OPINION OF ADVOCATE GENERAL MISCHO

delivered on 3 June 1999 *

Facts and relevant legal provisions

1. Between 1990 and 1992 the Danish company DAT-SCHAUB amba exported beef to the United Arab Emirates and applied for and obtained refunds in respect of those exports.

2. There came a point, however, when the Danish Ministry of Food, Agriculture and Fisheries (hereinafter 'the Ministry') began to have doubts as to the justification of granting such refunds, doubts which it communicated to the Commission.

3. When the Commission informed the Ministry that not all the refunds were in fact due, the Ministry set off the amount of the refunds paid out against the securities lodged. DAT-SCHAUB thereupon brought an action against the Ministry before the Østre Landsret, claiming reimbursement of DKK 9 898 936.75.

4. In order to tackle effectively the question which the Østre Landsret has referred to the Court, it is necessary first to provide details of the commercial operations carried out by DAT-SCHAUB.

5. The Jebel Ali Free Zone was created in Dubai (United Arab Emirates). DAT-SCHAUB set up a meat processing undertaking (Dubai Meat Packers) within the Free Zone, to which it exported its meat.

6. Upon arrival in that zone, meat originating in the Community was processed by that undertaking before being imported either into the United Arab Emirates or into other States of the region which, like the United Arab Emirates, were members of the Cooperation Council for the Arab

* Original language: French.

States of the Gulf (hereinafter 'the GCC') and had set up a free trade area among themselves.

7. Those various operations, which were quite in order according to the laws of those States, were recorded in documents, which were also quite in order, drawn up by the local authorities. So checks were carried out both on entry into and exit from the Free Zone on the way to either the United Arab Emirates or to another GCC member country.

8. The only problem which arose was in connection with the Community rules on export refunds. The export documents drawn up by DAT-SCHAUB, on the basis of which the refunds were granted, gave the United Arab Emirates as the country of destination. This was correct in that the meat was actually unloaded in that State but was less evidently so as regards what Community law means by 'country of destination' in the context of the rules on export refunds and the requirements it imposes in respect of the granting of refunds, since the meat was processed in the Free Zone before being sent partly to the United Arab Emirates and partly to other GCC countries.

9. Both the parties to the proceedings before the Danish court, namely DAT-SCHAUB and the Ministry, and the Commission, which submitted observations to the Court, accept that the Community provisions applying to the exports carried out by DAT-SCHAUB during the period under consideration are those of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products. [1]

10. The provision of that regulation which causes a problem is Article 17, which reads as follows:

'1. The product must have been imported in the unaltered state into the non-member country or one of the non-member countries for which the refund is prescribed within 12 months following the date of acceptance of the export declaration. However, that period may be extended under the conditions laid down in Article 47.

2. Products shall be regarded as having been imported in the unaltered state if there is no evidence whatsoever of processing.

1 — OJ 1987 L 351, p. 1.

However:

...

— a product which was processed before being imported shall be regarded as having been imported in the unaltered state if the processing took place in the non-member country into which all the products resulting from such processing were imported.

3. A product shall be considered to have been imported when it has been cleared through customs for release for consumption in the non-member country concerned.'

11. DAT-SCHAUB claimed before the national court that, under the Cooperation Agreement between the European Economic Community, of the one part, and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait) of the other part, approved by Council Decision 89/147/EEC of 20 February 1989,[2] even those products resulting from processing which were released for consumption in GCC countries other than the United Arab Emirates met the condition contained in the second subparagraph of Article 17(2). The Ministry took the opposite view.

12. It was in order to be able to decide between those two submissions that the national court referred the following question to the Court of Justice for a preliminary ruling:

'Having regard to the Cooperation Agreement between the European Economic Community and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf, approved by Council Decision 89/147 of 20 February 1989, must the term "non-member country" in the second subparagraph of Article 17(2) of Regulation No 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products be construed as meaning that countries parties to the Charter are treated as one single non-member country, with the result that a product which, after processing in the Jebel Ali Free Zone in the United Arab Emirates, is imported into and released for consumption in another of the countries parties to the Charter is to be regarded as having been imported in the unaltered state within the meaning of Article 17 of the regulation?'

2 — OJ 1989 L 54, p. 1.

