# OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 26 February 1987 *

*Mr President,*
*Members of the Court,*

1. This is an application for the annulment of Council Decision No 85/458/EEC of 28 August 1985 on the clearance of the accounts presented by Ireland in respect of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, expenditure for 1981 in so far as it disallows the sum of IRL 2 281 956.15 for the payment of export refunds relating to exports of butter and butteroil to countries which are not members of the Community.

## I — The relevant Community legislation

2. As you know, the payment of export refunds is designed to cover, in the case of products covered by the common agricultural policy exported to non-member countries, the difference between the price of the product on the Community market and its price on the world market in order to ensure the market disposal of such products.

3. The possibility of differentiating the refund according to the destination of the product has also been provided for in many cases in order to take account of the distance of the Community market from that of the country of destination or of special conditions obtaining in the latter country.

4. Common administrative procedures have been adopted for all the agricultural sectors in order to ensure that export refunds are paid in a uniform manner throughout the Community.

5. At the time of Ireland's accession to the European Communities the common procedures for applying the system of export refunds were laid down in Commission Regulation No 1041/67 of 21 December 1967,[1] Article 3 of which made payment of the refund subject to proof that the goods had left the Community territory.

6. Article 5 of the regulation required the production of a control document, the form of which was to be governed by Regulation No 2315/69, in order to secure such proof where a product for which customs export formalities had been completed crossed the territory of a Member State other than that in which such formalities had been completed.

7. The document (known as the T 5 form) was certified by the customs authorities of the Member State of final export when final export took place, and thus constituted proof that the products had left the geographical territory of the Community and gave the holder of the document entitlement to payment of the export refund. For that purpose a copy of the certificate had to be returned within eight days to the competent authorities of the Member State of first export.

8. It appears that the forms were frequently not sent or were mislaid en route, resulting

* Translated from the Portuguese.

1 — Official Journal L 314, 23.12.1967. Regulation No 1041/67 was subsequently replaced by Commission Regulation No 192/75 of 17 January 1975 which has been amended on a number of occasions, most recently by Regulation No 2730/79 of 29 November 1979.

in heavy losses in export refunds for the traders concerned.

9. This circumstance had particularly serious effects in countries which did not have suitable links for transporting export merchandise to other parts of the world; such goods had to be transported by sea through other Community ports to their final destination.

10. One such country was Ireland, which exported large quantities through other Community ports, in particular Rotterdam.

11. The problem was considered at the 33rd meeting of the Community Transit Committee in Brussels on 17-19 July 1973 and led to the conclusion of a 'gentleman's agreement' to be applicable between the parties with the full support of the Commission.

12. The agreement (which I shall call 'the 1973 Agreement') decided that, for the purposes of granting export refunds, departure from the geographical territory of the Community should be at the first port of loading, when the goods were shipped to another Community port where they were to be transhipped to their final destination.

13. T 5 forms were therefore no longer required for products right up to the port where they finally left the Community; it was sufficient for the authorities in the Member State of first export to certify that the products had left the geographical territory of the Community.

14. Regulation No 1041/67 did not originally fix a time-limit for export to non-member countries to be completed except in the case of advance payments; in principle, the only time-limits were those laid down for depositing the proof of export with the intervention agency and, where necessary, proof of import into a specific non-member country.

15. A 45-day time-limit for the export of goods from the Community was introduced only in 1974, by means of Commission Regulation No 2110/74, which provided that the time-limit was to apply from the date on which the products were placed under customs control for export.

16. The time-limit was subsequently extended to 60 days by Commission Regulation No 2730/79 of 29 November 1979,[2] in force at the time of the transactions at issue in this case in place of Regulation No 1041/67. Article 9 of Regulation No 2730/79 made payment of the refund subject to proof being furnished that the product in respect of which customs export formalities had been completed had left the geographical territory of the Community 'within 60 days from the day of completion of such formalities'.

## II — The facts

17. In 1980 refunds differentiated according to destination were introduced for butter and butteroil.

18. Payment of them required production of proof of import into the country of destination and the trader was also obliged to furnish a copy of the transport document.

19. In 1981 an Irish trader exported various quantities of butter and butteroil to non-member countries.

2 — Official Journal L 317, 12.2.1979, p. 1.

20. The exported products left Irish territory within 60 days of completion of the customs export formalities, but owing to transhipment operations in other Community ports the products did not finally leave Community territory until after the 60-day period had elapsed.

21. At the time of export, contracts for the sale of the goods had already been concluded and the delay was attributable in most cases, according to Ireland, to difficulties and disturbances in the country of destination.

