OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 11 November 1999 *

I — Legal and factual background to the dispute in the main proceedings and the question referred to the Court under Article 177 of the EC Treaty (now Article 234 EC)

1. By order of 7 April 1998, received at the Court Registry on 12 June 1998, the Bundesfinanzhof asked this Court to give a preliminary ruling on the interpretation of Article 33(1) 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] in conjunction with the first paragraph of Article 29 of Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products. [2] The question raised in these proceedings is the following:

'Is the second paragraph of Article 33(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1997 in conjunction with the first paragraph of Article 29 of Commission Regulation (EEC) No 2220/85 of 22 July 1985 to be interpreted as meaning that the additional amount of 20% of the export refund concerned is to be levied even where the goods placed in customs warehousing with a view to advance payment of the refund pursuant to Article 5 of Council Regulation (EEC) No 565/80 of 4 March 1980 in conjunction with Articles 25 and 26 of Regulation (EEC) No 3665/87 are not exported — as originally planned — but are put back into free circulation in the Community directly following warehousing and the application for payment (Article 29(2) of Regulation (EEC) No 3665/87) is withdrawn?'

2. In essence, the national court is asking the Court to define the precise scope of the duty to make repayment imposed on a trader who, after submitting to the national authorities an application for advance payment of an export refund, withdraws that application before they have given their decision on it in order to return the goods into the customs territory of the Community, but nevertheless receives the advance payment of the export refund originally

* — Original language: Italian.

1 — OJ 1987 L 351, p. 1, as several times amended, in particular for our purposes by Commission Regulation (EEC) No 1615/90 of 15 June 1990 (OJ 1990 L 152, p. 33), Article 1(2) of which reworded the original version of Article 33 of Regulation No 3665/87 'in order to make [it] more intelligible' (see second recital). In accordance with the second paragraph of Article 2 of Regulation No 1615/90, the regulation is to apply to transactions for which the export declaration is accepted by the national authorities as from 1 July 1990 or a later date (see note 9 below).

2 — OJ 1985 L 205, p. 5.

applied for. More specifically, the Bundesfinanzhof seeks to ascertain whether, in the circumstances referred to here, an additional amount of 20% is to be added to the sum which the exporter is required to repay in accordance with Article 33 of Regulation No 3665/87 (see paragraph 6 below) where the sum payable *in respect of the quantity exported* is less than the advance payment.

3. Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products [3] (OJ 1980 L 62, p. 5), as amended by Council Regulation (EEC) No 2026/83 of 18 July 1983 (OJ 1983 L 199, p. 12), provides for and regulates the possibility of facilitating finance for exports by means of the payment of a sum equal to the refund even before the undertaking concerned has produced evidence that the transaction has been duly completed — that is to say, evidence that the goods have left the Community customs territory and been imported into a non-member country — just as soon as the goods intended for export have been brought under the customs warehousing or free zone procedure (see Articles 4 and 5). Since, plainly, advance payment does not alter the conditions which give rise to the trader's entitlement to the refund, the Community legislature has imposed the requirement that the trader should lodge appropriate security. That security ensures that the exporter will reimburse a sum equal to the amount already received, plus an additional amount if it is later established that the right to a refund never in fact came into existence or where the products or goods placed under the warehousing or free zone procedure were not actually exported within the prescribed period (Article 6 of Regulation No 565/80).

4. The detailed rules for the actual application of Regulation No 565/80 were laid down in Title 2, Chapter 3 of Regulation No 3665/87. In order to be eligible for advance payment of the export refund in respect of goods previously stored (or processed), the exporter concerned must lodge with the customs authorities a *payment declaration* containing all the particulars necessary for determining the refund (description of the goods and their net mass and, where necessary, their composition and use or destination, see Article 25). On the other hand, before that declaration is accepted, [4] the exporter is required to lodge security equal to the amount calculated in

3 — OJ 1980 L 62, p. 5 (as amended). In accordance with Article 5(1) of that regulation: 'An amount equal to the export refund shall, at the request of the party concerned, be paid as soon as the products or goods have been brought under the customs warehousing or free zone procedure with a view to their being exported within a set time-limit'. Article 1 of Regulation No 565/80 provides for the regulation to apply *inter alia* to the beef and veal sector subject to the common organisation of the markets introduced by 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), and also lays down general rules for granting export refunds and for fixing their amount as established by Regulation of the Council (EEC) No 885/68 of 28 June 1968 (OJ, English Special Edition 1968(I), p. 237). For the purposes of Regulation No 805/68, the grant of refunds on the export of beef or veal in order to compensate for the difference between world market prices and Community prices is intended to protect Community participation in the international beef and veal market.

