JUDGMENT OF THE COURT (Third Chamber)

28 June 2007 *

In Case C-1/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Hamburg (Germany), made by decision of 15 December 2005, received at the Court on 3 January 2006, in the proceedings

Bonn Fleisch Ex- und Import GmbH

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, U. Lõhmus, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2006,

after considering the observations submitted on behalf of:

— Bonn Fleisch Ex- und Import GmbH, by K. Landry, Rechtsanwalt,

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

— the Greek Government, by I. Chalkias and S. Papaioannou, acting as Agents,

— the Commission of the European Communities, by F. Erlbacher, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 47(3) 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), as amended by Commission Regulation (EC) No 2955/94 of 5 December 1994 (OJ 1994 L 312, p. 5) ('Regulation No 3665/87').

2 The reference was made in the course of proceedings between Bonn Fleisch Ex- und Import GmbH ('Bonn Fleisch') and Hauptzollamt Hamburg-Jonas (Principal Customs Office, Hamburg-Jonas, 'the Hauptzollamt') concerning the repayment of export refunds demanded by the Hauptzollamt.

Legal context

Community legislation

Regulation (EEC) No 3566/92

3 In accordance with Article 2 of Commission Regulation (EEC) No 3566/92 of 8 December 1992 on the documents to be used for the purpose of implementing Community measures entailing verification of the use and/or destination of goods (OJ 1992 L 362, p. 11):

'Where implementation of a Community measure is subject to proof that the conditions prescribed by that measure as to the use and/or destination of goods imported into, exported from, or moving within the Community have been complied with, such proof shall be furnished by production of Control Copy T 5. ...'

Regulation No 3665/87

4 According to the 50th recital in the preamble to Regulation No 3665/87:

'... it may happen that by reason of circumstances beyond the control of the exporter the control copy cannot be produced although the product has left the customs territory of the Community or has reached a particular destination; ... such a situation may impede trade; ... in such circumstances other documents should be recognised as equivalent'.

5 Article 3(5) of Regulation No 3665/87 reads as follows:

'The document used for export to enable products to qualify for a refund must include all information necessary for the calculation of the amount of the refund, and in particular:

(a) a description of the products in accordance with the nomenclature used for refunds;

(b) the net mass of the products or, where applicable, the unit of measurement to be taken into account in calculating the refund; and,

(c) in so far as is necessary for calculating the refund, particulars of the composition of the products or the relevant reference.

If the document mentioned in this paragraph is the export declaration, this document must also include these references and the reference *refund code*.'

6 Under Article 4(1) of that regulation:

'Without prejudice to the provisions of Articles 5 and 16, the refund shall be paid only upon proof being furnished [that] the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state.'

7 Article 6 of the regulation provides that if, before leaving the customs territory of the Community, a product for which the customs declaration has been accepted crosses Community territory other than that of the Member State where that declaration was accepted, proof that the product has left the customs territory of the Community is to be furnished by production of the original of the T 5 control copy referred to in Article 2 of Regulation No 3566/92.

8 Article 18(1) of Regulation No 3665/87 provides:

'Proof that the product has been cleared through customs for release for consumption shall be furnished by production of:

(a) the relevant customs document or a copy or photocopy thereof; ... or

(b) a certificate of unloading and release for consumption drawn up by an international control and supervisory agency approved by a Member State. The date and number of the customs document of release for consumption must appear on the certificate concerned.

(c) any other document endorsed by the customs authorities of the non-member country concerned which identifies the products and shows that they have been released for consumption in that country.'

9 Article 47 of Regulation No 3665/87 provides:

'1. The refund shall be paid only on application by the exporter and shall be paid only by the Member State in whose territory the export declaration was accepted.

Application for the refund shall be made either:

(a) in writing; Member States may prescribe a special form to be used for this purpose;

or

(b) using computerised systems, in accordance with detailed rules to be adopted by the competent authorities and after approval by the Commission.

...

2. Except in cases of force majeure, the documents relating to payment of the refund or release of the security must be submitted within 12 months following the date of acceptance of the export declaration.

3. Where the T 5 control copy referred to in Article 6 is not returned to the office of departure or relevant centralising body within three months of its issue owing to circumstances beyond the control of the exporter, the latter may submit to the competent agency a reasoned request that other documents be regarded as equivalent.