Assessment

13. The question as worded in fact contains two separate questions. One concerns the way in which the second subparagraph of Article 17(2) of Regulation No 3665/87 is to be interpreted as such. The other concerns the differences in the way the provision might be interpreted if a refund is being sought in respect of exports to GCC member countries, by reason of the Agreement between the Community and those countries. I shall examine each of those questions in turn.

Article 17 of Regulation No 3665/87

14. Article 17(1) of Regulation No 3665/87 states that payment of a differentiated refund is dependent on the product having been imported in the unaltered state, within a specified period, into the non-member country or one of the non-member countries for which the refund is prescribed; importation is subject to compliance with the formalities for release for consumption in that country.

15. Clearly, the disputed exports by DAT-SCHAUB which, it should be noted, according to the documents submitted to the Danish customs authorities were intended for the United Arab Emirates, do not meet that condition, since it is accepted that the exported meat was processed in the Jebel Ali Free Zone where it was unloaded before the formalities for release for consumption were carried out either in the United Arab Emirates or in any other GCC country.

16. It is therefore only if the conditions under which that processing took place can be deemed to correspond very closely to the conditions laid down in the second subparagraph of Article 17(2) of Regulation No 3665/87, so that importation after processing can be regarded as importation in the unaltered state, that DAT-SCHAUB would be entitled to the refund.

17. The second subparagraph of Article 17(2) stipulates that processing must have taken place in the non-member country into which all the products resulting from such processing were imported.

18. However, it has been established that after being processed the meat exported by DAT-SCHAUB was imported partly into the United Arab Emirates and partly into other GCC countries, so that condition is clearly not met.

19. DAT-SCHAUB is trying to convince us of the contrary, of course, arguing that since Article 17(1) of Regulation

No 3665/87 refers to importation in the unaltered state 'into the non-member country or one of the non-member countries' it should be considered that importation after processing into several non-member countries in respect of which the same refund is prescribed gives entitlement to a refund in the same way as importation into just one non-member country. The plaintiff thus implies that it is due to the somewhat defective wording of Article 17 that it has been deprived of refunds to which the Community legislature intended it to be entitled.

20. However, the Commission has provided an explanation which enables us to rule out any defective drafting. It points out that Regulation No 3665/87 applies to all the refunds provided for under the various common organisations of the markets, and submits that the regulation must therefore cover all the cases provided for under those organisations, in particular the case, which is not covered by the common organisation for beef but which is covered by the common organisation for cereals, for example, where differentiated refunds are fixed on the basis not of individual countries but of zones including several countries of destination.

21. Thus there is no inconsistency between paragraphs 1 and 2 of Article 17. The rules laid down for granting the refund where importation takes place after processing are, for reasons relating to checking which I shall deal with later, simply stricter than those applying in the case of importation in the unaltered state.

Cooperation Agreement between the European Economic Community and the countries parties to the GCC Charter

22. Does the Cooperation Agreement between the GCC countries and the Community dictate, as DAT-SCHAUB claims and the national court does not rule out, that the refund should also be paid where products resulting from the processing of meat in the Jebel Ali Free Zone are released for consumption in a GCC country other than the United Arab Emirates?

23. For this to be the case, not only must DAT-SCHAUB be able to rely on that Agreement in order to exclude the interpretation of Article 17 of Regulation No 3665/87 which its wording dictates, it must also be demonstrated that there is a conflict between that interpretation and the commitments which the Community has made to the GCC States.

24. The text of the Agreement makes clear that this is not the case. As both the Ministry and the Commission point out,

the Agreement is a framework agreement, doubtless one that is important in itself, but one in which the parties only undertake to establish, each within the limits of its competence, 'the broadest possible economic cooperation' in the various fields which it lists.

25. In the field of trade, it provides merely that the parties will grant each other most-favoured-nation treatment, leaving the adoption of specific provisions to promote trade until a trade agreement is negotiated at a later date.

26. DAT-SCHAUB correctly points out that Article 19 of the Agreement provides that:

'In the fields covered by this Agreement and without prejudice to its provisions:

— the arrangements applied by the GCC countries in respect of the Community shall not give rise to any discrimination between its Member States, their nationals or their companies or firms,

— the arrangements applied by the Community in respect of the GCC countries shall not give rise to any discrimination between them, their nationals, or their companies or firms.'

27. But, as the Ministry and the Commission submit, it is not clear how the fact that the Community rules authorise payment of the export refund, where processing takes place before importation, only under the strict conditions laid down in the second subparagraph of Article 17(2) of Regulation No 3665/87 could be regarded as an infringement of that prohibition of discrimination.

