JUDGMENT OF THE COURT (First Chamber)

27 April 2006 *

In Case C-27/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Hamburg (Germany), made by decision of 5 January 2005, received at the Court on 27 January 2005, in the proceedings

Elfering Export GmbH

v

Hauptzollamt Hamburg-Jonas,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, K. Lenaerts, E. Juhász (Rapporteur) and E. Levits, Judges,

* Language of the case: German.

Advocate General: C. Stix-Hackl,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 January 2006,

after considering the observations submitted on behalf of:

— Elfering Export GmbH, by O. Wenzlaff and U. Schrömbges, Rechtsanwälte,

— Hauptzollamt Hamburg-Jonas, by S. Plenter, acting as Agent,

— the Commission of the European Communities, by J.C. Schieferer, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 5(4) and 51(2) of Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11, and corrigendum in OJ 1999 L 180, p. 53) ('Regulation No 800/1999').

2 The reference was made in the course of proceedings between Elfering Export GmbH ('Elfering Export') and Hauptzollamt Hamburg-Jonas (Principal Customs Office, Hamburg-Jonas) ('the Hauptzollamt') regarding a penalty which the Hauptzollamt imposed on Elfering Export following an application for an export refund.

Community law

3 Recitals 4, 12, 63 and 64 in the preamble to Regulation No 800/1999 state:

'... within the meaning of this Regulation, the day of export is that during which the customs authorities accept the act by which the declarant shows his willingness to carry out the export of the products for which he seeks the benefit of an export refund; ... such act is intended to draw the attention, and in particular the attention of the customs authorities, to the fact that the operation under consideration is being carried out with the aid of Community funds, in order that those customs authorities shall carry out suitable checks; ... at the time of acceptance, products are placed under customs supervision until their actual export; ... the date serves as a reference for establishing the quantity, nature and characteristics of the product exported;

...

... the arrangements provided for in this Regulation may be accorded only to products which are in free circulation and which are, if appropriate, of Community origin; ...

...

... the Community rules provide for the granting of export refunds on the sole basis of objective criteria, in particular as to the quantity, nature and characteristics of the product exported, and its geographical destination; ... in the light of experience, measures to combat irregularities and notably fraud harmful to the Community budget should be intensified; ... to that end, provision should be made for the recovery of amounts overpaid and sanctions to encourage exporters to comply with Community rules;

...

... to ensure the correct functioning of the system of export refunds, sanctions should be applied regardless of any subjectivity of the fault; ... it is nevertheless appropriate to waive sanctions in certain cases, and notably where there is an obvious error recognised by the competent authority, and to provide harsher sanctions in cases of intent; ... those measures are necessary, and should be proportionate, sufficiently dissuasive, and uniformly applied throughout the Member States'.

4 Article 5 of Regulation No 800/1999 provides that:

'1. "Day of export" means the day on which the customs authorities accept the export declaration stating that a refund is to be applied for.

2. The date of acceptance of the export declaration shall determine:

(a) the rate of refund applicable where the refund is not fixed in advance;

(b) any adjustments to be made to the rate of refund where it is so fixed in advance;

(c) the quantity, nature and characteristics of the product exported.

3. Any other act having the same effect in law as acceptance of the export declaration shall be deemed equivalent to such acceptance.

4. The document used on export to qualify for a refund shall include all information necessary to calculate the refund, and in particular:

(a) for products:

— a description, simplified where appropriate, of the products in accordance with the export refund nomenclature, together with the refund nomenclature code and, where necessary to calculate the refund, the composition of the products concerned or a reference thereto,

— the net mass of the products or, where applicable, the quantity expressed in the unit of measurement to be used when calculating the refund;

(b) in the case of goods, the provisions of Regulation (EC) No 1222/94 shall apply.

...'

5 Article 11 of Regulation No 800/1999 is worded as follows:

'1. Refunds shall be granted only on products which, irrespective of the customs situation regarding the packaging:

— are of Community origin and are in free circulation within the Community, or

— are in free circulation within the Community, or

— are in free circulation within the Community, the refund in this case being limited in amount to the import charge collected at the time of import.

The legislative provisions on the common organisation of the market in the product concerned shall determine the conditions applicable to the product having regard to the first subparagraph.

2. Where the refund is granted on condition that the product is of Community origin, exporters shall declare the origin as defined in the second and third subparagraphs in accordance with the Community rules in force.

For the grant of the refund, products are of Community origin if they are wholly obtained in the Community or if they underwent their last substantial processing or working in the Community in accordance with the provisions of Article 23 or 24 of Regulation (EEC) No 2913/92.

