JUDGMENT OF THE COURT (Fifth Chamber)
24 September 1985 *

In Case 181/84

REFERENCE to the Court under Article 177 of the EEC Treaty by Mr Justice Glidewell of the Queen's Bench Division of the High Court of Justice for a preliminary ruling in proceedings between

The Queen, ex parte E. D. & F. Man (Sugar) Ltd,

and

Intervention Board for Agricultural Produce (IBAP),

on the validity of Article 6 (3) of Commission Regulation (EEC) No 1880/83 of 8 July 1983 on a principal standing invitation to tender in order to determine levies and/or refunds on exports of white sugar (Official Journal 1983, L 187, p. 5),

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

Man Sugar, the plaintiff in the main proceedings, represented by F. Jacobs, QC, instructed by Simmons & Simmons, Solicitors,

the United Kingdom, represented by R. N. Ricks, acting as Agent,

* Language of the Case: English.

the Commission of the European Communities, represented by D. G. Lawrence, Legal Adviser, acting as Agent,

after hearing the opinion of the Advocate General delivered at the sitting on 18 June 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 4 July 1984, which was received at the Court on 10 July 1984, Mr Justice Glidewell of the Queen's Bench Division of the High Court of Justice referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the validity of Article 6 (3) of Commission Regulation (EEC) No 1880/83 of 8 July 1983 on a principal standing invitation to tender in order to determine levies and/or refunds on exports of white sugar (Official Journal 1983, L 187, p. 5).

2 That question arose in proceedings between E. D. & F. Man (Sugar) Limited (hereinafter referred to as 'Man Sugar'), a British firm of sugar traders and brokers, and the Intervention Board for Agricultural Produce (hereinafter referred to as 'the Board'), which is the national agency responsible for administering the common agricultural policy in the United Kingdom.

3 By a telex message dated 27 July 1983 Man Sugar submitted to the Board seven tenders for the export of sugar to non-member countries, having lodged the requisite security in the form of a bank guarantee. On 28 July 1983 the Board informed Man Sugar that five of its tenders had been accepted, representing a total amount of 30 000 tonnes of sugar for export.

4 It is common ground that in accordance with the relevant provisions of Community law Man Sugar was at that point required to apply for export licences by 12.00 hours United Kingdom time on 2 August 1983 at the latest. The Board

did not receive the telex messages applying for the export licences until between 3.41 p.m. and 3.57 p.m. on 2 August 1983.

5 That delay of a few hours was the result of circumstances which Man Sugar acknowledges do not constitute *force majeure*. The telexes were indeed prepared for dispatch at the usual time. However, owing to the absence of the employee whose responsibility it was to send them and the extra work on that day for the employee assigned to replace her, the telexes were sent with a slight delay.

6 As a result of that delay the Board declared the security of UKL1 670 370 forfeit. Man Sugar thereupon brought an action in the Queen's Bench Division of the High Court of Justice for repayment of the security, contending that its forfeiture was 'grossly unfair' and that the Community rules which imposed the forfeiture were contrary to the principle of proportionality.

7 Mr Justice Glidewell decided to stay the proceedings and referred the case to the Court of Justice for a preliminary ruling on the question:

'whether Article 6 (3) of Commission Regulation (EEC) No 1880/83 is invalid for breach of the principle of proportionality in that it purports to require, except in the event of *force majeure*, the forfeiture of the entire security in every case where, as a result of an unintentional failure on the part of the applicant, an application for an export licence is not received by the competent intervention agency within the period laid down by the legislation'.

The provisions of Community law applicable to exports of sugar to non-member countries

8 It is common ground that for many years the Community sugar market has been characterized both by structural surpluses and by prices higher than those on the world market. Under the common organization of the sugar market, the basic provisions of which are set out in Council Regulation (EEC) No 1785/81 of 30 June 1981 (Official Journal 1981, L 177, p. 4), surplus sugar may be exported

to non-member countries subject to licence and with the benefit of refunds which are designed to make good the difference between the price prevailing in the Community and the lower price prevailing on the world market. Article 13 of that regulation states that the issue of an export licence is conditional upon the lodging of a deposit which guarantees that the export will be effected during the period of validity of the licence and which is forfeit in whole or in part if the transaction is not effected, or is only partially effected, within that period.

9 In general terms the system operates by means of standing invitations to tender issued by the Commission in order to determine the refunds on exports of sugar. Tenders are submitted by traders to the national intervention agencies and the successful tenderers are designated by the Commission after it has consulted the Management Committee for Sugar. The tenders must indicate, *inter alia*, the amount of sugar which the tenderer wishes to export and the level of refund which he considers necessary to enable him to sell the sugar on the world market. The Commission is thus able to determine, in the light of the tenders received, the quantities of sugar to release and the appropriate level of refund.