4 — Or even afterwards, where the applicable national legislation so permits. The latter must, however, require the exporter to lodge the security within a maximum period of 30 days after acceptance of the payment declaration and before advance payment of the refund is made and must provide for the payment of an additional 20% if the security is not lodged in time, save in case of *force majeure* (Article 31(3)).

accordance with Article 29(3),[5] and any positive monetary compensatory amount, plus 20% (Article 31(1).[6]

5. At the time of acceptance of the payment declaration the goods intended for export are to be placed under customs control until they leave the customs territory of the Community (see Article 26).[7] By virtue of Article 32(1) of Regulation No 3665/87 goods under the customs control or free zone procedure must leave that territory in the unaltered state within 60 days from the date on which they are no longer subject to that procedure, that is to say, at the latest eight months after acceptance of the payment declaration. The goods may remain under a customs warehousing or free zone procedure, even in a Member State other than that in which the declaration was accepted, for a maximum period of 6 months (see Article 28(5) and (6)). The export declaration is to be notified by the undertaking concerned to the authorities of the Member State which accepted the payment declaration by the last day of that six-month period (see Article 30(1)). Actual payment of the refund by the national authorities to the exporter is therefore conditional on presentation of a written application for payment (Article 29(1) and (2)).

6. An export refund, the beneficiary's entitlement to which is subsequently established, is set off against the amount previously paid to the beneficiary, subject to the exporter's right to any balance. In accordance with Article 33(2) of Regulation No 3665/87, the security is released in full where the exporter produces proof that (i) the time-limits laid down in Articles 28(5) and 32(1) have been complied with (see paragraph 5 above) and (ii) the products exported give entitlement to the refund of an amount higher than or equal to that paid to the exporter in advance.

In the other situation (advance payment of an amount greater than that payable in respect of the amount which is actually subsequently exported, especially in the case of non-compliance with the time-limits laid down by Regulation No 3665/87) it is, on the contrary, the trader who must refund the difference, subject to adjustment of the refund by means of the application of a percentage reduction varying in relation

5 — Article 29(3) of Regulation No 3665/87 provides: 'The amount [to be paid in advance of export] shall be calculated by using the rate of refund applicable for the use or destination if that is indicated. In other cases the lowest rate of refund shall be used. The rate used, reduced or increased, as the case may be, by any accession compensatory amounts shall be multiplied by the coefficient fixed pursuant to Article 6(3) of Commission Regulation (EEC) No 3153/85 of 11 November 1985 laying down detailed rules for the calculation of monetary compensatory amounts (OJ 1985 L 310, p.4).'

6 — The 22nd recital in the preamble to Regulation No 3665/87 states that 'reimbursement of the amount paid in advance of export must be made if there proves to be no right to the export refund or if there was a right to a smaller refund; ... the reimbursement must include an additional amount to avoid abuses; ... in case of *force majeure* the additional amount is not reimbursed'.

7 — By virtue of Article 26, the time of acceptance of the payment declaration determines the rate of reimbursement, if the rate has not been fixed in advance. For goods intended for export after being subject to the customs control procedure the result of the scrutiny of the payment declaration or of the goods themselves is to be used for determining the refund, without prejudice to any subsequent verification (Article 28(1) and (2)).

to the length of time by which the operator has exceeded the time-limits. The difference between the amount already paid and the amount actually payable is then increased by 20% (save in cases of *force majeure*, see Article 33(2) and (4)). To that end, in accordance with Article 33(1), the competent authority is to initiate without delay the procedure for forfeiture of the caution laid down in Article 29 of Regulation No 2220/85 (see footnote 2 above).[8]

