ORDER OF THE COURT (First Chamber)
27 February 2003 *

In Case C-82/02,

REFERENCE to the Court under Article 234 EC by the Hof van Cassatie (Belgium) for a preliminary ruling in the proceedings pending before that court between

Agence Maritime Lalemant NV

and

Malzfabrik Tivoli GmbH,

Malteurop GIE,

Belgisch Interventie- en Restitutiebureau

* Language of the case: Dutch.

and between

Malzfabrik Tivoli GmbH

and

Belgisch Interventie- en Restitutiebureau,

on 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 (OJ 1979 L 317, p. 1), as amended by Commission Regulation (EEC) No 3826/85 of 23 December 1985 (OJ 1985 L 371, p. 1),

THE COURT (First Chamber),

composed of: M. Wathelet, President of the Chamber, P. Jann and A. Rosas (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after informing the referring court that the Court proposes to give its decision by reasoned order pursuant to Article 104(3) of the Rules of Procedure,

after inviting the persons referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations they might have in that regard,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By judgment of 28 February 2002, received at the Court on 12 March 2002, the Hof van Cassatie (Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC a question on 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 (OJ 1979 L 317, p. 1), as amended by Commission Regulation (EEC) No 3826/85 of 23 December 1985 (OJ 1985 L 371, p. 1, 'Regulation No 2730/79').

2 That question was raised in proceedings between, *inter alia*, Agence Maritime Lalemant NV ('Lalemant') and Belgisch Interventie- en Restitutiebureau (the Belgian Intervention and Refund Board, 'BIRB') concerning the grant of export refunds for consignments of malt exported in September and October 1986.

Relevant provisions

Export refunds

3 The Community rules applicable in the various sectors of the common agricultural policy provide that, to the extent necessary to enable a product to be exported, the difference between the world price and the Community price may be covered by an export refund.

4 At the time of the facts in the main proceedings, Article 16 of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organisation of the market in cereals (OJ 1975 L 281, p. 1) provided that such a refund could be granted in the cereals sector.

5 Also at that time, the common detailed rules for the application of the system of export refunds were governed by Regulation No 2730/79.

6 Pursuant to Articles 3 and 4 of that regulation, an exporter wishing to receive an export refund must file a declaration of export. The date on which that declaration is accepted by the customs authorities is regarded as the 'date of export', allowing the rate of the refund to be calculated. For the purposes of applying that regulation, the acceptance of the declaration of export is also considered to mark the completion of the customs export formalities and results in the products being placed under customs control until they leave the Community or until they reach their destination, as the case may be.

The requirement that the products must leave the geographical territory of the Community

7 The fourth and fifth recitals in the preamble to Regulation No 2730/79 are drafted as follows:

'Whereas the general rules laid down by the Council provide for the refund to be paid upon proof being furnished that the products have been exported from the Community; whereas, in order that the notion of "exportation from the Community" may be interpreted in a uniform manner, it should be specified that a product shall be regarded as having been exported when it leaves the geographical territory of the Community;

whereas, in view of the special situation of the commune of Livigno in Italy, products dispatched to that commune should be regarded as having left the geographical territory of the Community.'

8 Article 9 of Regulation No 2730/79 provides that:

'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:

— in the cases specified in Article 5, reached its destination unaltered,

or

— in other cases, left the geographical territory of the Community unaltered.

...

2. For the purposes of this Regulation:

— products shall be considered to have left the geographical territory of the Community when they have left for territories which, although forming part of the geographical territory of a Member State, form part of the customs territory of a non-member country; conversely, products shall not be

considered to have left the geographical territory of the Community if sent to a destination which, although forming part of the geographical territory of a non-member country, is incorporated in the customs territory of the Community,

— the territory of the commune of Livigno shall be considered not to form part of the geographical territory of the Community,

— the territories of the Canary Islands, Ceuta and Melilla shall be considered not to form part of the geographical territory of the Community,

— deliveries of catering supplies to platforms as specified in Article 19b(1)(a) shall in all cases be considered to have left the geographical territory of the Community.'