The supporting documents to be submitted with the request must include:

(a) where a control copy has been issued to furnish proof that the products have left the customs territory of the Community:

— the transport document, and

— a document which shows that the product has been presented at a customs office in a third country or one or more of the documents referred to in Article 18(1), (2) and (4).

...

The provisions of paragraph 4 shall apply for the production of equivalent proof.

4. Where the documents required under Article 18 cannot be submitted within the period referred to in paragraph 2, although the exporter has acted with all due diligence to obtain them and communicate them within such period, he may be granted further time for the production of these documents.

5. Requests for the treatment of other documents as equivalent, as referred to in paragraph 3, whether or not supporting documents are attached, and requests for extension of time referred to in paragraph 4 must be submitted within the period referred to in paragraph 2.

...'

Regulation (EC) No 800/1999

10 Regulation No 3665/87 was repealed and replaced by 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). Regulation No 800/1999 entered into force on 24 April 1999 and applies from 1 July 1999. However, under the first indent of Article 54(1) of that regulation, Regulation No 3665/87 continues to apply to exports covered by export declarations accepted before 1 July 1999.

National legislation

11 In German law, the Community provisions on export refunds were taken up in the Ausfuhrerstattungsverordnung (Export Refund Regulation) of 24 May 1996 (BGBl. 1996 I, p. 766, 'the AEVO').

12 Paragraph 3 of the AEVO prescribes the use, as the document for the purposes of Article 3(5) of Regulation No 3665/87, of the uniform document notified by the Federal Finance Ministry for that purpose in the official gazette of the Federal Finance Ministry (Federal Finance Administration) as 'Export declaration (additional page) for Community export refunds' (export declaration for refund purposes).

13 Paragraph 4 of the AEVO reads as follows:

'1. Confirmation that the consignment of goods has left the customs territory of the Community (exit confirmation) shall be given in the export declaration for refund purposes by the customs office of exit ... within the territory in which this regulation applies.

2. In the case of consignments of goods for which the export declaration has been accepted in another Member State of the European Union, the exit confirmation shall be given in the T 5 control copy by the competent customs office of exit within the territory in which this regulation applies.'

The main proceedings and the reference for a preliminary ruling

14 In 1998 Bonn Fleisch exported beef and veal directly from Germany to Russia after first placing it in customs warehousing and receiving, on application, advance payment of the export refunds.

15 After presenting the export declaration to the Hauptzollamt Bremen (Principal Customs Office, Bremen) on 8 April 1998, Bonn Fleisch on 13 July 1998 sent the defendant Hauptzollamt the transport document, endorsed with confirmation of clearance by the railway station of departure dated 9 April 1998, and the Russian import document, which gave 20 May 1998 as the date of release into free circulation. At the same time Bonn Fleisch requested release of the securities.

16 After the Hauptzollamt informed Bonn Fleisch by telephone on 21 July and 18 November 1999 that it had not received the export declaration with confirmation of export by the customs office of exit, by four notices of 23 June 2000 it required repayment of the export refunds which had been paid in advance to Bonn Fleisch, together with a supplement of 20%, on the ground that Bonn Fleisch had not produced proof that the products had been exported outside the customs territory of the Community within the period of 60 days prescribed in Article 4(1) of Regulation No 3665/87 by presenting the export declaration with confirmation of export.

17 In the objection procedure seeking annulment of those notices, Bonn Fleisch argued in particular that the export declaration was automatically forwarded to the Hauptzollamt internally within the customs administration. Regulation No 3665/87 did not impose an obligation on the exporter to produce the export declaration to the Hauptzollamt. In any event, Bonn Fleisch referred to a letter of the Hauptzollamt Stralsund (Principal Customs Office, Stralsund) of 2 November 2000 stating that the copy of the export declaration intended for the defendant Hauptzollamt had been posted by the Zollamt Mukran (Customs Office, Mukran).

18 According to the information provided to the Court at the hearing, that copy of the export declaration was sent to the Hauptzollamt within the 12-month laid down in Article 47(2) of Regulation No 3665/87. However, it is not in the administrative file of the Hauptzollamt, either because it was never received or because it was lost by that authority.

19 Bonn Fleisch stated by letter of 2 November 2000 that it had submitted to the Hauptzollamt by letter of 13 July 1998, which was within the 12-month period laid down in Article 47(2) of Regulation No 3665/87, the transport document and the Russian import document. It argues that the submission of those documents impliedly constitutes, should the export declaration be missing from the Hauptzollamt's file, an application for them to be regarded as proof of the export of the products from the customs territory of the Community.