10 Commission Regulation (EEC) No 1880/83 of 8 July 1983, which was adopted pursuant to Council Regulation No 1785/81 and is applicable in the present case, provides in Article 1 that 'there shall be issued a principal standing invitation to tender in order to determine export levies and/or export refunds on white sugar, and during the period of validity of this standing invitation there shall be issued partial invitations to tender'. The various provisions of Regulation No 1880/83 lay down the conditions under which tenderers must submit their tenders, the information which must be included in the tenders, the conditions for the issue of export licences and the detailed rules for the lodging and release of securities.

11 The system set up under Council Regulation No 1785/81 and Commission Regulation No 1880/83, and under Commission Regulation (EEC) No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products, may be divided into three stages. At the first stage the trader submits his tender to the national authority concerned. He must at that

point have lodged a security of 9 ECU per 100 kg of sugar to be exported and must in addition declare that within four days of the acceptance of his tender he will apply for an export licence (Article 5 (3) of Regulation No 1880/83).

12 The second stage begins once the tenderer has been informed that he has been successful. Under Article 12 (b) of Regulation No 1880/83 he is then obliged to apply for an export licence within four days. If he fails to apply for an export licence in time, as occurred in the present case, the security initially lodged is forfeited in respect of the amount of sugar for which no application has been submitted.

13 Article 6 (3) of Regulation No 1880/83, the validity of which is contested, is worded as follows:

'Except in the case of *force majeure*, the security will be released:

(a) ...

(b) To successful tenderers only if they applied for their export licence within the period laid down in Article 12 (b) and only for the quantity in respect of which they have fulfilled the obligation created by that licence, Article 33 of Regulation (EEC) No 3183/80 remaining applicable. The security lodged in respect of a quantity for which the above obligations have not been fulfilled shall be forfeited.'

14 If export licences have been duly applied for, the third stage begins and the security of 9 ECU per 100 kg becomes the security to guarantee the export of the sugar. That export must take place before the end of the fifth calendar month following that in which the invitation to tender was issued. The security is forfeited if export does not take place by that date. The amount of the security may be increased where the price on the world market has varied beyond certain limits, in order to avoid any speculation by traders (Article 13 (3) of Regulation No 1880/83). Finally, if only part of the sugar is exported, the security is released only in proportion to the quantities actually exported, provided that at least 5% of the quantity indicated in the licence has been exported (Article 33 of Regulation No 3183/80).

The reply to be given to the question submitted to the Court

15 Man Sugar contends, primarily, that the obligation to apply for an export licence is not intended to guarantee the primary obligation to export, which is the only fundamental obligation imposed by the abovementioned Community legislation. The obligation to submit such an application has in fact no real justification.

16 In the alternative, Man Sugar maintains that, even if it is accepted that the obligation to apply for an export licence is justifiable, the forfeiture of the entire security for failure to comply with that obligation infringes the principle of proportionality, in particular for the following reasons: the contested regulation unlawfully imposes the same penalty for failure to comply with a secondary obligation — namely, the obligation to apply for an export licence — as for failure to comply with the primary obligation to export the sugar. The obligation to apply for an export licence could be enforced by other, less drastic means than the forfeiture of the entire security and therefore the burden imposed is not necessary for the achievement of the aims of the legislation. The severity of the penalty bears no relation to the nature of the default, which may, as in the present case, be only minimal and purely technical.

17 The United Kingdom submits that, as a result of the new provisions in force since 1981, the short period within which successful tenderers must apply for an export licence no longer performs an essential function in the management of the sugar market. The only remaining functions of the licence are purely administrative in nature, namely to confirm to the Commission the accuracy of the information already given by the trader at the time of his tender and to determine whether the monetary compensatory amounts applicable to the export are to be fixed in advance.

18 The United Kingdom therefore considers that it is possible to replace the present system of rules by other, less strict rules which would continue to ensure that the fundamental objective, namely the export of sugar, is achieved, while reducing the risk to traders represented by the severity of the penalty for unintentional failure to apply for an export licence within the prescribed period.

19 The Commission, on the other hand, considers that the contested provision of Regulation No 1880/83 is valid. It argues in the first place that, with regard to the principle of proportionality, the Court has drawn a distinction between two types of obligation which Community law may impose. According to the Commission, the Court distinguishes between primary obligations, where the legislation requires the performance of some act essential to achieve the aims pursued by the legislation and where failure to comply with the obligation may lead to forfeiture of the entire security, and secondary obligations, essentially of an administrative nature. In the Commission's view, it is clear from the judgments of the Court that it is only the penalty for infringement of such a secondary obligation which must be proportionate to the objective of administrative efficiency sought by the measure in question. In this instance the obligation to apply for an export licence is a primary obligation comparable to the obligation to export.