28. If a GCC member country other than the United Arab Emirates were to establish a free zone in which meat exported from the Community was processed, Article 17 would be applied in the same way as it is in respect of the United Arab Emirates. The Community authorities would not consider in that case either that the GCC countries

constituted a single non-member country for the purposes of that provision.

29. Contrary to what DAT-SCHAUB claims, the GCC is not a common market, and this is why the Community customs rules allocate a separate identification code to each of the GCC countries. This clearly indicates that a commercial transaction undertaken with one of those countries cannot be equated with the same transaction with another of them.

30. If one were to adhere strictly to the wording of the question referred for a preliminary ruling by the Østre Landsret, one could halt the reasoning at the point where it is established that the Community rules laid down in Article 17 of Regulation No 3665/87 preclude, despite the existence of the Agreement between the Community and the GCC countries, DAT-SCHAUB from receiving refunds in respect of the exports at issue in the dispute between it and the Ministry.

31. However, DAT-SCHAUB has put forward in its observations a number of grounds other than those put forward by the national court on which it should be granted entitlement to the refunds it is claiming.

32. For the sake of completeness, I shall consider these briefly, as the Ministry and the Commission did in their observations.

Principle of proportionality and good faith

33. DAT-SCHAUB claims that the principle of proportionality precludes the refunds from being withheld, since the rate of the refund at the time of the operations at issue was the same for all the GCC countries. It did not therefore engage in any manœuvre in order to procure undue advantage.

34. In its submission, the Community provisions which the Ministry relied upon against it are intended, by imposing obligations in order to facilitate checks, to prevent traders from committing fraud and deriving unjustified enrichment therefrom, and cannot be applied to the fullest extent where, as in the case of the operations which it carried out, not only has there been no loss to Community finances but also painstaking checks have been carried out by the authorities of the United Arab Emirates and other GCC member

countries which have established with certainty the final destination of the goods.

35. The Ministry and the Commission challenge this presentation of the Community rules on differentiated refunds. They refer to the case-law of the Court, which has always been extremely strict with traders when it has been called on to rule on the merits and application of Community rules in this field. [3]

36. They stress the risks of fraud inherent in any transaction involving the processing of exported products before they are imported, that is to say released for consumption, and point out that the adoption of a system of differentiated refunds is always designed to meet the Community's concerns with regard to commercial policy and the general pattern of trade, which cannot tolerate a change of destination even if such a change offers no financial advantage to the trader concerned. [4]

37. The Commission points out in this regard that, according to DAT-SCHAUB's reasoning, it would also be necessary to grant it refunds if the processed products had been re-exported from the Jebel Ali Free Zone to any other country in respect of which the amount of the refunds was, at the material time, the same as that fixed for the United Arab Emirates and the other GCC member countries, which would be tantamount to leaving it to the traders and not the Community authorities to conduct the Community's commercial policy in the field of agricultural products.

38. For my part, I consider that the Court of Justice cannot follow DAT-SCHAUB along the course on which it wishes to take it. Firstly, it should be noted that invoking the principle of proportionality in order to promote an interpretation of a Community provision which is different from that resulting from its wording, whilst stating as DAT-SCHAUB does that one does not wish to challenge the validity of that provision, is a fairly risky venture.

39. Secondly, I share the Commission's view that one cannot criticise measures intended to facilitate the checks which must be carried out by the Community authorities on the ground that those checks would be excessive, or even in some cases ineffective, when there is undoubtedly a risk of fraud. This is the case when processing operations are carried out which

3 — See in particular Case 89/83 *Hauptzollamt Hamburg-Jonas* v *Dimex* [1984] ECR 2815; Case 276/84 *Metelmann* v *Hauptzollamt Hamburg-Jonas* [1985] ECR 4057; Case C-27/92 *Möllmann-Fleisch* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-1701; Case C-347/93 *Belgian State* v *Boterlux* [1994] ECR I-3933; and Case C-299/94 *Anglo Irish Beef Processors International and Others* v *Minister for Agriculture, Food and Forestry* [1996] ECR I-1925.

4 — See Case 125/75 *Milch-, Fett- und Eier-Kontor* v *Hauptzollamt Hamburg-Jonas* [1976] ECR 771.

inherently offer an opportunity for unscrupulous traders to cause those authorities to lose track of the products exported.