9 Article 10 of Regulation No 2730/79 defines certain circumstances in which the exporter must prove not only that the product left the geographical territory of the Community, but also that it was imported into a non-member country. Article 20 of that regulation, which applies where the rate of refund varies according to destination, requires proof of completion of the customs entry formalities for home use in the non-member country. Article 26 of the same regulation, which applies to products for the victualling of seagoing vessels and aircraft, provides that Member States may advance the net amount of the refund to the exporter subject to certain special conditions, in particular that the products be placed in victualling warehouses under customs supervision.

Payment in advance of export refunds

10 Article 2 of Regulation No 2730/79 provides that that regulation applies without prejudice to the Community provisions for advance payment of export refunds.

11 At the time of the facts in the main proceedings, that subject was governed by Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5), 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).

12 The fifth recital in the preamble to Regulation No 565/80 states that the payment of an amount equal to the export refund does not in any way affect the conditions under which the right to an export refund is established.

13 Under Article 5(1) of Regulation No 565/80, an exporter may obtain the payment of an amount equal to the export refund 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.

14 In that case, pursuant to Regulation No 798/80, the exporter must lodge a payment declaration and provide a security, the purpose of which is to ensure that the time-limits laid down by the applicable rules are complied with and that repayments of overpaid sums are made where the amount of the refund to which the exporter is entitled is less than the amount of the advance payment.

15 Article 11(2) of Regulation No 798/80 provides that products or goods may remain under the customs warehousing or free zone procedure for six months from the date of acceptance of the payment declaration. Article 11(3) of the same regulation provides, *inter alia*, that, within 60 days from the date on which the products or goods are no longer subject to the procedure provided for in Article 5 of Regulation No 565/80, they must leave the geographical territory of the Community.

The disputes in the main proceedings and the question referred for a preliminary ruling

16 The judgment ordering reference shows that Malteurop GIE ('Malteurop'), a French company, contacted Lalemant to ask it to complete the formalities and steps necessary for the shipment of consignments of malt from Antwerp (Belgium) to Algeria.

17 On 23 June 1986, Malteurop informed Lalemant that 1 000 tonnes had to be shipped. In a letter drafted in French, Malteurop asked Lalemant to place 1 000 tonnes of malt 'in a customs warehouse' on behalf of Malzfabrik Tivoli GmbH ('Tivoli') by 30 June 1986 at the latest.

18 On 27 June 1986, the customs formalities were completed by the establishment of a T5 document for the export of 1 000 tonnes of malt.

19 Certain consignments of malt only left the geographical territory of the Community on 19 September 1986 (450 tonnes) and 4 October 1986 (150 tonnes), more than 60 days after completion of the customs export formalities.

20 On 20 January 1987, Lalemant submitted an export refund application in the name of Tivoli. Those refunds were paid.

21 Following an investigation by the German authorities, which found that 600 tonnes of malt had left the geographical area of the Community more than 60 days after the completion of the customs export formalities, the Belgian State, represented by the service responsible for refunds which preceded the BIRB, brought two sets of proceedings against Lalemant and Tivoli seeking repayment of refunds in the sum of BEF 1 193 973 and BEF 3 581 919. Lalemant summoned Malteurop to appear as intervener and third party and Tivoli brought third-party proceedings against Lalemant.

22 In considering the main actions and, more precisely, Lalemant's plea in law that goods placed in a customs warehouse should be regarded as having left the geographical territory of the Community within the meaning of Article 9(1) of

Regulation No 2730/79, the Hof van Cassatie held it necessary to refer the following question to the Court for a preliminary ruling:

'Must 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 be interpreted as meaning that goods exported to non-member countries and in respect of which customs export formalities have been completed are to be regarded as having left the geographical territory of the Community when they actually leave the territory of the Community or when they are placed in a customs warehouse?'

The question referred for a preliminary ruling

23 By its question, the national court essentially asks whether, on a proper interpretation of Article 9(1) of Regulation No 2730/79, 'geographical territory of the Community' refers to a physical concept or whether the requirement that the product in respect of which export refunds have been applied for must have left the geographic territory of the Community is satisfied where the product was placed in a customs warehouse.

