OPINION OF ADVOCATE GENERAL ELMER
delivered on 8 October 1996 *

Introduction

1. Under 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 [1] (hereinafter 'the Regulation'), export refunds are in general payable in respect of agricultural products where it is established that the product in question has left the geographical territory of the Community.

In the case of certain agricultural products, however, different refund rates apply for different countries, and such variable export refunds, as they are called, are payable only when proof is furnished that customs formalities have been completed in the country of destination.

In the present case, the Greek Polimeles Protodikio (Court of First Instance (several judges)) in Athens has referred to the Court a question concerning the interpretation of the Regulation in relation to a specific case in which goods perished as a result of *force majeure* after leaving the geographical territory of the Community but before arriving in the country of destination.

The relevant rules in the Regulation

2. The ninth, sixteenth and seventeenth recitals in the preamble to the Regulation provide as follows:

'... certain export transactions can lead to abuses; ... in order to avoid such abuses, payment of the refund should be subject to the condition that the product has not only left the geographical territory of the Community but has also been imported into a non-member country and, where applicable, actually marketed there;

...

* Original language: Danish.

1 — OJ 1979 L 317, p. 1, as last amended by Commission Regulation (EEC) No 1180/87 of 29 April 1987 amending Regulation (EEC) No 2730/79 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 113, p. 27). The Regulation has now been replaced by Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on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).

... where the rate of the refund is varied according to the destination of the product, provision should be made for it to be verified that the product has been imported into a non-member country for which the refund was fixed; ...

... in order to put exports of products for which the refund varies according to destination on an equal footing with other exports, provision should be made for a part of the refund equal to the amount thereof as calculated on the basis of the lowest rate of refund applicable to be paid as soon as the exporter has furnished proof that the product has left the geographical territory of the Community'.

Articles 9, 10, 20, 21 and 22 of the Regulation contain the following provisions:

'*Article 9*

1. Without prejudice to the provisions of Articles 10, 20 and 26, the refund shall be paid only upon proof being furnished that the product in respect of which customs export formalities have been completed has, within 60 days from the day of completion of such formalities:

— ...

— ... left the geographical territory of the Community unaltered.

...

Article 10

1. In the following circumstances payment of the refund shall be conditional not only on the product having left the geographical territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a non-member country and where appropriate into a specific non-member country:

(a) where there is serious doubt as to the true destination of the product; or

(b) where by reason of the difference between the rate of the refund on the exported product and the import duties applicable to an identical product on the day when customs export formalities are completed it is possible that the product may be reintroduced into the Community.

...

4. If the product, after leaving the geographical territory of the Community, has perished in transit as a result of *force majeure*, the amount paid shall be:

— in the case of a refund which varies according to destination, the part thereof specified in Article 21,

— in the case of a refund which does not so vary, the total amount thereof.

...

Article 20

1. Where the rate of refund varies according to destination, payment of the refund on exports to a non-member country shall, subject to the provisions of Article 21, be made only if the product has been imported into a non-member country for which the refund is prescribed.

2. A product shall be considered to have been imported when the customs entry formalities for home use in the non-member country concerned have been completed.

...

Article 21

1. By way of derogation from Article 20 and without prejudice to the provisions of Article 10, a part of the refund as specified below shall be paid on proof being furnished that the product has left the geographical territory of the Community:

...

2. The provisions of paragraph 1 shall apply only where for a given product a refund has been fixed in respect of all non-member countries:

...

Article 22

...

2. However, where as a result of *force majeure* a product exported under an export licence or advance fixing certificate specifying a compulsory destination is delivered to a destination other than that in respect of which such licence or certificate was issued, then where the exporter is able to furnish proof of *force majeure* together with proof, which shall be assessed having regard to the provisions of Article 20, of delivery to such other destination, he shall be entitled to claim the refund applicable in respect of the said other destination.

...'.

3. The annex to Commission Regulation (EEC) No 229/81 of 29 January 1981 fixing the export refunds on cereals and on wheat or rye flour, groats and meal [2] provides as follows:

'...