20 In that letter of 2 November 2000, Bonn Fleisch also applied, expressly, for the transport document and the Russian import document it had sent to the Hauptzollamt by letter of 13 July 1998 to be accepted as equivalent in accordance with Article 47(3) of Regulation No 3665/87:

21 The Hauptzollamt rejected that application as out of time by decision of 13 December 2001, on the basis of Article 47(5) of Regulation No 3665/87. It also observed that Bonn Fleisch's letter of 13 July 1998 could not be regarded as an application for the documents to be accepted as equivalent, since that required an express application and the Hauptzollamt was not entitled to recognise documents as equivalent of its own motion.

22 Bonn Fleisch brought proceedings in the Finanzgericht Hamburg (Finance Court, Hamburg) on 20 March 2003 against the decisions of the Hauptzollamt dismissing its objections.

23 The Finanzgericht Hamburg finds that, where a product for which an export declaration has been accepted crosses Community territory other than that of the

Member State on whose territory the declaration was accepted before leaving the customs territory of the Community, Article 6 of Regulation No 3665/87 provides that proof that the product has left the customs territory of the Community must be furnished by production of the original of the T 5 control copy. It observes, by contrast, that in the case of direct export as in the main proceedings, the legislature has not regulated the way in which proof is to be furnished that the products have been exported from the customs territory of the Community, so that national law applies, in this case Paragraph 4(1) of the AEVO.

24 The national court notes that under the first indent of Article 49(3) of Regulation No 800/1999, which replaced Regulation No 3665/87, the exporter may submit to the competent agency a reasoned request for other documents to be deemed equivalent if the T 5 control copy, or, where appropriate, the national document proving exit from the customs territory of the Communities, is not returned to the office of departure or the central body within three months of issue owing to circumstances beyond the control of the exporter. Since Regulation No 800/1999 merely rephrased for reasons of clarity the wording used in Article 47(3) of Regulation No 3665/87, no importance should be attached, in the national court's opinion, to the fact that the latter provision mentions only the T 5 control copy and not the national document proving exit of the products from the customs territory of the Community.

25 The national court finds that the main proceedings are characterised by the fact that, while the export declaration prescribed by Article 4 of Regulation No 3665/87 was not returned to the Hauptzollamt within the 12-month period laid down in Article 47(2) of that regulation, Bonn Fleisch nevertheless sent the Hauptzollamt, within that period, the transport document and the Russian import document. Those documents could, in its view, constitute equivalent proof for the purposes of Article 47(3) of Regulation No 3665/87. It considers that in certain circumstances to be defined the competent authorities may of their own motion regard documents as equivalent. The fact that, according to the preamble to Regulation No 3665/87,

Article 47(3) was included in the interests of exporters speaks for that interpretation. It would scarcely be compatible with the objectives of the common organisation of the markets to refuse to pay refunds or release securities on the ground that a mere formality, namely an express request for documents to be recognised as equivalent, has not been complied with.

26 As to whether a request for documents to be regarded as equivalent may be made implicitly or as a precaution, the national court acknowledges that the obligation to make an express request makes it easier for the competent authorities to check that the time-limit has been complied with. However, it is possible to ascertain whether a request has been made in time even if it has been made only implicitly or as an ancillary point, since the exporter must have made the request to the competent authority in some form or other. In the national court's view, what matters is whether the exporter's intention to prove that the products were duly exported from the customs territory of the Community is clear in the circumstances of the particular case.

27 Since it considered that the case before it raised questions of the interpretation of Community law, the Finanzgericht Hamburg decided to stay the proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(1) Is the competent office entitled and obliged of its own motion to regard other documents as equivalent under Article 47(3) of Regulation No 3665/87?

(2) Can a request for other documents to be regarded as equivalent under Article 47(3) of Regulation No 3665/87 also be made by implication and as a precaution?'

The questions referred for a preliminary ruling

28 By its questions, which should be examined together, the national court essentially asks whether the competent national authorities dealing with export refunds may or must consider of their own motion whether documents are equivalent under Article 47(3) of Regulation No 3665/87, and whether a request for documents to be regarded as equivalent pursuant to that provision may be made implicitly.

29 Regulation No 3665/87, one of whose objectives is to combat irregularities and fraud detected in the area of export refunds, contains substantive and procedural rules concerning the obtaining of export refunds (see Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 60, and Case C-385/03 *Käserei Champignon Hofmeister* [2005] ECR I-2997, paragraph 26).

