Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

6 December 2012 *

(Agriculture — Regulation (EEC) No 3665/87 — Article 11 — Export refunds — Request for a refund in respect of exported goods which do not confer entitlement to a refund — Administrative penalty)

In Case C-562/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 7 September 2011, received at the Court on 9 November 2011, in the proceedings

**Société d'Exportation de Produits Agricoles SA (SEPA)**

v

**Hauptzollamt Hamburg-Jonas,**

THE COURT (Fifth Chamber),

composed of M. Ilešič (Rapporteur), acting as President of the Fifth Chamber, E. Levits and M. Safjan, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 2 October 2012,

after considering the observations submitted on behalf of:

— Société d'Exportation de Produits Agricoles SA (SEPA), by D. Ehle, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by G. von Rintelen and B. Burggraaf, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1), as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 (OJ 1994 L 310, p. 57) and by Commission Regulation (EC) No 495/97 of 18 March 1997 (OJ 1997 L 77, p. 12).

2 The reference has been made in proceedings between Société d'Exportation de Produits Agricoles SA (SEPA) ('SEPA') and Hauptzollamt Hamburg-Jonas (Principal Customs Office, Hamburg-Jonas) concerning the imposition of an administrative penalty on SEPA for having wrongly requested an export refund.

### Legal context

3 Regulation No 3665/87 was repealed and replaced by Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11, and corrigendum OJ 1999 L 180, p. 53), which was subsequently repealed and replaced by Commission Regulation (EC) No 612/2009 of 7 July 2009 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 2009 L 186, p. 1). The dispute in the main proceedings, however, remains governed by Regulation No 3665/87, as amended.

4 The first subparagraph of Article 11(1) of Regulation No 3665/87, as amended by Regulation No 2945/94, provided:

'Where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:

(a) half the difference between the refund requested and the refund applicable to the actual exportation;

(b) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.'

5 The second subparagraph of Article 11(1) stated that '[t]he refund requested is deemed to be the amount calculated from the information supplied [by the applicant] …'.

6 The third subparagraph of Article 11(1) provided:

'The sanction referred to under (a) shall not apply:

[a] in the case of *force majeure*,

[b] in exceptional cases characterised by circumstances beyond the control of the exporter, which occur after the acceptance by the competent authorities of the export declaration or the payment declaration, and provided that he, immediately after he took note of these circumstances …, notifies the competent authorities, unless the competent authorities have already established that the refund requested was incorrect,

[c] in cases of obvious error as to the refund requested, recognised by the competent authority,

….’

7 The fourth subparagraph of Article 11(1) stated:

‘Where the reduction referred to under (a) or (b) results in a negative amount, the exporter shall pay that negative amount.’

8 Regulation No 495/97, which entered into force on 26 March 1997, amended point (b) of the third subparagraph of Article 11(1) of Regulation No 3665/87 as follows:

‘…

(b) in exceptional cases where the exporter, on his own initiative, immediately after becoming aware that the refund requested is excessive, notifies the competent authority thereof in writing, unless the competent authority has informed the exporter that it intends to examine the request or the exporter has otherwise become aware of this intention, or the competent authority has already established that the refund requested was incorrect’.

9 Article 13 of Regulation No 3665/87 provided:

‘No refund shall be granted on products which are not of sound and fair marketable quality, or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose.’

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

10 From February 1997 to January 1998, SEPA lodged export declarations for consignments of beef with the Zollamt Hallbergmoos (Customs Office, Hallbergmoos). SEPA enclosed with those export declarations hygiene certificates issued by the veterinary authorities, including information that that meat originated from German ‘isolation’ slaughterhouses, which are slaughterhouses in which sick animals are slaughtered as well as animals which have to be slaughtered urgently on special emergency grounds.

11 The principal customs office which is responsible for the customs clearance of those goods, that is to say, the Hauptzollamt Landshut, transferred those export declarations to the Hauptzollamt Hamburg-Jonas, which was the competent body for granting and paying export refunds in accordance with the European Union common agricultural policy. However, the Hauptzollamt Landshut did not, in all cases, transfer to the Hauptzollamt Hamburg-Jonas the hygiene certificates which SEPA had enclosed with its export declarations.

12 After having initially granted and paid to SEPA refunds totalling DEM 1 633 436, the Hauptzollamt Hamburg-Jonas, by decisions of 15 and 22 November 1999, sought recovery of those refunds on the ground that the condition relating to sound and fair marketable quality set out in Article 13 of Regulation No 3665/87 had not been met.

13 Following an instruction dated 16 September 1997 emanating from the public authorities, the Hauptzollamt Hamburg-Jonas had taken the view that the meat originating from isolation slaughterhouses was not of sound and fair marketable quality.

14 The order for recovery of those refunds was challenged in legal proceedings by SEPA. Since the isolation slaughterhouses had veterinary certification confirming the fitness of the meat at issue for human consumption, and since hygiene certificates had, moreover, been drawn up in order to comply with customs formalities, SEPA claimed that the sound and fair marketable quality of the consignments of exported meat could not be called into question.