CCT heading No	Description	Refund
...	...	...
	Wheat flour:	
ex 11.01 A	— of an ash content of 0 to 520:	
	— for exports to the USSR	...
	— for exports to other third countries	72.00
	...	...
...		

...'.

2 — OJ 1981 L 26, p. 40.

The proceedings before the national court

4. In April 1981 a Greek company sold 1 900 tonnes of wheat flour to a company in Vietnam. During transport by ship to Vietnam, the consignment was lost when the ship sank 37 nautical miles west of Port Saïd in Egypt. The vendor company had taken out an insurance policy against loss of the export refund as a result of shipwreck or any other maritime risk. After paying compensation to the vendor company under that insurance policy, the insurance company Astir AE (hereinafter 'Astir') brought proceedings before the Polimeles Protodikio against the Greek State for payment of DR 7 351 674 in respect of export refunds on the ground that it had been subrogated to the vendor company's right to a corresponding amount of refund. The Greek State refused to pay on the ground that there was no entitlement to that amount.

The question submitted for a preliminary ruling

5. It was against this background that the national court, by order of 29 March 1990, which was received at the Court on 3 April 1995, decided, after hearing the parties, to stay proceedings and refer:

'the following question to the Court of Justice of the European Communities under Article 177 of the EEC Treaty: On a proper construction of Article 10(4) of Commission Regulation (EEC) No 2730/79, in conjunction with the provisions of Articles 20 and 21 thereof, is an exporter of an agricultural product, in this case wheat flour, entitled to a refund where the exported product, after leaving the geographical territory of the Community, has perished in transit as a result of *force majeure* and where for that product the same amount of refund was fixed for all non-member countries except the Soviet Union, for which, as regards the product mentioned above, no amount of refund was fixed?'

Analysis

6. The question whether an insurance company, when it pays the amount due under an insurance policy to an insured party, is subrogated to the rights of that insured party does not appear to be governed by Community law and is thus a matter which comes under national law.

7. By its question, the national court is in fact seeking to ascertain whether there can be a variable refund in cases where the same rate of refund has been fixed for all non-member countries, with the exception of one single non-member country, for which no rate has been fixed (see the above diagram

concerning export refunds, which, with regard to heading ex 11.01 A (wheat flour), contains merely a dash against the words 'for exports to the USSR', and thus does not fix any rate for that country).

If the case does not involve a variable refund, there is entitlement to a refund under the main rule in Article 9 of the Regulation, which requires only that the product has left the geographical territory of the Community.

If, however, the answer to the question is that such a case does involve a variable refund, Article 20 in Title 3, Section 2 of the Regulation dealing with refunds varying according to destination will apply. Under Article 20, the refund is payable only if proof is furnished that the customs formalities in the country of destination have been completed. Article 21(1) none the less provides that advance payment of the lowest refund rate is possible. According to Article 21(2), however, Article 21(1) applies only where a refund has been fixed in respect of all non-member countries. The national court therefore also requires to know in the present case whether Article 21(2) must be construed as meaning that the fact that no rate has been set (indicated by the symbol —) must be treated as equivalent to the setting of a zero rate, such that the condition under Article 21(2) that a refund be fixed in respect of all non-member countries can be regarded as having been satisfied. The national court also requires to know whether, for payment of the refund, significance attaches to the fact that the product, after leaving the geographical territory of the Community, perished as a result of *force majeure*.

The issue of the variable refund

8. Astir submits that there can be a variable refund only in the case where different rates have been fixed for several countries. Where no rate at all has been fixed, this cannot constitute a variation, but amounts, on the contrary, to an exception to the right to a refund for certain destinations. An exception, it argues, does not have the same significance as a variation. In the present case, in which a refund was fixed for all countries, and no refund was fixed for one country, one cannot speak of a variation, but rather of an exception. This exception does not apply where the product has perished as a result of *force majeure*. The refund valid for all countries must therefore be paid.