22. Since proof of importation had been lodged within the prescribed time-limits, the Irish Minister for Agriculture paid the appropriate export refunds.

23. When the Commission came to close the EAGGF accounts (Guarantee Section) for 1981, however, it decided that those payments were not eligible for Community finance.

24. The Commission's refusal to accept them was based on Article 2 (1) of Council Regulation No 729/70 of 21 April 1970,[3] which provides that 'refunds on exports to third countries, granted *in accordance with the Community rules* within the framework of the common organization of the agricultural markets, shall be financed' (the emphasis is mine).

25. As the period of 60 days laid down in Article 9 of Regulation No 2730/79 was not observed in this case, the export refunds were not granted 'in accordance with the Community rules'.

## III — Legal submissions

26. *A* — The principal submission on which Ireland bases its case is that the Commission has misinterpreted Regulations Nos 729/70 and 2730/79 in the light of the 1973 Agreement, of which it failed to take account.

27. Alternatively it alleges that if there was error on its part, which it denies, it is attributable to the conduct of the Commission in accepting and permitting the operation of the 1973 Agreement. It also alleges that the Commission breached the principles of the protection of legitimate expectation, legal certainty, non-retroactivity, and proportionality, and that the refusal to finance the payments at issue constitutes undue formalism.

28. *B* — As regards Regulation No 729/70, Ireland maintains that Article 2 (1) must be interpreted in the light of the seventh recital in the preamble to the regulation, according to which measures must be taken 'to prevent and deal with any irregularities and to recover the amounts lost as a result of such irregularities or negligence'.

29. In Ireland's view the Commission could only disallow the payments at issue if it could be established that failure to comply with the time-limit had caused loss to the Community. That was not the case.

30. In my view that submission is not well founded. The essential point is whether or not the expenditure in question was incurred in compliance with the rule in Article 2 of Regulation No 729/70 — that is, whether or not it was incurred in accordance with the 'Community rules within the framework of the common organization of the agricultural markets'. Consequently, it must be ascertained whether the Community rules governing export refunds — in accordance with Article 9 (1) of Regulation No 2730/79 — were complied with in the case in hand.

3 — Official Journal L 94, 28.4.1970, p. 13.

31. If they were not, we have before us one of the irregularities referred to in the seventh recital in the preamble to Regulation No 729/70 which would justify the Commission's refusal to finance the expenditure for the export refunds through the EAGGF.

32. C — However, if we are to determine whether or not the exports were completed in compliance with the Community legislation we must interpret Article 9 (1) of Regulation No 2730/79 correctly.

33. (a) It is essential in that regard to ascertain how the period between completion of the customs formalities for agricultural products exported to a third country and their exit from the Community is to be determined, since failure to observe that period results in loss of entitlement to payment by the Community of the export refunds.

34. In order to do so it is necessary to decide whether the 1973 Agreement is valid in the light of the provisions contained in Regulation No 2730/79. I should point out that for the purposes of paying refunds the agreement provides that 'departure from the geographical territory of the Community for the purpose of Regulation No 1041/67 takes place at the first port of loading'.

35. As you know, Regulation No 2730/79 replaced Regulation No 1041/67 to which the agreement refers. It is important to note that Article 9 of Regulation No 2730/79 is drafted in words similar to those of Article 3 of Regulation No 1041/67, apart from the fact that Regulation No 2730/79 lays down a maximum period for departure of the goods from the geographical territory of the Community.

36. Ireland submits that Regulation No 2730/79 in no way modified the terms of the 1973 Agreement, with which it is entirely compatible.

37. Similarly, the Commission 'does not contest either the existence or the validity of the 1973 Agreement', considering that it is 'useful' and that it 'should continue to be applied in future, in particular in the interests of peripheral Member States and their exporters'. The difference between the parties is that whereas Ireland maintains that the agreement does not invalidate the 60-day period laid down in Article 9 of Regulation No 2730/79 because the period runs from completion of the customs formalities in the exporting Member State to departure from the first port of loading, the Commission contends that the period runs up to the date of final departure from the Community.

38. (b) In my view, given its wording, the 1973 Agreement is as compatible with Regulation No 2730/79 as it was with Regulation No 1041/67.

39. Bearing in mind the special difficulties faced by peripheral countries which frequently make it necessary to export goods via another Community port where they must be transhipped, the agreement means that the phrase 'departure from the geographical territory of the Community' in Regulation No 1041/67 (Articles 3 and 5) must be interpreted as meaning that that departure 'took place at the first port of loading'.

40. The same interpretation applies, as the Commission acknowledges, to the identical wording employed in Regulation No 2730/79.