7. The facts giving rise to this dispute have been described by the national court as follows. In July 1990 LFZ Nordfleisch AG ('Nordfleisch'), the respondent in the main proceedings, applied to the German customs authorities for about 70 tonnes of beef to be placed in storage under customs rules with a view to export. The relevant payment declarations were produced by Nordfleisch on 24, 25 and 27 July 1990. After the security provided for by Article 31 of Regulation No 3665/87 had been lodged, Nordfleisch presented to the customs authorities applications for advance payment of the export refunds for the goods in question on 1 August 1990. However, between 2 and 6 August 1990 Nordfleisch withdrew its applications, having decided not to export the goods but to return them into the customs area of the Community.[9] The company thus requested and received from the German authorities, for each of the applications withdrawn, a copy of information sheet INF 3.[10] However, on 24 August 1990 the Hauptzollamt Hamburg-Jonas ('the Hauptzollamt') also decided to grant Nordfleisch the refunds originally applied for, paying it a total sum of DEM 237 150.02. Lastly, by decision of 6 November 1990 the Hauptzollamt

8 — Article 29 referred to in the text provides: 'Once the competent authority is aware of circumstances giving rise to forfeiture of the security, in whole or in part, it shall without delay demand that the party required to meet the obligation to pay the sum forfeited, allowing up to 30 days from the day of issue of demand for payment. Where payment has not been made at the end of this period, the competent authority shall:

(a) without delay clear any security [lodged in the form of a cash deposit] to the appropriate account;

(b) without delay require the guarantor [who has provided a written guarantee and is approved by the competent authority] to pay, allowing up to 30 days from the day of issue of demand for payment,

(c) without delay take steps to

(i) convert the securities [pledged in the form of: mortgages; recognised claims against a public body or public funds, which are due and payable and against which no other claim has precedence; securities negotiable in the Member State concerned, provided they are issued or guaranteed by that State; or bonds issued by mortgage credit associations, listed on a public stock exchange and for sale on the open market, provided that their credit rating ranks equal with that of government bonds] into money sufficient to recover the sum due,

(ii) clear pledged cash deposits to its own account.

The competent authority may without delay clear any security [in the form of cash] to the appropriate account without first requiring the person concerned to effect payment.'

9 — At the hearing before the Court Nordfleisch's representative stated that the export declarations in issue — all later than 1 July 1990 — were never formally accepted by the German authorities, because of the company's unexpected decision to reintroduce the beef into free circulation. I would observe at this point that, although the declarations were not accepted, it is Article 33 of Regulation No 3665/87, as amended by Regulation No 1615/90 (see section 6 above), which must be applied in the circumstances. I agree with the Commission that the second paragraph of Article 2 of Regulation No 1615/90 (see footnote 2 above) is a provisional measure relating solely to prefinancing procedures already under way on the date on which the measure was published in the *Official Journal* (16 June 1990).

10 — This is the information sheet which exporters are required to produce — in addition to a declaration of entry into free circulation of returned goods presented to a customs office in a Member State other than that of export — for the purposes of eligibility for the procedure provided for by Council Regulation (EEC) No 754/76 of 25 March 1976 on the customs treatment applicable to goods returned to the customs territory of the Community (OJ 1976 L 89, p. 1), in particular where export of the goods in question gave rise at the appropriate time to the completion of customs formalities in respect of the grant of export refunds. At the exporter's request, the custom authorities of the Member State of export issue him with the original and one copy of sheet INF 3 for presentation at the customs office of the State of reimportation (see Commission Regulation (EEC) No 2945 of 26 November 1976 laying down provisions for the implementation of Regulation No 745/76, (OJ 1976 L 335, p. 1), Articles 6(1)(b), 7(1) and 11. Regulation No 2945/76 was repealed, with effect from 1 January 1994, by Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

claimed repayment of that sum and ordered Nordfleisch to pay the additional 20% pursuant to Article 33 of Regulation No 3665/87.