15 In a reference for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court), the Court of Justice found that the marketability of the product 'in normal conditions' was an inherent aspect of 'sound and fair marketable quality' and that meat such as that in issue in the main proceedings, the production, treatment and distribution of which were significantly restricted, even if it fulfilled the hygiene criteria and was the object of a commercial transaction, could not be regarded as being marketable 'in normal conditions' (Case C-409/03 *SEPA* [2005] ECR I-4321, paragraphs 26 and 30). Following that judgment in particular, SEPA's action was dismissed and recovery of those refunds became definitive.

16 Following its decisions of 15 and 22 November 1999 to enforce recovery, the Hauptzollamt Hamburg-Jonas also, by a decision of 23 November 1999, imposed on SEPA the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87, as amended. That penalty amounted to DEM 816 718.

17 SEPA challenged that penalty decision and the Hauptzollamt Hamburg-Jonas upheld its challenge in so far as that decision concerned consignments of meat for which the Hauptzollamt Landshut had attached the hygiene certificate to the export declaration as submitted. In that regard, the Hauptzollamt Hamburg-Jonas found that, in cases where it had been able to infer from the documents which had been submitted to it that the meat originated from isolation slaughterhouses, the conditions required for the application of point (a) of the first subparagraph of Article 11(1) had not been met.

18 After having, consequently, reduced by EUR 62 723, by amending decisions of 3 May 2002 and 8 April 2004, the amount of the penalty initially imposed, the Hauptzollamt Hamburg-Jonas rejected SEPA's complaint as to the remainder by decision of 31 January 2006.

19 SEPA brought an action against that decision before the Finanzgericht Hamburg (Finance Court, Hamburg), which dismissed it by a judgment of 8 September 2008. An appeal on a point of law ('Revision') brought against that judgment is currently pending before the Bundesfinanzhof (Federal Finance Court).

20 Since it took the view that the outcome of the dispute requires an interpretation of Article 11(1) of Regulation No 3665/87, as amended, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must a penalty be imposed on an exporter who makes a request for a refund, providing a correct explanation of the facts relevant to the grant of the export refund, although no right to a refund actually exists in relation to the relevant exportation?'

## The question referred for a preliminary ruling

21 By its question, the referring court asks, in essence, whether Article 11(1) of Regulation No 3665/87, as amended, must be interpreted as meaning that the reduction referred to in point (a) of the first subparagraph of Article 11(1) must be applied in the case where an exporter, acting in good faith and giving an exact description of the nature and origin of the goods at issue, makes a request for a refund for an exportation which does not give a right to a refund.

22 According to SEPA, the reply to that question must be in the negative. It notes that its export declarations identified the consignments of beef at issue as originating from isolation slaughterhouses and had hygiene certificates attached. It was only at a later stage, when it became aware of the instruction emanating from the competent German authorities, according to which the meat originating from isolation slaughterhouses did not meet the condition as to sound and fair marketable quality referred to in Article 13 of Regulation No 3665/87, and when that assessment was confirmed in the abovementioned judgment in *SEPA*, that SEPA could have known that the exports concerned did not give a right to a refund. In such circumstances, the imposition of the penalty provided for under point (a) of the first subparagraph of Article 11(1) of that regulation is, in its view, unjustified.

23 The Austrian Government shares that position. Conversely, the European Commission is of the opinion that the answer to the question posed should be in the affirmative.

24 In that regard, it must be pointed out, first, that the reduction referred to in the first subparagraph of Article 11(1) of Regulation No 3665/87, as amended, must be applied not only when a refund is due while being less than that requested by the exporter, but, also, in the case where it is established that no refund is due, that is to say, that the amount of refund is zero (see, as regards Article 51(1) of Regulation No 800/1999, the wording of which corresponded to that of Article 11(1) of Regulation No 3665/87, Case C-27/05 *Elfering Export* [2006] ECR I-3681, paragraph 27, and Case C-143/07 *AOB Reuter* [2008] ECR I-3171, paragraph 22). In those cases, that reduction led to a negative amount, which, under the fourth subparagraph of Article 11(1) of Regulation No 3665/87, had to be paid by the exporter.

25 It must be borne in mind, next, that that reduction mechanism consists in imposing the payment of a penalty, the amount of which is determined in proportion to the amount which would have been unduly received by the exporter had the requested refund been granted. It concerns a penalty which forms an integral part of the export refund scheme and is not criminal in nature (see, to that effect, Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 43; *AOB Reuter*, paragraph 18; and Case C-489/10 *Bonda* [2012] ECR, paragraph 30).

26 The liability on which that penalty is based is essentially objective in nature. It follows that the reduction referred to in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 must be applied even if the exporter has not committed any fault (*AOB Reuter*, paragraphs 17 and 19, and Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraph 58).

27 It must be borne in mind, finally, that, if the export declarations were initially accepted by the competent authorities and if it appears on the basis of findings made after that acceptance that the exporter at issue was not entitled to a refund, the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 must, in principle, be imposed (*AOB Reuter*, paragraphs 27 and 30).