41. At all events, as the agreement states, that interpretation is adopted for the purposes of granting refunds.

42. As I have already said, Regulation No 2730/79 merely fixed a maximum period between completion of customs formalities

and departure 'from the geographical territory of the Community'.

43. I do not consider that the mere fixing of that period modified the import of the 1973 Agreement in any respect whatsoever, in particular that part which provided that when export was effected from another Community port departure from the geographical territory of the Community was to take place at the first port of loading.

44. That is the essential import of the 1973 Agreement and accepting the existence, validity and usefulness of the agreement — whether in the past or in the future —, as the Commission and the Member States have done, entails acceptance of all its provisions.

45. In my view, it is on that basis that this case should be resolved.

46. (c) Having said that, however, account must be taken in interpreting the terms of the 1973 Agreement of the new provision contained in Article 9 of Regulation No 2730/79 which introduced the new period of 60 days.

47. Let us first consider the purpose of the 1973 Agreement as the parties appear to have viewed it and continue to view it in the light of this action.

48. Broadly, it was designed to ensure that countries which, owing to their geographical situation, were usually obliged to have recourse to intermediate Community ports for their exports were not placed at a serious disadvantage, as regards export refunds, by comparison with countries which enjoyed direct links with the rest of the world.

49. The Commission maintains that the interpretation of the 1973 Agreement put forward by Ireland is unduly wide and enables the unfavourable position of the peripheral countries to be converted into an unjustifiable advantage, instead of merely restoring equality.

50. The Commission maintains that such an interpretation has the effect of enabling exporters in a country such as Ireland to evade the 60-day period laid down by a Community regulation: it thus gives rise to discrimination against exporters who export directly to third countries (and who have no means of escaping the 60-day rule) in favour of those who need to tranship their goods (and who may evade the application of the 60-day rule by storing their goods in a second Community port).

51. Moreover, it would thus be possible for an exporter to benefit from the advance fixing of an export refund, in particular when refunds were high, to export his goods from his Member State to a second Community port, and on the pretext of storage for transhipment wait in the second port until a market for the goods was found.

52. That calls for the following remarks:

53. (i) the 60-day period applies to all exporters and must be respected once fixed; the problem is to decide how it runs in various situations, bearing in mind the interpretation adopted by the 1973 Agreement within its particular sphere of application;

54. (ii) exporters in countries with direct points of exit for disposing of their goods are not prevented from opting, should that

appear to be advantageous, to transport them with intermediate transhipment;

55. (iii) in particular, they may wish to do so where they consider the advance fixing of the refund to be more advantageous than the advantage connected with direct links with the outside world;

56. (iv) transport involving intermediate transhipment may be accomplished either through Community ports, or through non-Community ports. In the first case, it is possible, particularly in special circumstances, that traders may seek to rely on the 1973 Agreement, the text of which does not distinguish countries according to their geographical situation. The second case is a very effective way of avoiding the restriction of the 60-day rule.

57. In practice the 1973 Agreement enables the difficulties resulting from the requirement that the goods be accompanied by T 5 forms and that such forms be returned to the country of origin to be avoided.

58. However, it is doubtful whether, on the Commission's interpretation, those problems may be avoided by requiring another control document, for instance in the form of a combined transport document such as that recommended by the International Chamber of Commerce.

59. As matters stand at present, there appears to be only one way of reconciling the 60-day period laid down in Article 9 of Regulation No 2730/79 with the provision in the 1973 Agreement whose validity has been confirmed by both parties.

60. That is, that the 60-day period runs — as provided by Article 9 of Regulation No 2730/79 — from the day of completion of the customs export formalities to the departure of the goods from the geographical territory of the Community which, according to the agreement, 'takes place at the first port of loading'.

61. It is from that moment, in fact, that the goods — as both parties agree — cease to have the status of Community goods, becoming liable to import duties ('prélèvements agricoles') if they are to re-enter Community territory.

62. That status does not alter during transhipment in any other Community port even if it is necessary to have recourse to temporary storage.

63. In the absence of such an interpretation it would be difficult not to consider that exports through Community ports were being placed at a disadvantage by comparison with those using ports in non-member countries for transhipment. I see no good reason for such a disadvantage, which is liable to encourage the use of ports in non-member countries rather than Community ports.

64. The same interpretation appears to have been adopted by all but one of the representatives of the Member States in the Expert Group on Trade Mechanisms and the Management Group.

65. (d) As the Commission stated, the 1973 Agreement applies solely where the goods are to be 'genuinely transhipped'; according to the Commission that excludes intermediate storage.