30 The substantive rule in Article 4(1) of Regulation No 3665/87 provides that payment of the refund is subject to proof being furnished that the products for which the export declaration has been accepted have, within 60 days from the date of that acceptance, left the customs territory of the Community in the unaltered state. In the absence of that proof, the refund is not to be paid.

31 Article 47 of Regulation No 3665/87, which appears in Title 4, 'Procedure for payment of the refund', sets out the procedural rules which the exporter must observe in order to obtain payment of the refund.

32 Article 47(3) provides that, where the T 5 control copy referred to in Article 6 of Regulation No 3665/87 is not returned to the office of departure or the centralising body within three months of its issue as a result of circumstances beyond the control of the exporter, he may submit to the competent agency a reasoned request that other documents be regarded as equivalent. By that request, the exporter produces equivalent documents to prove that the products concerned have left the customs territory of the Community as required by Article 4 of that regulation.

33 However, it is apparent from the wording of Article 6 of Regulation No 3665/87, to which Article 47(3) of that regulation refers, that it is only for a product that before leaving the customs territory of the Community crosses territory other than that of the Member State on whose territory the export declaration was accepted that proof that the product has left the customs territory of the Community is furnished by production of the T 5 control copy.

34 It follows that Article 47(3) of Regulation No 3665/87 is not applicable, as the Commission rightly submitted, to the direct export of products such as that at issue in the main proceedings. That provision does not concern requests for documents to be regarded as equivalent which are made because of the loss of the national document proving, in the case of direct export, that the products concerned have left the customs territory of the Community.

35 That provision of Regulation No 3665/87 applies only to the indirect exports referred to in Article 6 of that regulation. It is Regulation No 800/1999 which expressly provides that a request for documents to be regarded as equivalent may be made where the T 5 control copy in the case of indirect export or, where appropriate, the national document proving exit of the products from the customs territory of the Communities in the case of direct export is not returned to the office of departure or the centralising body within three months of issue.

36 That regulation only applies from 1 July 1999, however, so that Article 47(3) of Regulation No 3665/87 remains applicable to exports, such as those at issue in the main proceedings, for which the export declarations were accepted before that date.

37 In the absence of Community legislation specifying, for direct exports, the document which the exporter must produce as proof that the products for which the export declaration has been accepted have left the customs territory of the Community in the unaltered state, it is for the Member States to determine which document the exporter must produce in support of an application for payment of a refund.

38 The documents in the case show that, in German law, under Paragraph 4(1) of the AEVO, confirmation that a consignment of goods has left the customs territory of the Community is given by the customs office of exit in the export declaration for refund purposes in the territory in which the AEVO applies.

39 According to the information available to the Court, that provision does not provide, at least not expressly, for the exporter to be able to produce equivalent proof in order to be paid the export refund.

40 However, the requirement of the proper functioning of the Community system of refunds cannot allow Member States to obstruct the aims pursued by Regulation No 3665/87 or breach the principles of Community law, in particular the principle of proportionality.

41 While in the case of direct export, in the absence of Community legislation on the point, the detailed procedural rules intended to safeguard the rights which individuals derive from Community law fall within the internal legal order of the Member States by virtue of the principle of procedural autonomy of the Member States, they must, however, not be less favourable than those governing similar domestic situations (principle of equivalence) or render impossible in practice or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Joined Cases C-430/03 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, paragraph 17, and Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 52).

42 In those circumstances, the national authorities competent for export refunds, when handling a case such as that at issue in the main proceedings, in which the national document certifying that the products in question have left the customs territory of the Community cannot be produced for reasons outside the control of the exporter, must none the less assess of their own motion the adequacy of the information or documentation produced by the exporter, having regard to the scheme and to the spirit and purpose of Regulation No 3665/87.

43 As to the purpose of that regulation, the 50th recital in the preamble and Article 47(3) of the regulation make it clear that the Community legislature intended to provide in certain circumstances for the exporter to be able to establish by equivalent proof that the products have left the customs territory of the Community.

44 By providing for a certain flexibility in the procedural rules applicable to the production of the proof that the exporter must provide in order to be paid the refund, Regulation No 3665/87 takes into consideration the fact that exporters are liable to encounter difficulties in obtaining customs documents from the competent authorities, on whom they have no means of exerting pressure (see, to that effect,

Case C-467/01 *Eribrand* [2003] ECR I-6471, paragraph 41), and the fact that the loss of the documents required by that regulation for obtaining a refund is sometimes attributable to those authorities.