9. The Greek Government refers to a statement by the Commission, according to which the present case is covered by the second subparagraph of Article 8(2) of Council Regulation (EEC) No 2746/75 of 29 October 1975 laying down general rules for granting export refunds on cereals and criteria for fixing the amount of such refunds. [3] That provision provides authorization for rules dero-

3 — OJ 1975 L 281, p. 78.

gating from the rule in the first subparagraph of Article 8(2), under which a variable refund is payable on proof being provided that the product has reached the destination for which the refund was fixed. The second subparagraph of Article 8(2) of Regulation No 2746/75 thus constitutes the legal basis for Article 21 of Regulation No 2730/79.

10. The Commission submits that the absence of a refund rate for the Soviet Union was attributable at the time to an embargo. The purpose behind not setting any refund rate was to ensure that no aid would be paid for exports to the Soviet Union. The failure to set any refund rate ought therefore, in the Commission's view, to be equated with a variation. In the case where a rate of ECU 72 has been set for the majority of non-member countries, while no rate has been set for one non-member country, there is a variation of the refund rate according to destination. Indeed, the same result could have been achieved by fixing a zero rate.

11. During the oral procedure, the Commission submitted that there is a non-variable refund if the refund rate is the same for all countries. The Commission has always understood the non-fixing of a refund rate for a specific country as meaning that an exporter who has exported to the country in question should not receive any refund. In other words, the lowest rate can also follow from a failure to fix any rate. This may, for instance, be seen in another area in Commission Regulation (EEC) No 776/78 of 18 April 1978 on the application of the lowest rate of refund on exports of dairy products and repealing and amending certain regulations. [4] The eighth recital in the preamble to that regulation states as follows: '... the lowest rate of the refund can also result from the non-fixing of a refund'. The present case, it submits, thus involves a variable refund, since no refund was fixed for the Soviet Union.

12. Questioned on this point during the oral procedure, the Commission stated that there is none the less a difference between a dash and a zero rate. First, zero is a rate and can therefore be fixed in advance. The issue of a certificate with a zero rate makes it possible for the exporter to insure himself for that rate for the entire period of validity of the certificate. This may be particularly useful in cases of tension on the world market which can result in the setting of export duties. Under Commission Regulation (EEC) No 120/89 of 19 January 1989 laying down common detailed rules for the application of export levies and charges on agricultural products, [5] a refund fixed in advance is not affected by a subsequent export duty levied prior to completion of customs formalities. Second, Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance

4 — OJ 1978 L 105, p. 5.

5 — OJ 1989 L 16, p. 19, as amended by Commission Regulation (EEC) No 1431/93 of 10 June 1993 amending Regulation (EEC) No 120/89 laying down common detailed rules for the application of export levies and charges on agricultural products (OJ 1993 L 140, p. 27).

payment of export refunds in respect of agricultural products [6] covers products for which a rate of zero or above has been fixed.

13. I wish to stress that Article 9(1) of the Regulation provides that a refund is payable only if proof is furnished that the product has left the territory of the Community. Article 20(1) provides that where the rate of refund varies according to destination, payment of the refund may be made only if the product has been imported into a non-member country for which the refund is prescribed. Under Article 20(2), proof must be provided that the customs formalities have been completed in the country of destination. It follows from the ninth and sixteenth recitals in the preamble to the Regulation that the purpose of the provision in Article 20(1) is to prevent abuse. If the same refund rate does not apply for all non-member countries, there is thus a risk that the product may be sent on to a country to which a lower rate applies.

14. In my view, this danger of abuse exists not only where different rates, including zero rates, have been set for various countries, but also where no rate at all has been set for one or more countries. In both instances there is thus a need for the rule in Article 20(1). For that reason I take the view — along with the Commission, whose explanation of the formulation of zero rates and the non-fixing of rates forms the basis for my opinion — that there is a variable refund in cases where the same refund rate has been fixed for all non-member countries, with the exception of one single country, for which no rate has been fixed.