66. The Commission is right to refer to *transhipment* as the condition for application of the agreement.

67. That is precisely what was envisaged by the agreement itself, as is evidenced by its wording.

68. That was also the position when Regulation No 1041/67 was applicable. In other words: even before any period was laid down for departure from the goods from Community territory, the provision in the 1973 Agreement was applicable only if the goods despatched to another Community port were intended to be transhipped there for transport to their final destination.

69. The combined transport document to which I have already referred might serve to provide proof on that point.

70. It would not be logical to refuse to apply the agreement whenever goods are to be unloaded and placed in temporary storage pending the arrival of fresh transport or for obvious technical reasons, instead of being transhipped directly from one ship to another (which is certainly not usual).

71. That view — which no one advocates [illegible] — would render the 1973 Agreement entirely meaningless.

72. On the other hand, to distinguish between 'genuine transhipment' and 'intermediate storage' which is not transhipment would be to introduce a rigid criterion which is not to be found in any of the documents involved in these proceedings or in any other text.

73. The Commission tells us that it has adopted a criterion based on the reasons for the delay which has made it necessary to prolong the period of intermediate storage.

74. It did so, however, not precisely in order to distinguish between 'transhipment' and 'storage', but rather to define the cases in which it conceded that intermediate storage could exceed the 60 days referred to in Article 9 of Regulation No 2730/79.

75. The Commission alleges in fact that where the procedure for clearing accounts is concerned it adopted a particularly lenient view in cases where the delay before final shipment of the goods was due solely to 'reasons connected with transport'.

76. I see no adequate reason for adopting that approach.

77. If the 60-day period applies equally to transhipment in the final port in the Community, as the Commission maintains, exceeding it will constitute a breach of Article 9 of the regulation unless it is the result of *force majeure* sufficient to justify extending that period in accordance with the procedure provided for in the last subparagraph of Article 9 (1).

78. That is what happens in any case as regards the time-limit for exporting goods directly from the country of origin and the same must be said when, as Ireland maintains and on the interpretation which appears to me to be the better one, the 60-day period which runs in the case of transhipment from completion of the customs formalities to departure from the first port of export has been exceeded.

79. In any event the Commission's practice of distinguishing (where the law does not so distinguish) between reasons connected with transport and other reasons in order to decide whether delay in loading is justifiable or not, and in deciding case by case whether the delay is admissible, appears to me to be in patent contradiction to the principle of legal certainty, as is evident from the very fact that these proceedings were brought.

80. It is my view that the 1973 Agreement is only inapplicable when it is clear that the

intermediate storage was not done in connection with transhipment, and in the absence of any other explanation to show that the extension of the period of storage was not due to the intention to speculate on the levels of the refunds and the need to await the appearance of a client or market conditions more favourable for the export. At the hearing the Commission's representative conceded that the 60-day period was intended to prevent such speculative action.

81. In general it may be concluded that since the 1973 Agreement refers to 'transhipment', it is not compatible with intermediate storage resulting solely from a delay in loading the goods for their final destination which is entirely attributable to the exporter.

82. That was not so in this case: the contracts of sale for the goods had already been duly concluded at the time of export and the delay appears to have been attributable to genuinely objective reasons connected with the country of final destination of the goods (exchange control, new import regulations, etc.).

83. Since the delays were not delays *in transhipment* attributable to the exporter himself, there would appear to be no objective reason for distinguishing between those which were connected directly 'with transport' and those which were attributable to other compelling factors complicating the transportation of the goods.

84. There is indirect textual support for that interpretation, moreover, in Article 20 (4) of Regulation No 2730/79 where there is mention (among other factors) of 'circumstances beyond the control of the exporter'.

85. It also appears that in the present case the requirements laid down in Articles 20 and 31 of Regulation No 2730/79 for payment of the export refunds were complied with in due time by the Irish trader; likewise, the advance payments for the refunds were made in compliance with the requirements laid down in Article 25 of the regulation.

86. (e) Might it not be possible, however, to interpret the introduction of the 60-day period by Article 9 of Regulation No 2730/79 (and prior to that the period of 45 days) as meaning precisely that a temporal criterion was being introduced in order to distinguish between transhipment and other events?

87. I do not think so. In the first place, that is not to be inferred from the provisions of the regulation read in conjunction with the 1973 Agreement; in the second place, the 60-day period runs independently of whether or not there has been transhipment since it applies equally to goods exported directly to third countries.

88. (f) In conclusion, I should point out that I consider that the Commission's interpretation would have one of the following results: either

89. (i) it would discount completely departure from the first port of loading for the purposes of calculating the 60-day period; or

90. (ii) it would have the effect of establishing a double 60-day period — one for departure from the first port of loading and one for departure from the port of transhipment.