24 Since it considered that the answer to that question left no room for reasonable doubt, the Court, pursuant to Article 104(3) of its Rules of Procedure, informed the national court that it was proposing to give its decision by reasoned order and invited the interested parties referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations they might have in that regard. Only Lalemant and the BIRB of the parties to the main action, and the Commission, replied to the Court's invitation, stating that they had no observations to make.

Observations submitted to the Court on the question referred for a preliminary ruling

25 Lalemant submits that the reply to the question referred for a preliminary ruling should be that the goods placed in a customs warehouse immediately after completion of the customs formalities, prior to their carriage by ship to a non-member country, must be treated, the moment they were so placed, as having left the geographical territory of the Community within the meaning of Article 9(1) of Regulation No 2730/79.

26 Citing the judgment of 22 October 1987 in Case 337/85 *Ireland* v *Commission* [1987] ECR 4237, in which the Court held that, where products exported by sea had to undergo transhipment in a Community port other than the port of loading, the first port of loading had to be equated, for the purposes of the payment of export refunds, to the port of final departure from the geographical territory of the Community within the meaning of Article 9(1) of Regulation No 2730/79, Lalemant concludes that the product must be treated as having left that territory not only when it has physically left, but also where the export formalities referred to in Articles 3 and 4 of that regulation have been completed.

27 That, it maintains, is the case where products are placed immediately in a customs warehouse awaiting shipment to a non-member country, since those products then lose the status of Community goods and are no longer in free movement within the Community market. In particular, they can only be the subject of specific operations (Case 49/82 *Commission* v *Netherlands* [1983] ECR 1195), which distinguishes placement in a customs warehouse from placement under customs control within the meaning of Article 3(3) of Regulation No 2730/79.

28 That interpretation of Article 9(1) of Regulation No 2730/79 is supported by Article 5 of Regulation No 565/80, which provides that a refund may be paid in advance for products or goods which have been brought under the customs warehousing or free zone procedure with a view to their being exported within a set time-limit, and by Article 11(3) of Regulation No 798/80, which provides that products or goods must leave the geographical territory of the Community within 60 days of the date on which they are no longer subject to the procedure laid down in Article 5 of Regulation No 565/80.

29 The BIRB, the Italian Government and the Commission, by contrast, consider that Article 9(1) of Regulation No 2730/79 requires the products to have actually left the geographical territory of the Community.

30 They claim that Regulation No 2730/79 refers to the physical concept of geographical territory, and not to the legal concept of customs territory. They cite the fourth recital in the preamble to that regulation in support of that distinction.

31 They point out that that regulation lays down expressly the exceptions to the definition of geographical territory, such as the placement of goods for the victualling of ships and aircraft in warehouses under customs supervision, the departure of products to territories which, although forming part of the geographical territory of a Member State, are included in the customs territory of a non-member country, or the case of the commune of Livigno, which is in Italy but is subject to a separate customs regime.

32 They submit that the Community legislature should, similarly, have adopted a specific measure equating the concept of geographical territory to that of customs territory. The BIRB states in that regard that if the legislature had intended the

placement under customs control to be equated to actually leaving the territory, it would have made the grant of export refunds subject only to the customs authority's acceptance of the declaration of export.

33 The Commission states that the interpretation that the products must physically leave the geographical territory of the Community is supported by Articles 10 to 12 of Regulation No 2730/79 and by the judgment of 12 December 1985 in Case 276/84 *Metelmann* [1985] ECR 4057. That judgment concerned a product which, after completion of the customs export formalities, had been placed in a customs warehouse where it was repackaged into different units and subsequently left the geographical territory of the Community. The Commission claims that it is perfectly apparent from that judgment that Article 9(1) of the same regulation requires the product actually to leave the geographical territory of the Community and not merely that it be placed in a customs warehouse.

34 The BIRB further states that it was wrongly suggested to the national court that the goods had been brought under the customs warehousing procedure, since there was no declaration of storage. The goods were merely the subject of a declaration of export in export form EX69, after which they were placed under customs control and stored temporarily in a grain silo while awaiting shipment.