8. Since it did not regard itself as bound to pay the additional sum, Nordfleisch, which on the other hand has no objection to repaying the sum wrongly paid to it by the authorities, challenged the abovementioned decision before the Finanzgericht (Finance Court) Hamburg. Upholding Nordfleisch's action, the Finanzgericht decided that the alteration of the destination of the goods, which is always possible even where the products to be exported have been placed in customs warehousing, implied that the trader had renounced Community financing for the transaction. The declaration that the goods had been returned into the customs territory of the Community therefore wiped out both the obligation to lodge a caution in accordance with Article 31 of Regulation No 3665/87 and, a fortiori, the obligation to pay the additional amount in issue. Moreover, the Finanzgericht considered that that additional sum is intended solely to guarantee flat-rate compensation for the unjustified advantages enjoyed by the exporter as a result of the granting of credit free of charge and is not intended to ensure completion of the customs warehousing procedure with a view to export. The solution here propounded holds good, according to the Finanzgericht, even where, as in this case, the customs authority mistakenly makes advance payment of the refund after the application for payment has been withdrawn.

9. The Hauptzollamt lodged an appeal for cassation of the judgment at first instance with the Bundesfinanzhof, which in contrast declared itself to be inclined to uphold the appeal. According to that court, Article 33(1) of Regulation No 3665/87, in conjunction with the first paragraph of Article 29 of Regulation No 2220/85, must be interpreted having regard not only to the letter of the provisions but also to the objectives pursued. Consequently those rules are, in its view, applicable not only where export has actually taken place, even if after a period other than that stated in the export declaration (see paragraph 5 above), but a fortiori where the obligation to export arising from the acceptance of that declaration has not been fulfilled at all. The Bundesfinanzhof states that it is not possible under the Community legal order by withdrawing the payment declaration to negate the practical effects of placing goods in customs warehousing for export with a view to obtaining a refund. The declaration became definitive once it was accepted by the customs authorities. The exporter's subsequent withdrawal of the application for payment cannot therefore have any effect either, the one act being moreover independent of the other. On the basis of recital 22 in the preamble to Regulation No 3665/87 (see footnote 6), the national court concludes that the purpose of levying

the additional amount in question is not only to ensure repayment of the amount paid in advance and to deprive the trader of the corresponding financial advantage from which he has unjustifiably benefited. Besides, if that were the case, the rate of 20% provided for would be disproportionately high, since a rate just a few points above the applicable bank rate would be sufficient. According to the Bundesfinanzhof, the additional amount in question is also intended to prevent any unfounded claims for advance payment of refunds. The penalty (annulment of the entries made concerning the export in question on the certificate on the basis of which the export ought to have been carried out and forfeiture in whole or in part of the security to the authority which had issued the certificate) provided for in the event of non-performance (save in cases of *force majeure*) of the obligation to export goods placed under customs warehousing during the period of the certificate's validity by Commission Regulation No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products [11] (see Articles 43(1) and (3) and 39(1)(b), second indent) would not be sufficient to achieve that result. According to the Bundesfinanzhof, so far as concerns the penalties provided for the procedure for the issuing of certificates is independent of the procedure for placing goods under customs warehousing. That, in its view, is made quite clear by the fact that Article 33(1) of Regulation No 3665/87 (as amended by Regulation No 1615/90, see footnote 2 above) makes no reference to the provisions of Regulation No 3719/88.

II — Legal analysis

10. The solution I intend to lay before the Court is in substance the same as that proposed by the Commission, the observations of which are to my mind well founded and persuasive. The Commission has examined in abstract the structure of prefinancing for the export of agricultural products, provided for and governed by Regulations No 565/80 and No 3665/87, and has in particular considered the reasons why the Community legislature has required this twofold manifestation of the exporter's intention (he being bound, first, to submit a payment declaration and, second, a written request; see paragraph 4 above). Since the customs authorities already carry out a check of goods placed under customs warehousing and of the relevant payment declaration (see footnote 7 above), the further requirement of an application for payment can be explained only by the purpose of leaving the exporter free to