45 It is common ground, as is apparent from paragraph 18 above, that the loss or disappearance of the export declaration required by the German legislation to prove that the products concerned left the customs territory of the Community was not attributable to Bonn Fleisch.

46 It is also apparent from the scheme and spirit of Regulation No 3665/87, in particular the provisions of Article 47, that the regulation aims not automatically to deprive a diligent exporter of the refunds provided for by the Community legislation where, despite having made every effort required of him, the exporter is unable to produce the documents required for the export refund to be paid, because those documents have been lost as a result of circumstances beyond his control (see, by analogy, with reference to Article 47(4) of Regulation No 3665/87, Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 148).

47 Where, then, an application has been made for payment of an export refund under Article 47(1) of Regulation No 3665/87 and, as a result of circumstances beyond the exporter's control, the national export document proving that the products in question have left the customs territory of the Community cannot be produced, the national authorities competent in matters of export refunds must, in accordance with the objectives pursued by Regulation No 3665/87, of their own motion take account of equivalent means of proof and of requests made by implication for documents to be treated as equivalent.

48 Those means of proof, which may, in the same way as provided for in Article 47(3) of Regulation No 3665/87, include both the transport document and the import document of a non-member country relied on by Bonn Fleisch in the main proceedings, must nevertheless be just as satisfactory for the purpose of the verification in accordance with the detailed rules laid down by national law, provided that those rules respect the scope and effectiveness of Community law (see, to that effect, with reference to Commission Regulation (EC) No 1222/94 of 30 May 1994 laying down common detailed rules for the application of the system of granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds (OJ 1994 L 136, p. 5), as amended by Commission Regulation (EC) No 229/96 of 7 February 1996 (OJ 1996 L 30, p. 24), Case C-120/95 *Heinrich Schulze* [2006] ECR I-10717, paragraph 26).

49 It should also be noted that, as a general rule, in accordance with Article 47(2) of Regulation No 3665/87, those equivalent means of proof, like all other documents submitted to obtain payment of a refund or release of a security, must, except in the case of force majeure, be lodged within 12 months from the date of acceptance of the export declaration.

50 Where, however, the passing of the deadline for furnishing equivalent proof is attributable to the competent national authorities, the national document proving that the products have left the customs territory of the Community having been lost or mislaid by them, they cannot rely on the 12-month period as against a diligent exporter.

51 In those circumstances, the answer to the questions referred for a preliminary ruling must be that Article 47(3) of Regulation No 3665/87 does not apply to the direct export of products.

Where, however, as a result of circumstances beyond the control of the exporter, the national export document proving that the products in question have left the customs territory of the Community cannot be produced, the national authorities competent for export refunds must, in accordance with the objectives of Regulation No 3665/87, take into account of their own motion equivalent means of proof and implied requests for documents to be treated as equivalent. Those means of proof must nevertheless be just as satisfactory for the purpose of the verification in accordance with the detailed rules laid down by national law, provided that those rules respect the scope and effectiveness of Community law.

Where the passing of the deadline for furnishing equivalent means of proof is attributable to the competent national authorities, they cannot rely on the 12-month period laid down by Article 47(2) of Regulation No 3665/87 as against a diligent exporter.

Costs

52 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 (Third Chamber) hereby rules:

Article 47(3) 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 Commission Regulation (EC) No 2955/94 of 5 December 1994, does not apply to the direct export of products.

Where, however, as a result of circumstances beyond the control of the exporter, the national export document proving that the products in question have left the customs territory of the Community cannot be produced, the national authorities competent for export refunds must, in accordance with the objectives of Regulation No 3665/87, as amended by Regulation No 2955/94, take into account of their own motion equivalent means of proof and implied requests for documents to be treated as equivalent. Those means of proof must nevertheless be just as satisfactory for the purpose of the verification in accordance with the detailed rules laid down by national law, provided that those rules respect the scope and effectiveness of Community law.

Where the passing of the deadline for furnishing equivalent means of proof is attributable to the competent national authorities, they cannot rely on the 12-month period laid down by Article 47(2) of Regulation No 3665/87, as amended by Regulation No 2955/94, as against a diligent exporter.

[Signatures]