completion of the formalities prescribed by that State as a pre-condition for the entry into free circulation or marketing of the product within its territory and where the deterioration of the product which was the cause of its destruction or re-exportation occurred before completion of those formalities.

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 11 July 1984.

P. Heim
Registrar

T. Koopmans
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 29 MAY 1984 [1]

Contents

A — Facts . . . 2836
1. Facts and national procedure . . . 2836
2. Applicable Community law . . . 2838
3. The questions raised by the Bundesfinanzhof . . . 2839
B — Opinion . . . 2840
1. Case-law on export refunds . . . 2840
(a) Advocate General's Opinion in Case 125/75 . . . 2840
(b) Judgments of the Court . . . 2841
2. The arguments submitted by Dimex . . . 2842
3. Comments on 2 . . . 2843
4. The questions raised by the Bundesfinanzhof . . . 2844
(a) Question 1 . . . 2844
(i) Validity of the provision . . . 2844
(ii) Question whether proof is rebuttable . . . 2844
(iii) Extent to which proof is rebuttable . . . 2845
(b) Question 2 . . . 2846
(c) Question 3 . . . 2846
C — Proposed reply . . . 2847

1 — Translated from the German.

Mr President,
Members of the Court,

A — The case which falls to be dealt with today concerns a request for a preliminary ruling under Article 177 of the EEC Treaty submitted by the Seventh Senate of the Bundesfinanzhof [Federal Finance Court]. The facts of the case are as follows:

1. In August 1976, Dimex Nahrungsmittel Im- und Export GmbH & Co. KG, whose head office is in Hamburg, sold a quantity of Feta cheese in brine to a Kuwaiti company, the terms being "C and F Kuwait". On 6 August 1976 the goods were cleared for export at the Zollamt [Customs Office] Weilheim on the control copy (as referred to in Article 7 of Regulation No. 192/75) and transported by lorry to Livorno in Italy (the customs office at the point of exit from the Community). There its was noticed that some tins were damaged and that the brine had leaked out (according to information provided by the Middle East Verschiffungsagentur GmbH the damage was slight and was restricted to the packaging). After the damaged tins had been refilled and sealed the goods were loaded on board a ship chartered by Dimex (on its own account), which left Livorno on 13 August 1976.

The ship arrived in port in Kuwait on 27 August 1976, according to a landing certificate of the General Superintendence Company Ltd., and, as is also attested in the landing certificate, was unloaded between 27 September and 6 October 1976. According to a Lloyd's survey report the goods were received by the customs authorities between 22 September and 7 October 1976 and were sent from customs to the recipient's cold store on 5 October 1976 ("delivery of goods from customs to place where survey held", which the Bundesfinanzhof in its order rendered, not entirely correctly, as the "release" of the goods by customs on 5 October). In any event, it is not established that the goods were cleared through customs and it is in fact disputed whether there is any customs clearance in Kuwait for foodstuffs. In that respect it may be of interest that when the goods were inspected by the Lloyd's agent in the recipient's cold-store on 7 October 1976 they were found to be damaged (specifically, "dented, holed, bulged out"). The Kuwaiti health authorities therefore ordered on 25 October 1976 that the goods should be destroyed or re-exported, on the ground that they were unfit for human consumption; the buyer of the goods informed Dimex of that fact on the same day. It is also of interest that, in reply to a request by the German Public Prosecutor's Office, the German Embassy in Kuwait stated on 13 November 1978 that the customs clearance documents could probably not be obtained, since in Kuwait no duties were levied on the import of foodstuffs. In a further letter of 23 November 1978 the embassy stated that customs clearance of goods for entry into free circulation could only take place after inspection by the health authorities and was not given if the goods were rejected by them. The letter also mentioned that according to information provided by the buyer the goods in question had been destroyed. It should finally be noted in this regard that the insurance company with which Dimex had taken out transport insurance took the view that the damage was not caused in transport

but was rather to be attributed to the natural properties of the goods, and that it therefore assumed responsibility for only 50 % of the invoice value on an *ex gratia* basis.