40. Lastly, I consider that a minimum of discretion should be left to the Community authorities when introducing checks they regard as essential. That is why I consider that the amendments to the rules which were introduced subsequently, making them more flexible, are irrelevant as regards the way in which the operations carried out by DAT-SCHAUB between 1990 and 1992 should be dealt with. The fact that the Community legislature considers at a particular point in time, in the light of experience, that it is in a position to relax the restrictions which the rules impose on traders, as it did for example in Regulation (EC) No 1384/95 [5] as regards changing the country of destination in the case of differentiated refunds, does not mean that the earlier regulations can be regarded as going beyond what the principle of proportionality allows.

41. It would moreover be totally against the interests of those traders to adopt such a line of reasoning since it would cause the Commission, in order to avoid criticism for its past severity, to maintain in full checks which it had introduced at a particular point in time even if it no longer regarded them as being essential.

42. It is necessary, on the contrary, to allow the Commission to develop the rules flexibly in order to achieve as far as possible the objectives assigned to the common agricultural policy.

43. It is these considerations which lead me to dismiss the arguments which DAT-SCHAUB seeks to derive from the Commission's adoption on 30 June 1993 of a decision permitting the granting of refunds precisely in respect of operations such as those carried out by DAT-SCHAUB between 1990 and 1992.

44. When the Danish authorities advised it of the difficulties encountered by DAT-SCHAUB as a result of the arrangements which it had introduced for supplying the GCC countries, the Commission, at the same time as it found that the rules applicable indeed prohibited the granting of export refunds to DAT-SCHAUB in respect of the operations it had carried out, took the view that, by adopting special monitoring rules designed to prevent any risk of fraud, it was possible to take into account the particular situation existing in

5 — Commission Regulation of 19 June 1995 amending Regulation No 3665/87 as regards the adjustments necessary for the implementation of the Uruguay Round Agreement on Agriculture (OJ 1995 L 134, p. 14).

the GCC countries and DAT-SCHAUB's interest in developing its commercial presence in that region. Consequently, it made it possible to grant refunds in respect of products unloaded in the Jebel Ali Free Zone and processed there before being imported into the various GCC countries.

45. According to DAT-SCHAUB, that derogation from the rules proves that the rules had previously failed to take into account, at least in its particular case, the principle of proportionality.

46. In my view, the derogation proves, firstly, that the earlier rules did indeed have the implications the Ministry considered them to have. Secondly, it shows that the Commission, provided it is shown the need for adaptation in one particular case, is always ready to seek to reconcile the strictness of general rules which are regarded as being essential in order to protect the Community interests with the interests of a trader whose activities are prejudiced by those rules but are none the less perfectly legitimate. [6]

47. It will be noted also that the 1993 decision was not retroactive, [7] which could have had the effect of giving DAT-SCHAUB an advantage over any of its competitors who might have considered introducing similar arrangements but refrained from doing so in order to avoid the rules contained in Article 17 of Regulation No 3665/87 being applied against them and hence the loss of the refunds. Finally, it was only adopted for a limited period so that an assessment could be made of its effectiveness.

48. Finally, DAT-SCHAUB relies on the principle of good faith, which should be applied in its case on the ground that a reading of the second subparagraph of Article 17(2), especially in the light of other provisions of Regulation No 3665/87 which are applicable in the event of a change of destination of goods which have qualified for a differentiated refund, could lead an average trader to consider that operations of the type it carried out gave entitlement to refunds.

49. However, I think that even though the provision concerned could have been drafted more clearly, it can be understood by a reasonably prudent trader.

6 — See, for example, Case 66/82 *Fromançais* v *FORMA* [1983] ECR 395.

7 — As regards the impossibility, in such circumstances, of making it retroactive, see judgment in Case C-34/92 *GruSa Fleisch* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-4147.

Conclusions

50. I therefore propose that the Court give the following answer to the question submitted by the Østre Landsret:

Having regard to the Cooperation Agreement between the European Economic Community and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait), approved by Council Decision 89/147/EEC of 20 February 1989, the term 'non-member country' in the second subparagraph of Article 17(2) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products may not be construed as meaning that the countries parties to the Charter are treated as one single non-member country, which would have the result that a product which, after processing in the Jebel Ali Free Zone in the United Arab Emirates, was imported and released for free circulation in another of the countries parties to the Charter would be regarded as having been imported in the unaltered state within the meaning of Article 17 of Regulation No 3665/87.