The interpretation of Article 21(2)

15. On the assumption that there is a variable refund, Article 20 of the Regulation, as indicated, will be applicable. This provision departs somewhat from Article 21(1), under which part of the refund may be paid in advance on proof being furnished that the product has left the geographical territory of the Community. Article 21(1) may be traced back to the seventeenth recital in the preamble to the Regulation, which provides that, in order to put exports for which the refund varies according to destination on an equal footing with other exports, provision should be made for a part of the refund equal to the amount thereof as calculated on the basis of the lowest rate of refund applicable to be paid as soon as the exporter has furnished proof that the product has left the geographical territory of the Community. Article 21(1) does not require that the product must reach its destination. If this provision is applicable, it will thus entitle Astir to the lowest refund. Under Article 21(2), however, Article 21(1) applies only if a refund for a given product has been fixed in respect of

6 — OJ 1980 L 62, p. 5, as amended by Council Regulation (EEC) No 2026/83 of 18 July 1983 amending Regulation (EEC) No 565/80 on the advance payment of export refunds in respect of agricultural products (OJ 1983 L 199, p. 12).

all non-member countries. The question is therefore whether the non-fixing of a rate must be equated with the fixing of a zero rate, such that the condition in Article 21(2) can be regarded as satisfied. If relevant, the question will also arise as to what the lowest rate of refund may be.

16. The Commission and the Greek Government argue that the condition in Article 21(2) is not satisfied in this case, since, as the result of an embargo, no refund rate was fixed for the Soviet Union. Even if it were assumed that the non-fixing of a refund rate were equivalent to the fixing of a zero rate and the condition in Article 21(2) were thus satisfied, no advance payment could be effected under Article 21(1), since that provision prescribes payment of the lowest rate, which in that case would be precisely zero. This follows from the Court's judgment in Case C-321/91 *Tara Meat Packers*. [7]

17. I would point out that the Court, in *Tara Meat Packers*, addressed similar questions concerning 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. [8] Regulation No 3665/87 replaced that at issue in the present case and contained a codification of numerous amendments along with several adaptations. [9] The Article 20 referred to in the paragraphs of the judgment below corresponds substantially to Article 21 of the Regulation. Paragraphs 13 to 16 of the judgment in *Tara Meat Packers* are worded as follows:

'13. In that connection the provisions of Article 20, which are justified, according to the fourteenth recital in the preamble, by the concern that exports of products attracting a differentiated refund should be put on an equal footing with other exports, allow part of the refund to be paid even before, under the normal rules, proof has been furnished that the goods have actually reached their declared destination.

14. As a corollary of allowing advance payment of part of the refund, Article 20(2) provides, as a precautionary measure designed to ensure that the goods reach their declared destination, that the payment may not exceed the amount of refund calculated at the lowest rate provided for, this being the minimum payment irrespective of the country of actual final destination.

15. It follows that such a system is not applicable in circumstances such as those in the main proceedings where refund rates were not fixed for all destinations.

7 — Judgment of 25 May 1993, [1993] ECR I-2811.

8 — Cited in footnote 1.

9 — See the first recital in the preamble to Commission Regulation (EEC) No 3665/87.

16. This conclusion is inescapable, even if it is accepted, as [Tara Meat Packers] argues, that the fact that no rate was fixed is equivalent to the fixing of a zero rate. In such a case, the rate applicable in any event to all countries of export would be the zero rate and traders would consequently not be entitled to any advance payment under Article 20.'

18. In the light of paragraph 15 of that judgment, the unavoidable conclusion is that the non-fixing of a rate cannot be treated in the same way as the fixing of a zero rate in relation to the provision in Article 21 of the Regulation — and even if it could, there could at most be application of the zero rate, such that the exporter would not be entitled to any advance payment under the rule in Article 21 (see paragraph 16 of the judgment in *Tara Meat Packers*). This means that payment of the refund may be effected only under the rule in Article 20, which makes payment subject to the condition that the product has been imported into a non-member country for which the refund is prescribed.

Force majeure

19. Astir submits that it follows clearly from Article 10(4) of the Regulation that a refund is always payable in the case where a product has perished as a result of *force majeure* after leaving the geographical territory of the Community. Payment, it argues, is justified not through completion of the export transaction but rather with a view to compensating the exporter who cannot be blamed for the failure to complete the transaction. The Regulation does not in any case prescribe that the exporter is completely barred from receiving a refund, but rather merely contains provisions as to the amount of the refund.