For the export transaction in question Dimex received payment in advance of an export refund amounting to DM 31 948.02, granted by decision of 20 August 1976. With regard to the definitive grant of the refund, Dimex requested that it be permitted to furnish proof of exportation from the Community and importation into the country of destination by way of substitute documents as referred to in Article 11 of Regulation No 192/75, since the control copy mentioned above had not arrived at the Hauptzollamt within three months of the completion of the customs export formalities and it was not in a position to provide customs import documents (cf. request of 7 April 1977). The competent Hauptzollamt accepted the landing certificate, the sales invoice of 10 August 1976, evidence from the bank of payment against documents and the bill of lading of Interschiffsagentur, and on 21 April 1977 it therefore released the security given for the advance payment. During an inspection of Dimex's affairs the Hauptzollamt discovered that the goods had not been placed on the market in Kuwait, since they were unfit for human consumption. By a decision of 27 February 1978 it therefore demanded repayment of the difference between the refund paid and the minimum refund payable on completion of customs export formalities, an amount of DM 31 013.95.

Dimex first of all raised an objection against that decision and, upon its rejection, brought an action before the Finanzgericht, where it was successful. The Finanzgericht held that proof of importation could not be provided because of circumstances beyond the control of the importer, and that the Hauptzollamt had therefore accepted substitute documents, that is to say, it had considered proof of unloading to have been provided by means of the landing certificate (issued by an international control and surveillance agency approved by the Federal Republic of Germany and by Italy). According to Community law, proof of unloading took the place of proof of the completion of customs formalities for release into free circulation. The fact that the goods were destroyed after unloading was irrelevant, in particular since there was no reason to believe that they were already spoiled at the time of unloading and in Livorno they were clearly taken over in perfect condition (according to the bill of lading). In any event, once proof of unloading had been provided, it was no longer necessary to ascertain whether the goods were actually cleared for release into free circulation or were destroyed before such clearance, and proof that the goods were marketed in the country of destination could not be required.

The Hauptzollamt disagreed with that judgment and therefore appealed to the Bundesfinanzhof. It contends first that it is dubious whether the goods were "of sound and fair marketable quality" (Article 8 (2) of Regulation No 192/75) and argues that the Finanzgericht should have established whether the deterioration of the goods did not take place at an earlier stage. The Hauptzollamt also argues that the absence of proof of completion of customs import formalities was not due to circumstances beyond the control of the importer. Above all, it

takes the view that in cases such as this, in order to establish a right to a refund, it is essential that the goods should have reached the *market* of the territory of destination. Proof of customs clearance for release into free circulation is no more than rebuttable evidence of that; in any event proof of *unloading* cannot be regarded as documentary proof giving entitlement to a refund. It is also significant that since the goods were not of marketable quality they were not sold in Kuwait; in those circumstances the question whether they were cleared for entry into free circulation is not important.

2. The following provisions are relevant to the case to be dealt with in these proceedings.

Article 17 of Regulation No 804/68 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) provides that, in order to enable products such as cheese to be exported "on the basis of the prices for those products in international trade", the difference between those prices and the prices in the Community may be made up by an export refund. According to Article 17 (2) the refund may be varied according to use or destination. The latter was the case for *inter alia* feta cheese, under Regulation No. 1881/76 (Official Journal L 206, p. 49), which came into force on 31 July 1976.

In Regulation No 876/68 (Official Journal, English Special Edition 1968 (I), p. 234) the Council laid down general rules for the grant of refunds in accordance with Article 17 (3) of Regulation No 804/68. In Article 4 it states that the refunds may be varied according to the destination of the products "where the world market situation or the specific requirements of certain markets make this necessary". With regard to the payment of the refund, it provides in Article 6 (1) that the refund is to be paid upon proof that the products have been exported from the Community and that, in cases where Article 4 applies, it is to be paid upon proof that the product has reached the destination for which the refund was fixed.