Without prejudice to paragraph 5, products obtained from the following shall not qualify for refund:

— materials originating in the Community, and

— agricultural materials covered by the regulations referred to in Article 1 imported from third countries which did not undergo a substantial processing in the Community.

...

4. Declarations under paragraphs 2 and 3 shall be verified in the same way as the other information in export declarations.

...'

6 Article 51 of Regulation No 800/1999 provides that:

'1. Where it is found that an exporter with a view to the grant of an export refund has applied for a refund exceeding that applicable, the refund due for the relevant exportation shall be that applicable to the products actually exported, reduced by:

(a) half the difference between the refund applied for and that applicable to the actual export;

(b) twice the difference between the refund applied for and that applicable where the exporter intentionally provides false information.

2. The refund applied for shall be deemed to be the amount calculated from the information provided pursuant to Article 5 or 26(2). Where the refund varies according to destination, the differentiated part of the refund applied for shall be calculated using the particulars of quantity, weight, and destination provided pursuant to Article 49.

3. The penalty provided for in point (a) of paragraph 1 shall not apply:

(a) in cases of force majeure;

(b) in exceptional cases where the exporter, on his own initiative, immediately after becoming aware that the refund applied for is excessive, notifies the competent authority thereof in writing, unless the competent authority has informed the exporter that it intends to examine the request or the exporter has otherwise become aware of this intention, or the competent authority has already established that the refund requested was incorrect;

(c) in cases of obvious error as to the refund applied for, recognised by the competent authorities;

(d) in cases where the refund sought is in accordance with Regulation (EC) No 1222/94, and in particular Article 3(2) thereof, and is calculated on the basis of the average quantities used over a specified period;

(e) in cases of weight adjustment in so far as the difference in weight is due to a difference in the weighing method applied.

4. Where the reduction provided for in points (a) and (b) of paragraph 1 results in a negative amount, the exporter shall pay that negative amount.

5. Where the competent authorities establish that the refund applied for is incorrect and that export has not taken place and consequently the refund cannot be reduced, the exporter shall pay the penalty under point (a) or (b) of paragraph 1 which would apply if the export had taken place. Where the rate of refund varies according to destination, the lowest positive rate or, if higher, the rate resulting from the indications as to the destination pursuant to Article 24(2) or 26(4) shall be used to calculate the refund applied for and the refund applicable, except where a compulsory destination is stipulated.

6. Payment under paragraphs 4 and 5 shall be made within 30 days of receipt of the application for payment. Where that time-limit is not met, the exporter shall pay interest at the rate referred to in Article 52(1) on the period commencing 30 days from the date of receipt of the payment demand and ending on the day preceding that of payment of the amount demanded.

7. The penalties shall not apply simply where the refund applied for is higher than the refund applicable pursuant to Articles 4(2), 18(3), 35(2) and/or 50.

8. Penalties shall apply without prejudice to additional penalties laid down at national level.

9. Member States may waive the imposition of penalties of EUR 60 or less per export declaration.

10. Where the product indicated on the export declaration or payment declaration is not covered by the licence, no refund shall be due and paragraph 1 shall not apply.

11. Where the refund has been fixed in advance, the calculation of the penalty shall be based on the refund rates valid on the day on which the licence application is lodged and without taking account of the loss of refund pursuant to Article 4(1) or the reduction of the refund pursuant to Article 4(2) or Article 18(3). Where necessary, those rates shall be adjusted on the day of acceptance of the export declaration or payment declaration.'

7 Article 33 of Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal (OJ 1999 L 160, p. 21) provides that:

'...

6. Refunds shall be granted only on application and on presentation of the relevant export licence.

...

9. The refund shall be paid on proof that:

— the products are of Community origin,

— the products have been exported from the Community

...

10. Without prejudice to paragraph 9 first indent, in the absence of a derogation granted in accordance with the procedure laid down in Article 43, no export refund shall be granted on products which are imported from third countries and re-exported to third countries.

...'

The main proceedings and the question referred for a preliminary ruling

8 By export declaration of 30 August 2000, Elfering Export notified the Hauptzollamt Münster — Zollamt (Customs Office) Coesfeld — of the export to Russia of 6 090.50 kilograms of frozen beef in respect of which it applied for an export refund. In its export declaration, Elfering Export supplied information to the effect that the goods in respect of which the refund was sought originated in Germany.

9 By decision of 24 January 2001, the Hauptzollamt refused to grant the refund applied for, on the ground that the exported goods were not of 'sound and fair marketable quality' within the meaning of Article 21(1) of Regulation No 800/1999. The customs laboratory and training college of the Oberfinanzdirektion (Principal Revenue Office) Hamburg had recorded clearly visible freeze burn in the samples taken from the goods declared.