28 It follows from that settled case-law of the Court that it is not possible to uphold SEPA's argument, shared by the Austrian Government, according to which the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 becomes inapplicable because of the mere fact that the exporter acted in good faith and gave an exact description of the nature and origin of the goods at issue in his export declarations. Unlike point (b) of the first subparagraph of Article 11(1) of Regulation No 3665/87, point (a) of that provision applies, inter alia, in cases where the exporter, on the basis of the nature and origin of the goods, considered and satisfied himself that those goods were of a sound and fair marketable quality, and where it appeared at a later stage that that information was incorrect (see, by analogy, *SGS Belgium and Others*, paragraphs 57 to 59).

29 In this regard, the Court has already stated that, even if an exporter does not make an express declaration that the goods at issue are of sound and fair marketable quality, its application for a refund still implies that it guarantees that that condition is satisfied (Case C-309/04 *Fleisch-Winter*

[2005] ECR I-10349, paragraph 32). Where it subsequently becomes apparent that that declaration implicitly contained in the application for a refund was wrong, the penalty referred to in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 can be imposed on the exporter unless one of the exemptions established in the third subparagraph of Article 11(1) applies (see *Elfering Export*, paragraph 30).

30 It follows from all of the above factors that, in circumstances such as those at issue in the case in the main proceedings, where, despite the good faith of the exporter and the exact description of the nature and origin of the goods, the statement forming an integral part of the application for a refund, according to which those goods are of sound and fair marketable quality, proves to be incorrect, the reduction referred to in point (a) of the first subparagraph of Article 11(1) must be applied, unless one of the exemptions listed in the third subparagraph of Article 11(1) applies.

31 As regards those exemptions, SEPA has invoked the existence of *force majeure* within the meaning of point (a) of the third subparagraph of Article 11(1) of Regulation No 3665/87 and an exceptional case within the meaning of point (b) of the third subparagraph of Article 11(1).

32 The concept of *force majeure* in the sphere of agricultural regulations must be construed as referring to abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided in spite of the exercise of all due care (*Käserei Champignon Hofmeister*, paragraph 79 and the case-law cited).

33 However, contrary to what SEPA maintains, neither the instruction emanating from the competent German authorities, according to which the meat originating from isolation slaughterhouses did not meet the condition as to sound and fair marketable quality, nor the substance of the judgment in *SEPA*, in the same vein, could be considered as abnormal and unforeseeable. As the Court stated at paragraphs 29 and 30 of that judgment, it already appeared from Community legislation which had entered into force prior to the exports made by SEPA that the meat originating from isolated slaughterhouses, even if it fulfilled the hygiene criteria, could be authorised for human consumption only on the local market and only if various additional conditions had been fulfilled.

34 As regards the exemption provided for 'exceptional cases', it results both from the wording of point (b) of the third subparagraph of Article 11(1) of Regulation No 3665/87, in the version resulting from Regulation No 2945/94, and from the wording of that provision resulting from Regulation No 495/97 that the European Union legislature sought to allow exporters who wrongly made an application for a refund to avoid the penalty laid down in point (a) of the first subparagraph of Article 11(1) where they discover, after making their application, or even after it has been accepted, that it is unfounded and that they immediately inform the competent authorities accordingly.

35 In the present case, SEPA claimed before the Court that, prior to the adoption by the competent German authorities of the instruction indicating that the meat originating from isolation slaughterhouses did not meet the condition as to sound and fair marketable quality, those authorities had based themselves on the converse premiss that meat originating from isolation slaughterhouses met all the conditions to be exported with entitlement to export refunds. It also claimed that that instruction had not been published and that, since it had become aware of that, it had ceased making requests for export refunds for those products.

36 It is for the national court to determine whether those assertions are correct and whether their relevance is not contradicted by other factors. Subject to that determination, a set of specific circumstances such as those mentioned in the previous paragraph of this judgment can be treated in the same way as the existence of an exceptional case within the meaning of point (b) of the third subparagraph of Article 11(1) of Regulation No 3665/87.

37 In the light of all of the foregoing, the answer to the question referred is that Article 11(1) of Regulation No 3665/87, as amended, must be interpreted as meaning that, subject to the exemptions laid down in the third subparagraph of Article 11(1), the reduction referred to in point (a) of the first subparagraph of Article 11(1) must be applied, inter alia, in the case where it turns out that the goods for export in respect of which a refund was requested were not of sound and fair marketable quality, notwithstanding the fact that the exporter acted in good faith and correctly described the nature and origin of those goods.

## Costs

38 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 (Fifth Chamber) hereby rules:

**Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 and by Commission Regulation (EC) No 495/97 of 18 March 1997, must be interpreted as meaning that, subject to the exemptions laid down in the third subparagraph of Article 11(1), the reduction referred to in point (a) of the first subparagraph of Article 11(1) must be applied, inter alia, in the case where it turns out that the goods for export in respect of which a refund was requested were not of sound and fair marketable quality, notwithstanding the fact that the exporter acted in good faith and correctly described the nature and origin of those goods.**

[Signatures]