"Additional provisions" within the meaning of Article 6 (3) of Regulation No 876/68 were adopted by the Commission in Regulation No 192/75 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal 1975 L 25, p. 1). In Article 6 it provides that, unless the product has perished in transit as a result of *force majeure*, the payment of the refund is to be conditional upon the product having "been imported into a third country and where appropriate into a specific third country: (a) where there is serious doubt as to the true destination of the product ...". According to Article 7, where, before leaving the geographical territory of the Community, a product for which customs export formalities have been completed crosses Community territory other than that of the Member State in whose territory such formalities took place, proof that the product has left the geographical territory of the Community or reached the intended destination is to be furnished by production of a control copy (within the meaning of Regulation No 2315/69). Article 8 (2) provides that no refund is to be granted "for products or goods which are not of sound and fair marketable quality in the form in which

they are exported". Most important of all is Article 11 (as amended by Regulation No 2818/75, Official Journal 1975, L 280, p. 31), which provides as follows:

Where the rate of refund varies according to destination, payment of the refund shall, subject to the provisions of paragraph 2, be made only if the product has been imported into the third country or countries in respect of which the refund is prescribed.

A product shall be considered to have been imported when the customs formalities for entry into free circulation in the third country concerned have been completed. Proof that customs formalities have been completed shall be furnished by production of the relevant customs document, or of a copy or photocopy of such a document certified by the competent authorities.

However, if owing to circumstances beyond the control of the importer, proof of completion of customs formalities cannot be finished, or if the proof furnished is considered insufficient in view of the particular circumstances in the country of destination, the competent authorities of Member States shall require proof that the goods have been unloaded in the country concerned. Such proof shall be deemed to have been furnished by production of one or more of the following documents:

a copy of the port document issued or endorsed in the country of destination,

a certificate issued by an official agency of a Member State in that country,

a certificate from an international control and surveillance agency approved by the Member State where the customs export formalities have been completed,

a bank document issued by an authorized bank established in the Community certifying that a transfer of funds corresponding to the export in question has been made to the credit of the exporter's account which has been opened with such agency, where a third country makes such transfer a precondition for the importation of the product,

...

Finally, Article 13 provides that where the control copy referred to in Article 7 is not returned to the office of departure or relevant central body within three months of its issue owing to circumstances beyond the control of the party concerned, the latter may make application to the competent agency for other documents to be accepted as equivalent, stating the grounds for the application and furnishing supporting documents; it is further provided that the supporting documents must include the transport document and one or more of the documents specified in the second, third and fourth subparagraphs of Article 11 (1).

3. Since the case turned on the interpretation to be given to provisions of Community law, the Bundesfinanzhof stayed the proceedings pending before it and, by order of 21 April 1983, referred the following questions to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

"1. Must the proof required by Article 6 (2) of Regulation No 876/68 in conjunction with Article 6 (1) of Regulation No 192/75 that the product has been imported into the territory of destination be regarded as having been furnished irrebuttably if the person concerned has submitted a substitute document requested by the responsible auth-

ority under the third subparagraph of Article 11 (1) of Regulation No 192/75?

2. If the first question is answered in the affirmative: is that also the case where the responsible authority has requested the production of the substitute document and it then emerges that it was not a case in which proof of completion of the customs formalities within the meaning of the second subparagraph of Article 11 (1) of Regulation No 192/75 could not be furnished 'owing to circumstances beyond the control of the importer' (third subparagraph of Article 11 (1) of Regulation No 192/75)? How ought the last-mentioned words of the third subparagraph of Article 11 (1) of Regulation No 192/75 to be interpreted?

3. If the first question is answered in the negative: has a product been 'imported' into the territory of destination within the meaning of Article 6 (2) of Regulation No 876/68 in conjunction with Article 6 (1) of Regulation No 192/75 where a few days after unloading in that territory it has been either destroyed or re-exported? Does the answer depend on whether the product has been destroyed or re-exported before or after being cleared for entry into free circulation in that territory and whether the deterioration of the goods which was the cause of the destruction or re-exportation occurred before or after such clearance?"