11 — OJ 1988 L 331, p. 1 (by virtue of Article 1 of Regulation No 3719/88 it is also applicable to beef and veal). As is well known, import and export licences — on the presentation of which, at the time the import or export declaration is accepted, all imports into and exports out of the Community of agricultural products are conditional — are intended to ensure the proper working of the common organisation of the market by putting the competent authorities in a position constantly to follow the changing patterns of trade. Those licences give their holder the *right* to import or export. The issuing of such licences is, however, subject to the lodging of security to guarantee the *undertaking* given to import or export within the period of validity of the licences.

decide *whether, and if so when,* he wishes to receive advance payment of the export refund. The flexibility of the procedure is such as to make it particularly attractive to traders. They have an incentive to use it because they know that they can alter the destination of the goods to be exported even after the payment declaration has been accepted, even after the relevant application has been submitted, at least until the competent authorities have made their decision on that application. I do not, therefore, agree with the Bundesfinanzhof's view that, since the declaration and the application for payment are independent and separate acts, the legal consequences attaching to one have no effect upon the other. On the contrary, I believe that withdrawal of the application must necessarily also extinguish the obligation to provide security in accordance with Article 31 of Regulation No 3665/87 and all the other effects normally entailed by the payment declaration in which the exporter expresses his intention to obtain a refund on condition that he should, in compliance with the detailed rules laid down, actually export the warehoused goods as described in the declaration.

The effect of not applying for payment (or of withdrawing the application) is therefore that, following the normal course of the procedure, the national authorities are neither required nor empowered to make advance payment of the refund. Not by chance, the dispute in the main proceedings arises from the mistake made by the German customs authorities.

11. For the reasons I have set out, I believe that in the present case it is quite impossible to establish any improper or manipulative conduct on the part of Nordfleisch, which simply availed itself of the opportunity to change its mind offered by the system. This finding renders irrelevant the question of whether or not the object of the additional amount in issue is — in addition to preventing the unjust enrichment of the exporter concerned, [12] in so far naturally as such advantage is afforded him at his own request — also to prevent any improper applications for advance payment of refunds, as maintained in the order for reference (see paragraph 9 above).

12 — See Case 288/85 *Plange Kraftfutterwerke* [1987] ECR 611, paragraph 14, and Joined Cases C-5/90 and C-206/90 *Bremer Rolandmühle Erling and Others* [1992] ECR I-1157, paragraph 36, with regard to similar additional amounts of 20% provided for by Commission Regulation (EEC) No 1957/69 of 30 September 1969 on additional detailed rules for granting export refunds on products subject to a single price system (OJ English Special Edition 1969 (II), p. 417) and Commission Regulation (EEC) No 798/80 of 31 March 1980 laying down general rules on the advance payment of export refunds and positive monetary compensatory amounts in respect of agricultural products (OJ 1980 L 87, p. 42) respectively; Regulation No 798/80 repealed Regulation No 1957/69 as from 1 April 1980 and was in its turn repealed by Regulation No 3665/87 as from 1 January 1988. The Court added that having regard to the purpose of the supplement, a rate of 20% as provided for in the regulation could not be regarded as disproportionate, contrary to the view of the Bundesfinanzhof in the present case. The Court stated that 'Since the regulation laid down a standard rate for the whole of the Community, it was appropriate to take account, on the one hand, of the variety of interest rates applied in the Member States and, on the other, of the length of the period which could elapse between the grant of the refund and the actual repayment thereof' (*Plange Kraftfutterwerke*, paragraph 15).

12. If the exporter should decide not to export, after the authorities have decided to grant him the advance refund, he is precluded from withdrawing the application for payment. In such cases, therefore, the provisions referred to in the question referred (including the application of the additional 20%) must be declared to be applicable in their entirety to a trader who does not perform his undertaking to export in return for which he was allowed the prefinancing.