10 By a further decision of 20 March 2001, the Hauptzollamt imposed on Elfering Export a penalty in the amount of DEM 1 910.41 under Article 51(1)(a) of Regulation No 800/1999, on the ground that the undertaking had applied for an export refund exceeding that applicable.

11 After an unsuccessful appeal, Elfering Export brought an action on 13 March 2003 requesting that the Hauptzollamt be ordered to grant it an export refund and that the penalty notice of 20 March 2001 be annulled.

12 During the proceedings, the Hauptzollamt argued that the fact that Elfering Export had not proved that the goods in respect of which an export refund was sought were of Community origin also precluded that claim. In those circumstances, the national court split up the proceedings by order of 20 December 2004.

13 In the context of the first case, the action was dismissed in so far as it sought an order requiring the Hauptzollamt to grant an export refund. The national court, in its judgment of 20 December 2004, considered that, while the finding of freeze burn in the samples taken from the goods declared did not preclude the claim for a refund

since, in the case in point, that finding did not mean that the goods at issue were not of '[sound] and fair marketable quality', the action had, however, to be dismissed, since Elfering Export had not proved that the products which it had exported were of Community origin.

14 As regards the second case concerning the penalty, which is still pending before the national court, Elfering Export claims that the court should annul the penalty notice, whereas the Hauptzollamt contends that the court should dismiss the action.

15 Since it takes the view that the resolution of the dispute before it requires an interpretation of Community law, the Finanzgericht Hamburg (Finance Court, Hamburg) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is the declaration made in an export declaration that the product in respect of which a refund is sought is of Community origin information to which a penalty may attach under Article 51(2) of Regulation (EC) No 800/99 in conjunction with Article 5(4) thereof?'

The question referred for a preliminary ruling

16 It is apparent from the wording of Article 11 of Regulation No 800/1999 and of Article 33(9) of Regulation No 1254/1999 that, in the beef and veal sector, Community origin is a material condition for export refunds.

17 That conclusion is also clear from an analysis of the scheme of Regulation No 800/1999, as Article 11 thereof is contained in Chapter I of Title II of that regulation, entitled 'Entitlement to refunds'. It is that chapter which lays down the material conditions for entitlement to a refund.

18 In order to meet that material requirement, Community origin must be declared and proved. According to Article 33(9) of Regulation No 1254/1999, the refund is to be paid on proof that the products are of Community origin. It has already been stated by the Court in the context of Article 13 of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187), as last amended by Council Regulation (EC) No 1633/98 of 20 July 1998 (OJ 1998 L 210, p. 17), that context remaining similar as regards the application of Regulation No 1254/1999, which, in accordance with recital 38 in the preamble thereto and Article 49 thereof, consolidates and repeals Regulation No 805/68 as amended, that there is no doubt that that proof must be provided by the exporter (see, to that effect, Case C-309/04 *Fleisch-Winter* [2005] ECR I-10349, paragraph 26).

19 The procedure for verification of export declarations by the national authorities, a procedure provided for in Article 11(4) of Regulation No 800/1999, does not exempt the exporter from the requirement of proving the Community origin of the products. On the contrary, it is that procedure which generally reveals the necessity of seeking such proof from the exporter.

20 As the exporter's obligation to prove Community origin is clear and unambiguous, it must be considered whether or not breach of that obligation gives rise to the penalty provided for in Article 51 of Regulation No 800/1999.

21 It is common ground that Elfering Export stated that the goods in respect of which its refund was sought originated in Germany and that the national court has already found, in a separate decision, that Elfering Export did not prove that the products at issue originated in that Member State or were of Community origin.

22 According to Article 51(1) of Regulation No 800/1999, an exporter is to have a penalty imposed on him if he 'has applied for a refund exceeding that applicable'. Under Article 51(2) '[t]he refund applied for shall be deemed to be the amount calculated from the information provided pursuant to Article 5 or 26(2)'.

23 One of Elfering Export's main arguments is that Article 51(2) of Regulation No 800/1999 refers only to Article 5 of that regulation, Article 26 thereof not being relevant as regards the case in the main proceedings, and not to Article 11, which lays down obligations relating to the origin of the product in respect of which a refund is applied for. It submits that only inaccuracies in the information listed in Article 5(4)(a) of that regulation or, at any rate, only inaccuracies in information relating to the physical characteristics of the product may give rise to a penalty, not incorrect information regarding the origin of the product.