The questions put by the Bundesfinanzhof amount essentially to an inquiry whether the provisions referred to are to be interpreted as meaning that the higher rates of refund laid down for specific countries are payable even where it cannot be proven that the goods in question actually reached the market in those countries.

B — My *opinion* on the matter is as follows.

1. I should like at the outset to refer to the remarks concerning the refund rules made in the Advocate General's Opinion in Case 125/75 [1] (which also concerned the export of milk products to specific countries under the terms of Regulation No 876/68), since they seem to me to be convincing, and I should like also to give an outline of the relevant case-law.

(a) In the case referred to the Advocate General pointed out that the objective of the refund rules, as can be seen from the preamble to Regulation No 876/68, is to make the price of Community products competitive and thus to promote their sale on the markets of non-member countries. The varying of refunds according to destination is intended to encourage the marketing of Community products, having regard to particular market situations (in particular where the Community has a trade interest in being present on particular markets). Since this entails a comparison of prices, and since Article 3 of Regulation No 876/68 provides that in determining prices particular account is to be taken of the prices on the markets of non-member countries, the most favourable prices in

1 — Judgment of 2. 6. 1976 in Case 125/75, *Eier-Kontor* v *Hauptzollamt Hamburg-Jonas*, [1976] ECR 771.

non-member countries of destination for imports from non-member countries and the producer prices recorded in exporting non-member countries, it must be concluded that in this context market conditions and the requirements of specific markets are of key significance and that it is not only the amount of the transport costs which is relevant for the refund. Seen in this light the term "reach" as used in Article 6 of Regulation No 876/68 must be related to the *market*, that is to say, it is necessary that the goods should have been present on the market concerned and have been offered for sale there. The essential precondition for that is *importation* into the territory concerned. The completion of customs import formalities thus represents important evidence of marketing; it is however no more than evidence, merely a rebuttable element of proof.

(b) The *judgments of the Court* have taken the same direction. An early judgment relevant here is that in Case 6/71 [1], which concerned the term "export" in the context of the refund rules contained in Regulation No 19. It was exphasized that that term presupposed that the goods were offered for sale on the market of a non-member country and that they had at least been put into free circulation there (at p. 837, paragraph 7).

In its judgment in Case 125/75 [2] (which concerned a refund varying according to destination), the Court, referring to the preamble to Regulation No 876/68 (which mentions not only the varying distances from Community markets of markets in the countries of destination, but also the special conditions applied to imports in certain countries of destination), made it clear that the refund depended on the actual importation of the product. It was thus insufficient for the goods simply to be unloaded in a specific country; it was necessary for them to have been cleared through customs and put into free circulation at the destination (at p. 783, paragraphs 5 and 6).

That principle was confirmed in Case 44/76 [3], which also concerned Regulation No 876/68 and refunds varying according to destination. In that case the Court not only stressed that the abovementioned legal position was clearly established in the basic regulation (at p. 408, paragraph 14), but also stated, with regard to the right to require further proof provided for by Regulation No 1041/67, that the competent German customs office had often required proof of marketing in the country of destination and that this requirement was justified by the need to avoid fraudulent practices in connection with the refunds (at p. 409, paragraph 16).

In Case 820/79 [4], which also concerned Regulation No 876/68, reference was made to the fact that in 1973 the Management Committee for Milk and Milk Products unanimously took the view that Member States should require proof that goods had been put into free circulation in the country of destination

1 — Judgment of 28. 10. 1971 in Case 6/71, *Rheinmühlen Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1971] ECR 823.

2 — Judgment of 2. 6. 1976 in Case 125/75, *Eier-Kontor* v *Hauptzollamt Hamburg-Jonas*, [1976] ECR 771.

