JUDGMENT OF THE COURT (First Chamber)
12 December 1985*

In Case 276/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg for a preliminary ruling in the proceedings pending before that court between

Gebr. Metelmann GmbH & Co. KG, Hamburg,

and

Hauptzollamt Hamburg-Jonas

on the interpretation of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1979,L 317, p. 1) and Commission Regulation (EEC) No 1371/81 of 19 May 1981 laying down detailed rules for the administrative application of monetary compensatory amounts (Official Journal 1981, L 138, p. 1),

THE COURT (First Chamber)

composed of: R. Joliet, President of Chamber, G. Bosco and T. F. O'Higgins, Judges,

Advocate General: P. VerLoren Van Themaat
Registrar: P. Heim

after considering the observations submitted on behalf of:

Gebrüder Metelmann GmbH & Co. KG, the plaintiff in the main proceedings, by Mr Landry, of the Hamburg Bar,

Hauptzollamt Hamburg-Jonas, the defendant in the main proceedings, by Mr Vester,

* Language of the Case: German.

the Government of the Italian Republic, by Arnaldo Squillante, President of Chamber at the Council of State, Head of the Department for Contentious Diplomatic Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, avvocato dello Stato,

the Commission of the European Communities, by Bernhard Jansen, a member of its Legal Department, acting as Agent, assisted by Gerhard Lechleitner, Regierungsrat at the Federal German Ministry of Economic Affairs, Bonn, on secondment to the Commission's Legal Department under an exchange programme between national public servants and Community officials,

after hearing the Opinion of the Advocate General delivered at the sitting on 24 October 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 order of 1 October 1984 which was received at the Court on 21 November 1984, the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty certain questions concerning the interpretation of Article 9 (1) of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products and the interpretation of Commission Regulation (EEC) No 1371/81 of 19 May 1981 laying down detailed rules for the administrative application of monetary compensatory amounts.

2 Those questions were raised in a dispute before that court between Gebrüder Metelmann GmbH & Co. KG (hereinafter referred to as 'Metelmann'), whose registered office is in Hamburg, and the Hauptzollamt [Principal Customs Office] Hamburg-Jonas.

3 In August 1981 Metelmann applied to two German customs offices for clearance in respect of two consignments of milk powder packed in 25 kg sacks for export to Poland, in respect of which the rates of the export refund and of the monetary compensatory amount had been fixed in advance. Following customs clearance, the two consignments of milk powder, which, by virtue of their packaging, fell within subheading 04.02 A II (b) 1 of the Common Customs Tariff, were dispatched to Hamburg free port where a third party to whom they had in the meantime been sold repackaged them, before they left the customs territory of the Community, into 1 kg packs; that brought the goods within tariff subheading 04.02 A II (a) 1 in respect of which, however, the rate of refund applicable was the same.

4 The Hauptzollamt, which had granted Metelmann the export refund and the monetary compensatory amounts fixed in advance, subsequently demanded repayment of the sums in question on the grounds that, according to Article 9 (1) of Regulation No 2730/79, the refund was to be paid only upon proof that the product in respect of which customs export formalities had been completed had 'left the geographical territory of the Community unaltered', that the same requirement was applicable with regard to the payment of monetary compensatory amounts and that the consignments at issue did not fulfil the abovementioned condition because they had been repackaged.

5 Metelmann lodged an objection which was unsuccessful; it then brought an action before the Finanzgericht Hamburg, which stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 9 (1) of Commission Regulation (EEC) No 2730/79, which provides *inter alia* that export refunds are to be paid only if the product in question has left the geographical territory of the Community "unaltered", to be interpreted as meaning that an alteration in the product's presentation (such as repackaging into smaller units) entails forfeiture of the export refund, where such alteration brings the product within a different tariff subheading, even though the rate of refund applicable under the regulation fixing the export refunds is the same for both subheadings?

(2) If not, where the product's presentation is altered between the time of completion of customs export formalities and its departure from the territory of the Community, is the refund to be paid at the rate fixed in advance or at the rate applicable at the time of completion of customs export formalities?

(3) Are the interpretations requested in Questions 1 and 2, or one of them, to be applied to the relevant monetary compensatory amounts by an analogous interpretation of Commission Regulation (EEC) No 1371/81 of 19 May 1981, notwithstanding that the regulation, and in particular Article 7 (4) and Article 16 (2) thereof, lay down no express requirement that the product must be unaltered on exportation?'