20. The Commission and the Greek Government argue that, in the case of a variable rate of refund, payment can be made only in accordance with Article 21. *Force majeure* does not therefore have any bearing on payment of the amount of refund. This, they submit, follows from the Court's judgment in *Tara Meat Packers*.

21. During the oral procedure, the Greek Government expressed the view that it may be necessary to examine whether Articles 10, 20 and 21 must, in relation to situations involving *force majeure*, be construed as meaning that payment must be made of the lowest refund, being understood as the lowest available refund greater than zero, on condition that the available information indicates that, when lost, the goods were on their way to a country for which a rate had been set.

22. I would point out that Article 10(4), so far as concerns variable refunds in cases where the product has been lost as a result of *force majeure*, provides that payment is to be made of the amount of refund as calculated

in accordance with Article 21. In my opinion, Article 10(4) does not contain any provision which, for the purposes of the present case, follows directly in advance from Article 21. It would appear that the sole purpose of Article 10(4) is to provide that Article 21 also applies in the special cases of abuse mentioned in Article 10(1). According to the documents on the file, the present case does not involve any of these special cases of abuse, and consequently neither Article 10(1) nor Article 10(4), which is linked to Article 10(1), can apply.

23. Even if Article 10(4) were applicable, Astir would, in my opinion, be unable to derive any entitlement from it. So far as variable refunds are concerned, this provision, as already mentioned, must be assumed to serve the purpose of determining that Article 21 also applies in the special cases of abuse mentioned in Article 10(1). Article 10(4) thus determines the content of the *force majeure* proviso set out in Article 10(1). That proviso can, in my view, be assumed only to have the purpose of exempting the special cases of abuse from the particular requirements which can otherwise be laid down under Article 10(1). In contrast, there are no grounds for assuming that the purpose of the proviso is to ensure payment of refunds to an extent greater than that which follows from the general rules of the Regulation.

24. The Regulation thus does not contain any rules providing that cases of *force majeure* must be treated in a manner derogating from the general rules of the Regulation set out in Articles 9, 20 and 21. It is appropriate precisely in this connection to refer to Article 10(4), under which, so far as variable refunds are concerned, payment is made under the general rule in Article 21 in cases where a product has perished as a result of *force majeure*. This is, moreover, what the Court held in *Tara Meat Packers*. The Article 5(3) referred to in the paragraphs of the judgment cited below corresponds to Article 10(4) of Regulation No 2730/79. Paragraphs 17 and 18 of the judgment in *Tara Meat Packers* are worded as follows:

'17. With regard to the fact that the goods perished in transit as a result of *force majeure*, it must be pointed out that, in the case of a differentiated refund, Article 5(3) of Regulation No 3665/87 allows payment only of part of the refund, as specified in Article 20.

18. It follows that, in circumstances such as those in the main proceedings, the taking into account of a case of *force majeure* cannot have any bearing on the payment of a differentiated refund.'

25. It is necessary in this regard to bear in mind that Article 10(4), as mentioned above, concerns *force majeure* only in those special cases of abuse referred to in Article 10(1),

and which are not material to the present case.

The Community legislature did not find it necessary to set out a *force majeure* proviso in Articles 20 and 21. This also follows *a contrario* from Article 22, which contains an express *force majeure* proviso in relation to the special case in which a product is delivered to a destination other than that provided for.

26. The inescapable conclusion in those circumstances is that *force majeure* does not justify treatment that departs from the general rules in the Regulation.

Conclusion

27. For those reasons, I propose that the Court reply to the question as follows:

Articles 20 and 21 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 must be interpreted as meaning that exportation does not confer entitlement to a refund where the product concerned, after leaving the geographical territory of the Community, has perished during transport as a result of *force majeure* and where, for that product, the same refund has been fixed for all non-member countries, with the exception of one single country, for which no refund has been fixed.