3 — Judgment of 2. 3. 1977 in Case 44/76, *Eier-Kontor* v *Council and Commission*, [1977] ECR 393.

4 — Judgment of 25. 11. 1980 in Case 820/79, *Belgium* v *Commission*, [1980] ECR 3537.

(at p. 3548, paragraph 12). It was again emphasized that it was necessary that the goods be cleared for entry into free circulation in the country of destination and that evidence of the mere arrival of the goods (by submission of a bill of lading bearing the words "freight prepaid") was not sufficient (paragraphs 4, 6 and 7).

Finally, reference should be made to the judgment in Case 250/80 [1]. In that case, which dealt with the payment of *"accession" compensatory amounts,* also intended to offset differences in price levels, not only did the Court attach importance to whether there was actual trade in the products in question between the exporting State and the importing State (paragraph 14), the point on which Dimex focused its attention, but it also emphasized — in circumstances in which import formalities had been completed in Great Britain and the goods had then been re-exported to the Federal Republic of Germany — that the completion of customs formalities was not sufficient, that the system operated only if the product in question was actually marketed in the importing State, so that the price difference between that Member State and the exporting Member State became an economic factor (paragraphs 15 and 17).

2. Dimex's principal submissions (I shall deal with them before going on to discuss the questions raised) are clearly directed towards obtaining a *change in the Court's approach;* Dimex seeks to establish the principle that, even in the case of a refund varying according to destination, payment should not depend on customs clearance, but that it should be sufficient that the goods actually reached the territory of the importing State and that their subsequent fate (marketing in the importing State or re-export to other countries) should be disregarded.

Dimex bases its view on the premise that, since the system of refunds contributes to the disposal of Community agricultural surpluses, it should be regarded as an intervention measure for the benefit of milk producers. In cases of doubt an interpretation in favour of persons entitled to the refunds is called for, and in any event an interpretation — taking into account the principle of proportionality — which does not impose too severe a burden on exporters and permits them to compete successfully with exporters from non-member countries (which is not the case where they are obliged by the excessive requirements and uncertainties of the system to take out supplementary insurance with regard to the refunds, as Dimex did). Particular regard should be had to the exigencies of international transit trade, which would come to a standstill if customs clearance in the country of destination were required; moreover, practices observed in shipping tansactions should also be taken into account. In such transactions, once the goods have been shipped the buyer is not obliged to account for what is done with the goods; he can therefore not be required to have them cleared for release into free circulation in a particular country and to provide the corresponding documents to the seller. Since the varying of the refunds is based on

1 — Judgment of 27. 10. 1981 in Case 250/80, *Anklagemyndigheden* v *Töpfer,* [1981] ECR 2465.

differences in *freight costs,* it must be sufficient that a valid shipping contract linked with a documentary credit has been concluded and that evidence of the payment of freight costs is provided by means of a charter party. Dimex finds support for its view in the twelfth recital in the preamble to Regulation No 192/75, which refers to a liberal approach to the obligation of proof.

3. For my part, however, I cannot see how Dimex's basic submission can succeed (for which, in view of the case-law set out above, a decision of the full Court would, moreover, be required).

Its premise that the refund system is merely an instrument for the disposal of agricultural surpluses is certainly wrong. As was correctly stressed, that is only one aspect of the system, and it seems self-evident that, in providing financial subsidies for the export of goods to non-member countries, the Community also implements considerations of commercial policy (taking into account particular circumstances in specific markets and special import conditions) and has regard to them in developing the refund system. In that regard it is also clear, as was pointed out in the Advocate General's Opinion in Case 125/75 [1], that refunds are not only intended to offset freight costs, but also take into account particular market conditions and trade arrangements which cannot be disregarded.