6 Written observations were submitted by Metelmann, the Hauptzollamt Hamburg-Jonas, the Government of the Italian Republic and the Commission of the European Communities.

7 As regards Question 1, Metelmann considers that Article 9 of Commission Regulation No 2730/79 does not strictly prohibit any alteration in the presentation of the goods, in particular where such alteration does not affect the rate of refund. A prohibition of that kind would be contrary to the principle of proportionality if its sole purpose were to facilitate customs control. Moreover, there is no need to treat this case differently from that of goods subject to the customs warehousing or free zone procedure, in respect of which certain operations, such as change of packings, are expressly permitted by Article 4 (5) of 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 (Official Journal 1980, L 87, p. 42); paragraph 5 was added to Article 4 of that regulation by Article 2 (1) of Commission Regulation (EEC) No 2674/80 of 17 October 1980 (Official Journal 1980, L 274, p. 11). Accordingly, in Metelmann's view, repackaging of the goods in different units does not entail forfeiture of the refund, at any rate if the rate of refund remains the same.

8 The Hauptzollamt, the Government of the Italian Republic and the Commission suggest, for their part, that the answer to the question should be that an alteration in the presentation of the goods, in this case repackaging in different units, entails forfeiture of the refund. The Hauptzollamt lays emphasis on the need for effective customs control. The Government of the Italian Republic considers that any alteration in the presentation which is such as to entail a change in the tariff classification of the goods affects the equivalence of the altered product with the product declared for export and is therefore relevant for the purpose of determining whether the exporter is to forfeit the refund. The Commission points out that the Community legislature, when it provided that certain operations were to be permitted without affecting entitlement to the refund, considered it necessary to grant express authorization, as in the case of Article 1 (1) of Regulation No

2674/80 which amended Article 9 of Regulation No 2730/79 in order to permit goods to be frozen.

9 In order to answer the question submitted, it should in the first place be noted that Regulation No 798/80 does not, contrary to the view expressed by Metelmann, authorize products subject to the customs-warehousing or free-zone procedure to be altered by, for example, being repackaged in different units. The expression 'change of packings' which is included in the list of authorized operations set out in that regulation is also to be found in Article 1 (8) of Council Directive 71/235/EEC of 21 June 1971 on harmonization of the provisions laid down by law, regulation or administrative action relating to the usual forms of handling which may be carried out in customs warehouses and in free zones (Official Journal, English Special Edition 1971 (II), p. 398) alongside the phrase 'decanting and simple transfer into other containers'. The reference to the latter phrase, which moreover is unlikely to include decanting or transfer into containers of different dimensions, would be entirely redundant if the view were to be taken that 'change of packings' also includes repackaging in different units.

10 Accordingly, it is necessary to establish whether the interpretation of Article 9 (1) of Regulation No 2730/79 to the effect that an alteration in the presentation of the goods is always such as to entail forfeiture of the refund is incompatible with the principle of proportionality, at least where such alteration does not affect the rate of refund and consequently does not seem to exert any influence on the system of refunds.

11 In that regard, it must be emphasized that in view of the substantial volume of goods exported from the Community every year which qualify for a refund, it is virtually impossible to check whether the goods leaving the Community are the same as those which were the subject of a customs declaration other than on the basis of the packaging and the dimensions of the goods. Effective supervision is essential to ensure the proper functioning of the system of refunds, inasmuch as the refunds actually due can be paid only if the goods leaving the Community are properly identified.

12 Moreover, that conclusion is supported by Regulation No 798/80 which, by actually indicating the operations which may be carried out without affecting entitlement to the refund, clearly demonstrates that they are alterations which in no way serve to render customs control more difficult.

13 The principle of proportionality does not therefore preclude it being held that any alteration in the presentation of the goods entails forfeiture of the refund, where it is such as to render customs control more difficult and, for that reason, is likely to affect the proper functioning of the system of refunds.

14 The answer to Question 1 must therefore be that Article 9 (1) of Regulation No 2730/79, which provides that the export refund is to be paid on condition that the goods have left the geographical territory of the Community 'unaltered', must be interpreted as meaning that any alteration in the presentation of the goods, where it is such as to render customs control more difficult, entails forfeiture of the refund.