91. In the first case, it would defy the terms of the agreement, which defines the first port of loading as the place of 'departure from the geographical territory of the Community', and consequently it would breach the combined provisions of the agreement and Article 9 of the regulation.

92. The second possibility would enable both the 1973 Agreement to be respected and the Commission's interpretation of Article 9 of Regulation No 2730/79 to be upheld.

93. In principle, that could be the most equitable solution. That is because imposing the same requirement of time on exporters from peripheral countries (such as Ireland) for final departure from the Community as that applicable to those who export directly would not, in the result, compensate them fully for the disadvantages to which they are subject: a period of 60 days does not have the same significance for an Irish exporter as it has for a Belgian or a Dutch exporter able to use the ports of Antwerp or Rotterdam. That is what the Commission appears to have conceded, in essence, in its replies to the questions put by the Court when it stated that 'if the Commission had insisted strictly on the 60-day limit without taking any account of genuine transport delays this would have been discrimination against those exporters virtually obliged to tranship'.

94. However, the failure to observe the statutory time-limits appears to be an arbitrary solution, and as neither the legislature nor the Community Transit Committee adopted that solution one cannot legitimately substitute a different interpretation for their approach.

95. (g) In conclusion, I must say that in view of the fact that for the purposes of paying export refunds the first port of loading is regarded as the port of 'departure from the geographical territory of the Community' when the goods must be *transhipped* in another Community port for transport to their final destination, I consider it necessary to adopt the interpretation which best accords with the combined provisions of Article 9 of Regulation No 2730/79 and the 1973 Agreement. The 60-day period thus runs from completion of the customs formalities in the country of origin to departure of the goods from that first port.

96. *D* — (a) In view of what I have said there is no point in analysing the argument that the Commission contributed by its conduct to any error which may have been made by the Irish administration in paying the export refunds.

97. (b) It is also unnecessary in view of my conclusion to analyse the third and fourth submissions in the application.

98. (c) As regards the fifth, it cannot be upheld in view of the fact that the Commission maintains that it has always adopted the same interpretation of the agreement without any modification. Its interpretation was merely made known for the first time, as regards the sphere of application of Regulation No 2730/79, in the decision at issue in this case.

99. (d) I also consider that the sixth submission relied upon by Ireland, that of breach of the principle of proportionality, cannot succeed.

100. Ireland maintains that even if the 60-day period was exceeded that would prevent payment of the refunds in question since the provision concerning the time-limit is purely an administrative or procedural one and no economic loss to the Community resulted from failure to comply with it.

101. However, as the Commission pointed out, as regards administrative acts — and decisions on the clearance of accounts fall into this category — the principle of proportionality governs only those acts for which the public administration enjoys a discretionary power to select whatever measures

appear appropriate to achieve a particular aim. If the administration enjoys only a non-discretionary power there can be no discussion of the proportionality of measures adopted in the exercise of such powers. The decision regarding the clearance of the EAGGF accounts adopted in accordance with Article 2 of Regulation No 727/70 is a decision adopted in the exercise of a non-discretionary power, since the refunds are to be financed in accordance with 'the Community rules'.

102. Thus we come back to the question we have already resolved, of whether or not the payments were made in accordance with the Community rules.

103. As to the latter, Ireland has not challenged their validity.

104. (e) Ireland's last submission is that the Commission is guilty of undue formalism.

105. That argument would not, of course, be entirely pointless if it was held that the Commission's interpretation would make payment of refunds dependent on whether the exports were transhipped through a port outside the Community or through a Community port, or on mere differences in the route chosen.

106. As we have seen, the only relevant question as regards export refunds is whether or not the Community rules were complied with. Compliance with such rules cannot be characterized as undue formalism, particularly in view of the fact that the Court has already held that 'in cases where Community rules authorize payment of aid only on condition that certain formalities relating to proof or supervision are observed, aid paid in disregard of that condition is not in accordance with Community law and the expenditure incurred therein may not, in principle, be charged to the EAGGF'. [4]

107. *E* — On the basis of all that I have said, and because I consider that the interpretation given by the Commission to the combined provisions of Regulation No 2730/79 and the 1973 Agreement is not in conformity with the 'Community rules', I propose that the Court annul Commission Decision No 85/458/EEC of 28 August 1985 in so far as it disallows the sum of IRL 2 281 956.15 for the payment of export refunds for butter and butteroil and order the Commission to pay the costs.

4 — Judgment of 14 January 1981 in Case 819/79 *Germany* v *Commission* [1981] ECR 21, at page 34.