As regards the relevance of the principle of proportionality to the refund rules, it should not be forgotten — in so far as Dimex seeks to rely on the judgment in Case 6/78 [2] — that in that case the principle of *Community preference* played an important role and that it was stated in that respect that the competitive situation of Community exporters must not be less favourable than that of sellers from non-member countries (which would be the case if Community exporters were obliged to take out insurance covering "accession" compensatory amounts). Moreover, the uncontested statements of the Commission in no way give the impression that exporters are excessively burdened by the requirements of the refund system. It is an established fact that the Community is the largest exporter of milk products in the world and that as far as cheese itself is concerned exports to non-member countries have been increasing steadily for many years.

Dimex's reference to the twelfth recital in the preamble to Regulation No 195/75, which is confined to a specific case, clearly provides no support for its general point of view. In so far as Dimex refers to the exigences of international transit trade and the special characteristics of shipping contracts in order to show that the refund should depend solely on the *arrival* of the goods in the country of destination, it should be pointed out that that would result in the abandonment of the present system of variable refunds or would open the door to possibilities of fraud. Neither possibility

1 — Judgment of 2. 6. 1976 in Case 125/75, *Eier-Kontor* v *Hauptzollamt Hamburg-Jonas,* [1976] ECR 771.

2 — Judgment of 11. 7. 1978 in Case 6/78, *Union Française de Céréales* v *Hauptzollamt Hamburg-Jonas,* [1978] ECR 1675.

merits serious consideration. In any event, it is not sufficient to state that the refund system is an intervention measure whose adverse effect on exporters should be minimized.

4. I now come to the *questions submitted by the Bundesfinanzhof,* which must, as can be seen from the foregoing discussion, be dealt with in accordance with the existing case-law.

(a) The *first question* concerns the problem whether *proof* of importation into the country of destination is *irrebuttably furnished* where substitute documents requested by the competent authorities are submitted (it thus concerns the interpretation of the third subparagraph of Article 11 (1) of Regulation No 192/75, as amended by Regulation No 2818/75, which refers to proof that the goods have been unloaded).

(i) In this connection, probably on the assumption that the meaning of the two preceding subparagraphs (which refer to importation and clearance for release into free circulation) is important for the interpretation of that subparagraph, Dimex raises the question whether those two preceding subparagraphs are *valid.* In its view, if attention is restricted to the wording of the relevant provisions, the question arises whether they do not go beyond the limits laid down by the basic regulation of the Council, since Article 6 of Regulation No 876/68 refers only to proof that the products have *reached* their destination (which, says Dimex, is clearly to be understood in a factual sense); moreover, whilst exceptions may be made to that rule, the second subparagraph of Article 6 (2) of the regulation provides that conditions are to be laid down which offer *equivalent* guarantees (which certainly precludes the imposition of supplementary requirements by the Commission).

If it is desired to consider that question of validity (notwithstanding the fact that it was not raised by the Bundesfinanzhof), it may be dealt with quite briefly, in particular by considering the case-law to which I have already referred. It should not be overlooked, first of all, that Article 6 (3) of Regulation No 876/68 also refers to *additional* provisions and therefore clearly provides for the imposition of supplementary requirements. It is also important to point out that in the judgment in Case 125/75 [1] the necessity of clearance for release into free circulation was inferred from Regulation No 876/68 itself, and that in the judgment in Case 44/76 [2] the Court went so far as to state that the regulation clearly established that to be the legal position. It is clear, therefore, that the term "reached" contained in the regulation is to be equated with lawful import and that doubt cannot be cast upon the validity of Regulation No 192/75 because it expressly refers to clearance for release into free circulation.

(ii) On the basis of the case-law to which I have referred, there sould be no particular difficulty in deciding how to reply to the first question.

It is an essential prerequisite for the grant of refunds at rates which vary according to destination that the products concerned should be marketed,

1 — Judgment of 2 June 1976 in Case 125/75, *Eier-Kontor v Hauptzollamt Hamburg-Jonas,* [1976] ECR 771.