15 In the light of the answer given to Question 1, it is appropriate to answer Question 2 for cases in which, exceptionally, customs formalities may be completed anew after goods have left the geographical territory of the Community, where the formalities previously completed have become devoid of purpose as a result of the alterations made to the goods.

16 For such eventualities, it is necessary to determine the reference date for fixing the rate of the refund.

17 Only the Commission has considered the possibility of again completing customs export formalities after the event. In its view, in such cases the reference date for fixing the rate of refund should be that on which the product actually left the Community, since the previous customs formalities will have become devoid of purpose as a result of the alterations made to the product after the completion of those formalities.

18 In that regard, it must be remembered that the purpose of the refund is to offset the difference between Community prices and world market prices. Where, exceptionally, customs export formalities are completed anew after the goods have left the geographical territory of the Community, it is no longer possible to take into account the prices which those goods would have fetched on the Community market; consequently, the date on which they leave the geographical territory of the Community must also be regarded as the time after which it is no longer possible to calculate the difference between Community prices and world prices. If

the rate of refund were to be fixed by reference to the prices applying on the date when the customs export formalities were completed anew after the goods had left the Community, it would no longer bear any relation to the purpose of the refund and would necessarily be of an arbitrary nature. That conclusion is inescapable, especially as in those circumstances the exporter would be able to choose, when completing the customs formalities again, a date on which the rate of refund is more favourable.

19 The answer to Question 2 must therefore be that where, exceptionally, customs export formalities may still be completed after the date on which the goods have left the geographical territory of the Community, the refund is to be fixed at the rate applicable on that date.

20 In Question 3, the Finanzgericht seeks to ascertain whether the answers given to the first two questions are applicable to the payment of monetary compensatory amounts, although Article 7 (4) and Article 16 (2) of Regulation No 1371/81 lay down no express rules concerning the export of goods unaltered.

21 All the parties who have submitted observations suggest that this question should be answered in the affirmative, with the exception of Metelmann which argues that if the view is taken that any alterations in the presentation of the goods entail forfeiture of the refund, it should be borne in mind that Regulation No 1371/81 does not contain any provision which makes the payment of monetary compensatory amounts conditional on the exportation of the goods unaltered.

22 It is clear from Article 2 of Commission Regulation (EEC) No 243/78 of 1 February 1978 providing for the advance fixing of monetary compensatory amounts (Official Journal 1978, L 37, p. 5), which was applicable at the time of the events which gave rise to these proceedings, that monetary compensatory amounts may be fixed in advance only if the levies and refunds are also fixed in advance. Accordingly, forfeiture of the refund fixed in advance also entails forfeiture of the monetary compensatory amounts fixed in advance.

23 With regard to the date which is relevant for the purpose of fixing the rate of the monetary compensatory amounts in the event of the completion of customs formalities after the goods have left the Community, it should be noted that Article 5 (4) of Commission Regulation (EEC) No 1372/81 of 19 May 1981 laying down detailed rules for the calculation of monetary compensatory amounts (Official Journal 1981, L 138, p. 14) provides that the monetary coefficient which,

according to Article 5 (2) (b) of that regulation, applies to the export refunds and levies in trade with non-member countries is to be derived from the percentage used to calculate the monetary compensatory amounts. It follows that reference may not be made to different dates for fixing the rate of the monetary compensatory amounts, on the one hand, and the rate of the refund, on the other.

24 Accordingly, the answer to Question 3 must be that the answers given to the first two questions also apply to the payment of monetary compensatory amounts under Regulation No 1371/81.

Costs

25 The costs incurred by the Government of the Italian Republic and by 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 on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Finanzgericht Hamburg, by order of 1 October 1984, hereby rules:

(1) Article 9 (1) of Regulation (EEC) No 2730/79, which provides that the export refund is to be paid on condition that the goods have left the geographical territory of the Community 'unaltered', must be interpreted as meaning that any alteration in the presentation of the goods, where it is such as to render customs control more difficult, entails forfeiture of the refund.

(2) Where, exceptionally, customs export formalities may still be completed after the date on which the goods have left the geographical territory of the Community, the rate of refund to be applied is that applicable on that date.

(3) The answers given to the first two questions also apply to the payment of monetary compensatory amounts under Regulation (EEC) No 1371/81.

Joliet Bosco O'Higgins

Delivered in open court in Luxembourg on 12 December 1985.

P. Heim
Registrar

R. Joliet
President of the First Chamber