24 That line of reasoning cannot be followed.

25 First of all, it must be noted, as the national court and the Commission of the European Communities pointed out, that the list of information in Article 5(4)(a) of Regulation No 800/1999 is not exhaustive in nature. That has also been held to be the case by the Court, in the context 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 (OJ 1987 L 351, p. 1), a context which remained similar with regard to the application of Regulation No 800/1999, which replaced and repealed Regulation No 3665/87 (see *Fleisch-Winter*, paragraph 29).

26 Article 5(4)(a) of Regulation No 800/1999 requires the exporter to provide all information necessary to calculate the refund; the term 'in particular' means that the Community legislature expressly mentions only some of that information. The content of the expression 'all information' should not be restricted to the physical characteristics of the product, but must encompass all information relating to the conditions subject to which the export refund is granted.

27 As the Commission has rightly observed, the information referred to in that provision is used not only in the mathematical calculation of the exact amount of the refund but rather, and above all, to ascertain whether a right to that refund exists or not. Thus Article 51(1) of Regulation No 800/1999, under which a penalty is imposed where 'an exporter ... has applied for a refund exceeding that applicable', must be interpreted as meaning that the exporter is regarded as having applied for a refund exceeding that applicable not only where an overclaim is detected when the information which he has provided is taken into account, but also where it is established that he is not entitled to a refund, that is to say, that the amount of refund is zero.

28 It must also be pointed out that, as stated in Article 11(4) of Regulation No 800/1999, declarations under paragraphs 2 and 3 of that article, in particular the declaration of Community origin, are to be verified in the same way as the other information in export declarations. That provision confirms that the declaration of Community origin is covered by the same legal rules as that information and, consequently, that failure to comply with the duty to provide information as to the

Community origin of the product at issue is subject to the same rules on penalties as those applicable to a failure to comply with that duty with regard to the information referred to in Article 5(4) of that regulation.

29 Elfering Export is wrong when, referring to the requirement of 'sound and fair marketable quality' laid down in Article 21 of Regulation No 800/1999, it suggests that failure to comply with that requirement likewise does not entail the imposition of a penalty. That requirement together with that of proving the Community origin of the product play a similar role in the scheme of Regulation No 800/1999 and failure to comply with them generally gives rise to the same consequences both as regards the right to a refund and as regards the imposition of a penalty.

30 In *Fleisch-Winter*, the Court has already considered in tandem the questions of the right to a refund and imposition of a penalty with regard to the requirement of 'sound and fair marketable quality' and the conclusions which it reached are uniformly valid in respect of both issues. Although, in that judgment, the Court was not called upon to rule on the merits of a specific right to a refund or penalty applied, that judgment must be interpreted as meaning that if an exporter does not have a right to a refund because of failure to comply with the requirement of 'sound and fair marketable quality', a penalty can be imposed on him unless exemptions are provided for by Community legislation.

31 Lastly, in order to determine the scope of the provisions at issue the aim of Regulation No 800/1999 is of the utmost importance. According to recital 63 in the preamble to that regulation, those provisions are intended to combat irregularities and notably fraud harmful to the Community budget and the penalties are designed to encourage exporters to comply with Community rules.

32 It must be observed that the rules relating to sanctions are aimed at ensuring compliance with 'Community rules' in general and not only with some or specific provisions thereof.

33 The penalties which have to be imposed as a result of non-culpable conduct or intentional acts on the part of an exporter are set out together in Article 51(1) of Regulation No 800/1999. That indicates that the argument that failure by the exporter to comply with Community law requirements not expressly laid down in Article 5(4)(a) of Regulation No 800/1999 but resulting from Article 11 (products not of Community origin) or Article 21 (products not of sound and fair marketable quality) of that regulation should not entail the application of Article 51 of the regulation cannot be followed, as it would lead to the unacceptable outcome that even if the exporter's action were intentional, he would avoid a penalty.

34 In such circumstances, the argument that only inaccuracy in the information expressly mentioned in Article 5(4)(a) of Regulation No 800/1999 should entail a penalty, while failure to comply with the material conditions provided for in Chapter I of Title II of that regulation should not have such a consequence, fails to have regard to the aim of that regulation and would seriously prejudice the effective application of the common agricultural policy. If that line of reasoning were followed, not only irregularities but also fraud would have no consequences under Community law.

35 Having regard to the foregoing considerations, the answer to the question referred must be that the declaration made in an export declaration that the product in respect of which a refund is sought is of Community origin is information to which a penalty may attach under Article 51(2) of Regulation No 800/1999 in conjunction with Article 5(4) thereof.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The declaration made in an export declaration that the product in respect of which a refund is sought is of Community origin is information to which a penalty may attach under Article 51(2) of Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products in conjunction with Article 5(4) thereof.

[Signatures]