2 — Judgment of 2 March 1977 in Case 44/76, *Eier-Kontor v Council and Commission,* [1977] ECR 393.

that is to say, be traded in within the territory concerned. The completion of customs import formalities gives access to the market, but can certainly not be equated with marketing. Proof of the completion of those formalities can therefore be no more than rebuttable evidence. Reference may be made in that regard to the above-mentioned decisions on "accession" compensatory amounts. The use of the phrase "shall be considered" in the provision in question (the second subparagraph of Article 11 (1) of Regulation No 192/75) does not furnish a counter-argument. In subparagraph (3) of that provision itself it is envisaged that proof of completion of customs formalities may be regarded as "insufficient in view of the particular circumstances in the country of destination".

If the proof which is primarily required amounts only to rebuttable evidence, then the alternative form of proof, namely proof that the goods have been *unloaded*, which provides only limited evidence that the goods have reached the market and been traded in within the territory concerned, can itself be no more than rebuttable evidence.

(iii) The Bundesfinanzhof did not ask what conditions and possible limits apply to the rebuttal of such evidence.

In that regard Dimex submitted that, even if checks may subsequently be made to verify whether the conditions for the payment of the refund were met and previously accepted evidence may be rebutted, it is necessary — having regard to the principles of legal certainty and protection of legitimate expectation and to the objectives of the refund system — to observe certain limits in carrying out such checks. Thus, according to Dimex, a demand for repayment of refunds may be made only where unloading documents were falsified or contained misstatements, or in a case of abuse of the system (which must without exception be proven by the authorities demanding repayment). Conversely, a demand for repayment may not be made where it is subsequently ascertained that the goods were not cleared for entry into free circulation, in particular because the goods have deteriorated or have been re-exported in circumstances for which the exporter is not responsible.

In so far as it is necessary to consider this point in the context of the first question, it is clear from the observations which I made earlier that the view put forward by Dimex is too narrow. As I have pointed out, the essential prerequisite is that the goods should be traded in within the country of destination. An exporter can and must protect himself in that regard (by, for example, inserting clauses in the contract). Where it is discovered that there was no such trade, the alternative form of proof can in principle be declared insufficient. It is clear that, depending on the circumstances of the particular case, the principle of protection of legitimate expectation may also apply, but it is unnecessary to examine that question in further detail here. It is hard to see how that principle can apply in this case since it is established that on 25 October 1976 (a considerable time before the substitute documents were submitted) Dimex learned that the goods could not be marketed in Kuwait and that, when it accepted the alternative form of proof in April 1977, the Hauptzollamt was left unaware of that important fact.

(b) Since the *second question* presupposes an affirmative answer to the first question, there is no need to consider it in detail.

If it is clear that proof cannot be provided irrebuttably by the submission of substitute documents, it follows that the competent authorities may later reconsider their conclusion that proof of completion of customs formalities could not be furnished because of circumstances beyond the control of the importer. It is therefore unnecessary to consider further how that phrase is to be understood, and whether it should not in fact read "beyond the control of the *exporter*", as Dimex submits, referring to Article 20 of the subsequent regulation, Regulation No 2730/79, and observing that exporters cannot be held responsible for decisions taken by importers of their own free will. Without going into the matter more closely at the present time, I wish only to suggest that, as the Commission remarked, it does not seem inappropriate to refer to the "importer" in this connection, if one considers circumstances in which the importer with whom the exporter does business deliberately refrains from having the goods cleared through customs. The third subparagraph of Article 11 (1) of Regulation No 192/75 may also properly be held to apply — as the preamble to Regulation No 2818/75, which amends Article 11, suggests — where the exporter, because of the particular characteristics of the import procedure in the country in question, is not in a position to produce the customs documents, if such documents have gone astray for reasons which cannot be attributed to him or it would be unreasonably difficult to obtain them.

