment to be transported to a third country within Europe.

If the answer to the first question is in the negative the third question asks whether the subordinate clause in the first sentence of Article 6 (2) of Regulation No 876/68, whereby 'where Article 4 applies, the refund shall be paid under the conditions laid down in paragraph (1), provided it is proved that the product has reached the destination for which the refund was fixed', must be interpreted to the effect that the goods must have been released into free circulation there in accordance with the customs regulation or whether it is sufficient for the goods, which have been shipped, to be unloaded in a port at a destination outside Europe and after storage and transshipment to be transported to a third country within Europe.

If the answer to the second or third question is in the affirmative the fourth question asks whether the requirements that the product shall have been imported into a third country (Article 4 (1) of Regulation No 1041/67) and that the goods shall have reached their 'destination' (Article 6 (2) of Regulation No 876/68) are also fulfilled if the goods were, by virtue of the relevant contracts of sale, already destined ultimately, before completion of the customs export formalities within the meaning of Article 1 (2) of Regulation No 1041/67, not for the destination outside Europe laid down in Article 6 (2) of Regulation No 876/68 but for another third country in Europe with a lower refund rate and were in fact transported thence in accordance with the detour via the third country outside Europe which was stipulated by the export licence.

The fifth question asks whether it is of importance with regard to the interpretation of Article 4 (1) of Regulation No 1041/67 and of Article 6 (2) of Regulation No 876/68 which were referred to in the second, third and fourth questions:

- (a) whether the applicant exporter was aware at the relevant date that the goods would ultimately be shipped to the third country in Europe; or
- (b) whether one of the purchasers and sellers of the goods who were parties to the contracts of sale and purchase was resident at the destination outside Europe or in the country of such destination or had a branch there.

3 Since these questions mainly raise the problem of the objective of the system of refunds, it is fitting to give a general answer to them.

4 Article 17 (1) of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ English Special Edition 1968 (I), p. 176) provides that: '...to enable the products

listed in Article 1 to be exported ... on the basis of the prices for those products in international trade, the difference between those prices in the Community may be covered by an export refund.'

The second sentence of Article 17 (2) provides that the refund 'may be varied according to use or destination'.

The same provision is made in Article 4 of Regulation No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (OJ English Special Edition 1968 (I), p. 234) 'where the world market situation or the specific requirements of certain markets make this necessary'.

Article 6 (2) of the same regulation provides: 'Where Article 4 applies, the refund shall be paid under the conditions laid down in paragraph (1), provided it is proved that the product has reached the destination for which the refund was fixed'.

- 5 The reason why the refund varies according to the destination of the products is, according to the fourth recital to Regulation No 876/68, that 'markets in the countries of destination are at varying distances from Community markets and special conditions apply to imports in certain countries of destination'.

It follows from Article 4 and the recitals in the preamble to the aforementioned regulation that the amount of the refund depends on the conditions of the market which the product in question must enter and as a result on the actual import of the product into the given country of destination.

The variation in the refund takes place by reason of the desire to take account of the peculiar characteristics of each import market on which the Community wishes to play a part.

- 6 If it sufficed for the goods simply to be unloaded to qualify for payment of the refund at a higher rate, the *raison d'être* of the system of varying the refund would be disregarded and abuse would be made possible to the detriment of Community interests.

It is therefore necessary for the goods to have been cleared through customs and put into free circulation at the destination.

Only objective criteria can be taken into account in answering the question whether goods have reached the market at their destination.

- 7 The plaintiff in the main action has raised doubts as to the validity and interpretation of Article 4 of Regulation No 1041/67.

However it is clear that in the context of the said regulation the expression 'the Member States' must be understood to mean the agency of each Member State entrusted with paying the export refunds.

Further, having regard to the difficulty of setting out exhaustively the evidence which may be regarded as sufficient proof that exportation to a third country has taken place, the Commission has not exceeded its powers in authorizing the Member States to require the proof referred to in the said Article 4.

#### Costs

- 8 The costs incurred by the Commission of the European Communities which has submitted its observations to the Court are not recoverable and as the proceedings are, so far as the parties to the main action are concerned, 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 referred to it by the Finanzgericht Hamburg by order of that court dated 13 November 1975 hereby rules:

- (1) Article 4 (1) of Regulation No 1041/67 is a provision of general application and applies in all cases where there is a refund, even if the refund has been varied according to the destination;
- (2) The said article must be interpreted in conformity with Article 6 of Regulation No 876/68 and, where the refund is varied, means that the goods must have been given customs clearance and put into free circulation at the destination;

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

Lecourt            Kutscher            O'Keeffe            Donner            Mertens de Wilmars  
Pescatore            Sørensen            Mackenzie Stuart            Capotorti

Delivered in open court in Luxembourg on 3 June 1976.

A. Van Houtte  
Registrar

R. Lecourt  
President

OPINION OF MR ADVOCATE-GENERAL REISCHL  
DELIVERED ON 19 MAY 1976<sup>1</sup>

*Mr President,  
Members of the Court,*

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

General rules for granting refunds on the export of milk and milk products and

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

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

<sup>1</sup> - Translated from the German.