13. To my mind the principle of legality in relation to penalties enshrined in the Court's case-law is also of undoubted relevance for the purposes of this Opinion. From that principle is derived, *inter alia*, the rule prohibiting application by analogy *in malam partem* of provisions creating liability.[13] I would point out that Article 33(1) of Regulation No 3665/87 provides for the procedure for forfeiture of the security to be opened by the competent authorities — in order for the trader to pay the difference between what he is owed and what he has received, plus 20% — where the conditions for granting the Community financing paid to the exporter have not been satisfied. In my opinion, both the actual wording and the *ratio* of that penalty-imposing provision[14] demand the exclusion from its scope of a case such as this, which is so very different from that

13 — See, *ex multis*, the judgment in Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraphs 23 to 26: 'the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable' by the national law implementing a directive, even if only in interpreting the national implementing measures in the light of the wording and objectives of the directive, and the Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 18 June 1996 in the same cases (ECR I-6612, paragraphs 43 to 64).

14 — Application of a flat-rate increase to the repayment of sums paid but not due constitutes, to my mind, a punitive sanction the purpose of which is general deterrence and the essence of which is detrimental to the person infringing the provision. The additional 20% provided for by Article 33 of Regulation No 3665/87 has been explicitly described as a 'penalty' in Case C-263/97 *First City Trading and Others* [1998] ECR I-5537, paragraph 22. Since such penalties do no more than guarantee the effective and proper performance of undertakings voluntarily entered into by economic operators they must, according to the Court, be treated as *specific administrative instruments* intended to ensure the sound financial management of the Community public funds and forming an integral part of the scheme of aid in question based on the notion of solidarity (see Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 26), and may not be equated with penal sanctions (see, *ex multis*, Case 11/70 *Internationale Handelgesellschaft* [1970] ECR 1125, paragraphs 17 to 20, and Case 25/70 *Köster* [1970] ECR 1161, paragraphs 33 and 34). However, the Court's case-law, according to which 'Community legislation must be certain and its application foreseeable by those subject to it ... [in particular] in the case of rules liable to entail financial consequences' (see, *ex multis*, Case 237/86 *Netherlands* v *Commission* [1987] ECR 5251, paragraph 19), is also applicable to non-penal sanctions. I would also observe that the principle of the legality of administrative sanctions was given formal expression by Article 2 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1; see corrigendum in OJ 1998 L 36, p. 16), which provides for non-punitive measures and 'measures which shall not be regarded as penalties'.

expressly envisaged by the Community legislature. Here, advance payment of the refund took place against the will of the recipient, which had in fact informed the authorities in good time of its intention not to export and had withdrawn the application previously submitted. Consequently, the trader is no longer bound by the statements made to the authorities in the payment declaration; moreover, the time-limits laid down in Articles 28(5) and 32(1) of Regulation No 3665/87 (see paragraphs 5 and 6 above), non-compliance with which may give rise to the sanctions consisting of release in part only of the security and of the additional sum payable on the difference, are no longer applicable to it.

14. That a trader given an export licence should remain bound, for the purposes and consequences of Regulation No 3719/88 (see footnote 11), even where the application for payment under Article 29 of Regulation No 3665/87 has been withdrawn before the competent authorities have adopted their decision regarding it, by the obligation to export *voluntarily entered into by him* which must be performed exactly and completely (in particular, during the period of validity of the licence) is quite a different matter. This is, however, an obligation which, as the Bundesfinanzhof points out, subsists without any counterpart linking it to eligibility for financial benefits such as Community prefinancing for exports. It is, rather, bound up with the need to ensure that the authorities entrusted with the management of the common organisation of a market should have available precise forecasts of future commercial transactions. [15]

The Court has, implicitly but clearly, confirmed that the two obligations in question differ in nature, with reference to the securities introduced by the Community legislature in order to secure their performance. The Court has more particularly examined the security provided for by Article 6 of Regulation No 565/80 — the subject of the specific rules for application under Article 31 of Regulation No 3665/87 (see paragraph 4 above) — and the security introduced by 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, [16] to which the present equivalent under the law in force is the security provided for by Regulation No 3719/88 (see paragraph 9 above and footnote 17). In *Maizena* the Court declared that 'the purpose of the two securities at issue is not the same. The function of the security provided for under Article 6 of Regulation No 565/80 is to ensure repayment of the export refund paid in advance if exportation does not take place, and not to guarantee the exportation itself. The security at issue in this case is intended to ensure

15 — Case 808/79 *Fratelli Pardini* [1980] ECR 2103, paragraph 17.