(c) Finally, the *third question* relates to the fact that the exported feta cheese was not placed on the market in Kuwait, but was destroyed as being unfit for human consumption (it is unclear and disputed when and where the cheese became spoiled, whether before or after its arrival in Kuwait, and if after, before or after its clearance for release into free circulation, in which regard, moreover, it is not certain whether customs clearance in fact took place or was refused on account of the condition of the goods). In view of those circumstances, it must be resolved whether a product is "imported" into the territory of destination where a few days after arrival it is either destroyed or re-exported, and it must be decided whether the answer to that question depends on whether the product is destroyed or re-exported before or after clearance for release into free circulation in that territory and whether the deterioration of the goods which was the cause of the destruction or re-exportation occurred before or after such clearance.

In that connection Dimex maintains that it is to be inferred from Article 8 of Regulation No 192/75 that the only important point is whether the products are of sound and fair marketable quality at the time of their *exportation* (in this case the Finanzgericht found that to be the case, and its finding cannot be challenged). It should also be recalled, says Dimex, that the ship chartered by it *reached* the territory of Kuwait six weeks before it was unloaded, and that it is therefore probable that the deterioration of the goods occurred after that time (which it considers decisive).

It is quite clear, however, that those considerations do not assist in answering the question raised. From my review of the relevant case-law it is clear that it must be inferred from the basic regulation, Regulation No 876/68, that the decisive factor in granting a refund varying according to destination is the clearance of the goods for release into free circulation and the fact that the goods have been placed on the market in the territory in question with a view to their sale. Thus it is not the actual arrival in the territory of the country in question that is important, but the authorization of access to the market, which in Kuwait, as may be inferred from the letter of the German Embassy of 23 November 1978, certainly requires approval by the health authorities, if not customs clearance for release into free circulation. Moreover, if it is *marketing* that is essential for the payment of the refund, it cannot be sufficient that the goods have *left* the territory of the Community in sound condition; they must still be in that condition when they reach the market, since otherwise they cannot be marketed because they are not of merchantable quality.

As is apparent from the Court's decisions in previous cases, it is clear that there can be no question of the goods having been "imported" where they become unfit for marketing and are destroyed before clearance for entry into free circulation. If, however, that happens *after* customs clearance (which, as Dimex stated, in such countries sometimes takes place without a detailed examination), it will depend, as the Commission correctly contended, on whether the basic cause of the deterioration had already arisen before that. In a case such as the present that might easily be assumed, since on 7 October 1976, that is to say, immediately after unloading, Lloyds agents found the goods not to be in perfect condition in the buyer's cold store.

As far as the third question of the Bundesfinanzhof in concerned, all the elements necessary for its decision have now been set out. Therefore, in the absence of any question on this point, there is no reason also to go into the problem raised by Dimex as to whether, where it is decided that the conditions for the payment of a specific refund are not fulfilled, the refund can be calculated at the *lowest* rate, if (as Dimex maintains is the case with regard to the rate applicable to the United States) that rate has no real significance for the export trade (this is disputed by the Commission, which points to the development of feta cheese exports to the United States).

C — The following answers can therefore be given to the questions put by the Bundesfinanzhof:

(a) *The proof* required by Article 6 (2) of Regulation No 876/68, in conjunction with Article 6 (1) of Regulation No 192/75, that the product has been imported into the territory of destination *cannot be regarded as having been furnished irrebuttably* where the person concerned has produced a substitute document requested by the competent

authority pursuant to the third subparagraph of Article 11 (1) of Regulation No 192/75. That is also true where the competent authority has requested the production of substitute documents and it is subsequently discovered that the proof of completion of customs formalities, as referred to in the second subparagraph of Article 11 (1) of Regulation No 192/75, was not impossible owing to circumstances beyond the control of the importer.

(b) *A product is "imported"* into the territory of destination within the meaning of Article 6 (2) of Regulation No 876/68, in conjunction with Article 6 (1) of Regulation No 192/75, *when it has access to the market.* That is not the case where, before or shortly after unloading or customs clearance for entry into free circulation, the product deteriorates and is therefore destroyed, and where it may be assumed that the basic cause of the deterioration arose before the goods were unloaded.