Findings of the Court

35 The condition laid down by Article 9(1) of Regulation No 2730/79 concerning the departure of goods from the geographical territory of the Community refers to a physical concept and not to the legal concept of customs territory.

36 That interpretation is supported by the fourth recital in the preamble to Regulation No 2730/79, which states that the geographical territory concept was adopted in order to enable the concept of exportation from the Community to be interpreted in a uniform manner.

37 Moreover, that interpretation alone makes sense of the various points contained in Article 9(2) and the fifth recital in the preamble to the same regulation concerning the various circumstances in which the concepts of geographical territory and customs territory do not overlap.

38 Second, it should be noted that the placement of goods under customs control cannot be equated to their leaving the geographical territory of the Community. If it were otherwise, the condition laid down in that regard in Article 9(1) of Regulation No 2730/79 would be devoid of any purpose and export refunds would be granted upon completion of the export formalities within the meaning of that regulation.

39 That interpretation of Article 9(1) of Regulation No 2730/79 is supported by Article 26 of the same regulation, relating to victualling products, which sets out expressly the particular circumstances in which the placement of such products in premises under customs supervision enables the export refunds to be paid in advance.

40 That interpretation is not undermined by the judgment in *Ireland* v *Commission*, cited above. That case concerned the particular context of maritime transhipment

operations, which become necessary in certain circumstances and on the subject of which the Community Transit Committee, in an opinion in 1973, explained the concept of leaving the geographical territory of the Community.

41 Third, in so far as the concept of bringing goods under the customs warehousing procedure is relevant to the circumstances of the main proceedings, as described by the national court, it should be noted that the provisions applicable to export refunds at the time of the facts in the main proceedings lay down two separate procedures. The exporter may export directly, pursuant to Regulation No 2730/79, or export goods only after storage in accordance with the customs warehousing procedure under Article 5 of Regulation No 565/80.

42 Where the exporter wishes to obtain refunds for direct exports, he must lodge a declaration of exportation and place the goods under customs supervision where they may remain for a maximum of 60 days. Where the exporter wishes to obtain payment in advance of refunds for goods previously placed in storage, he must file a payment declaration and bring the goods under the customs warehousing procedure where they may remain for a maximum of six months, the exporter having to complete the export formalities within that period and export the goods within the following 60 days.

43 It follows from the provisions applicable to those two procedures when read together that the exporter who completes the customs export formalities within the meaning of Regulation No 2730/79 has categorically undertaken to export the goods within 60 days starting from the day on which the declaration of exportation is accepted, and is unable subsequently to opt for the procedure of payment of the refunds in advance after the goods have been stored in a customs warehouse under Regulation No 565/80.

44 Bringing goods under the customs warehousing procedure in order to benefit from the payment in advance of refunds, as provided for by Article 5 of Regulation No 565/80, can thus only occur prior to completion of the customs export formalities and provided that a payment declaration has been filed.

45 It follows that Lalemant's interpretation of Article 9(1) of Regulation No 2730/79, that the requirement to leave the geographical territory of the Community is met by bringing the product under the customs warehousing procedure, is manifestly unfounded.

46 It follows from the foregoing that Article 9(1) of Regulation No 2730/79 must be interpreted as meaning that the expression 'geographical territory of the Community' refers to a physical concept and that the requirement that the product in respect of which export refunds have been applied for must have left the geographical territory of the Community is not satisfied either by placing the product under customs control or by bringing it within the customs warehousing procedure.

Costs

47 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 question referred to it by the Hof van Cassatie by judgment of 28 February 2002, hereby rules:

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, as amended by Commission Regulation (EEC) No 3826/85 of 23 December 1985 must be interpreted as meaning that the expression 'geographical territory of the Community' refers to a physical concept and that the requirement that the product in respect of which export refunds have been applied for must have left the geographical territory of the Community is not satisfied either by placing the product under customs control or by bringing it within the customs warehousing procedure.

Delivered in open Court in Luxembourg on 27 February 2003.

R. Grass — Registrar

M. Wathelet — President of the First Chamber