16 — OJ 1980 L 338, p. 1 (repealed by Regulation No 3665/87 as from 1 January 1989).

that the undertaking to export during the validity of the licence will be honoured'. [17] On the basis of the principle of the independence of the risks in question and the corresponding securities, as set out in the case-law cited above, it must be concluded that — where an application for payment made pursuant to Article 29 of Regulation No 3665/87 is withdrawn in good time and the warehoused goods are subsequently re-released into free circulation — it is in keeping with the underlying rationale of the system that the exporter should be penalised by the loss (or non-release) [18] solely of the security intended to ensure that the goods are exported during the period of validity of the licence, and not also of the security intended to ensure that the export refund paid in advance is reimbursed together with the relevant additional amount, since in the circumstances of the case the conditions for implementing the latter security are not satisfied.

15. I therefore conclude, in agreement with the Commission's observations, that in this

17 — See Case 137/85 *Maizena* [1987] ECR 4587, paragraph 22. On the basis of the principle referred to, the Court rejected the plea raised by the plaintiff company, alleging that a double penalty had been inflicted on them in respect of the same facts, contrary to the principle *ne bis in idem*. 'Since, therefore, the purposes of the two securities are completely different, the forfeiture of both of them, even if it is triggered by the same event, cannot be regarded as disproportionate if the different risks in respect of which the securities were lodged actually materialise' (ibid., paragraph 23).

18 — According to whether or not the period of validity of the licence under which the goods are to be exported has expired at the date on which the person concerned demonstrates his intention to have recourse to the system applicable to returned goods. Pursuant to Article 39(1) of Regulation No 3719/88, 'Products which are subject to a system of export licences or which may qualify for a system of advance fixing of refunds or of other amounts applicable on export may qualify for treatment as returned goods under Regulation (EEC) No 754/76 only where the following provisions have been complied with:

...

(b) if export was effected under cover of an export licence or advance fixing certificate and such licence or certificate has not expired on the date on which the party concerned declares his intention to avail himself of the abovementioned returned-goods provisions:
— the entry on the licence or certificate relating to the export in question shall be cancelled, and
— the security relating to the licence or certificate shall not be released in respect of the export in question or, if it has been released, it must be furnished anew in proportion to the quantities concerned to the body which issued the licence or certificate;

(c) if export was effected under cover of an export licence or advance fixing certificate, and the licence or certificate has expired on the date on which the party concerned declares his intention to avail himself of the abovementioned returned-goods provisions, then:
— where the security relating to the licence or certificate has not been released in respect of the export in question, the security shall be forfeit, subject to the rules applicable in the particular case,
— where the security has been released, the titular holder of the licence or certificate shall provide the body which issued the licence or certificate with fresh security in respect of the quantities in question, and that security shall be forfeit, subject to the rules applicable in the particular case.'

case the appellant in the main proceedings not only possesses no legitimate claim to apply the additional amount in issue, but is also obliged to release in full the security lodged by Nordfleisch pursuant to Article 31 of Regulation No 3665/87. The respondent in turn must, in accordance with the national provisions on repayment of sums paid though not due, repay the sum paid to it as advance payment of the export refund.

III — Conclusion

Having regard to the considerations set out above, I propose that the Court should reply as follows to the question referred by the Bundesfinanzhof:

Article 33(1) 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 — as amended by Article 1(2) of Commission Regulation (EEC) No 1615/90 of 15 June 1990 — in conjunction with the first paragraph of Article 29 of Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products, is inapplicable to the situation of an exporter who, having submitted to the competent national authorities an application in accordance with Article 29(2) for advance payment of an export refund in respect of goods placed under customs warehousing, withdraws that application before a decision is taken on it, having decided to return the goods to the Community customs territory, but none the less receives payment of the amount originally applied for. In those circumstances, the national customs authority is obliged to release in full the security lodged by the exporter pursuant to Article 31 of Regulation No 3665/87 and does not possess any legitimate claim to apply the additional amount provided for by Article 33(1). The amount of the advance payment of the export refund paid to the exporter must be reimbursed by the latter in accordance with the national provisions governing repayment of sums unduly paid.