20 It should be noted that, as the Court held in its judgments of 20 February 1979 (Case 122/78, *Buitoni* v *FORMA*, [1979] ECR 677) and of 23 February 1983 (Case 66/82, *Fromançais SA* v *FORMA*, [1983] ECR 395), in order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalize failure to comply with the secondary obligation as severely as failure to comply with the primary obligation.

21 It is clear from the wording of the abovementioned Council and Commission regulations concerning standing invitations to tender for exports of white sugar, from an analysis of the preambles thereto and from the statements made by the Commission in the proceedings before the Court that the system of securities is intended above all to ensure that the undertaking, voluntarily entered into by the trader, to export the quantities of sugar in respect of which tenders have been accepted is fulfilled. The trader's obligation to export is therefore undoubtedly a primary obligation, compliance with which is ensured by the initial lodging of a security of 9 ECU per 100 kilograms of sugar.

22 The Commission considers, however, that the obligation to apply for an export licence within a short period, and to comply with that time-limit strictly, is also a primary obligation and as such is comparable to the obligation to export; indeed, it is that obligation alone which guarantees the proper management of the sugar market. In consequence, according to the Commission, failure to comply with that obligation, and in particular failure to comply with the time-limit, even where that failure is minimal and unintentional, justifies the forfeiture of the entire security, just as much as the total failure to comply with the primary obligation to export justifies such a penalty.

23 In that respect the Commission contended, both during the written procedure and in the oral argument presented before the Court, that export licences fulfil four separate and important functions:

(i) They make it possible to control the release onto the market of sugar.

(ii) They serve to prevent speculation.

(iii) They provide information for the relevant Commission departments.

(iv) They establish the system of monetary compensatory amounts chosen by the exporter.

24 As regards the use of export licences to control the release onto the world market of exported sugar, it must be noted that the traders concerned have a period of five months within which to export the sugar and no Community provision requires them to export it at regular, staggered intervals. They may therefore release all their sugar onto the market over a very short period. In those circumstances export licences cannot be said to have the controlling effect postulated by the Commission. That effect is guaranteed, though only in part, simply by staggering the invitations to tender.

25 The Commission considers, secondly, that the forfeiture of the entire security for failure to comply with the time-limit for applying for an export licence makes it possible to prevent traders from engaging in speculation with regard to fluctuations in the price of sugar and in exchange rates and accordingly delaying the submission of their applications for export licences.

26 Even if it is assumed that there is a real risk of such speculation, it must be noted that Article 12 (c) of Regulation No 1880/83 requires the successful tenderer to

pay the additional security provided for in Article 13 (3) of the same regulation. The Commission itself recognized at the hearing that that additional security removes any risk of speculation by traders. It is true that at the hearing the Commission expressed doubts about the applicability of Article 13 (3) before export licences have been issued. However, even if those doubts are well founded, the fact remains that a simple amendment of the rules regarding the payment of an additional security, requiring for example that, in an appropriate case, the additional security should be paid during the tendering procedure, in other words, even before the export licence has been issued, would make it possible to attain the objective sought by means which would be much less drastic for the traders concerned. The argument that the fight against speculation justifies the contested provision of Regulation No 1880/83 cannot therefore be accepted.

27 With regard to the last two functions attributed by the Commission to export licences, it is true that those licences make it possible for the Commission to monitor accurately exports of Community sugar to non-member countries, although they do not provide it with important new information not contained in the tenders and do not, in themselves, guarantee that the export will actually take place. It is also true that the export licence makes it possible for the exporter to state whether he wishes the monetary compensatory amounts to be fixed in advance.

28 However, although it is clear from the foregoing that the obligation to obtain export licences performs a useful administrative function from the Commission's point of view, it cannot be accepted that that obligation is as important as the obligation to export, which remains the essential aim of the Community legislation in question.

29 It follows that the automatic forfeiture of the entire security, in the event of an infringement significantly less serious than the failure to fulfil the primary obligation, which the security itself is intended to guarantee, must be considered too drastic a penalty in relation to the export licence's function of ensuring the sound management of the market in question.

30 Although the Commission was entitled, in the interests of sound administration, to impose a time-limit for the submission of applications for export licences, the

penalty imposed for failure to comply with that time-limit should have been significantly less severe for the traders concerned than forfeiture of the entire security and it should have been more consonant with the practical effects of such a failure.

31 The reply to the question submitted must therefore be that Article 6 (3) of Regulation No 1880/83 is invalid inasmuch as it prescribes forfeiture of the entire security as the penalty for failure to comply with the time-limit imposed for the submission of applications for export licences.

Costs

32 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by Mr Justice Glidewell of the Queen's Bench Division of the High Court of Justice by order of 4 July 1984, hereby rules:

Article 6 (3) of Regulation No 1880/83 is invalid inasmuch as it prescribes forfeiture of the entire security as the penalty for failure to comply with the time-limit imposed for the submission of applications for export licences.

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 24 September 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber