JUDGMENT OF THE COURT (THIRD CHAMBER)
27 JANUARY 1983 [1]

Interagra SA
v Fonds d'Orientation et de Régularisation des Marchés Agricoles (FORMA)
(reference for a preliminary ruling from the Tribunal Administratif, Paris)

(Export certificates — Conditions of issue)

Case 109/82

Agriculture — Common organization of the markets — Milk and milk products — Export certificates with advance fixing of refunds — Day of issue — Concept — Exports in connection with invitations to tender opened in an importing non-member country — Date of issue — Concept

(Regulation No 2044/75 of the Commission, Arts 3 (3) and 6)

It appears from the context in which the concepts of day of issue and date of issue are used in Articles 3 (3) and 6 respectively of Regulation No 2044/75 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products that the first concept relates to the day on which the export certificate is granted and the second to the day from which the period of validity of the certificate granted must be calculated. Consequently, there is no contradiction between those two provisions and Article 6 cannot be considered to be an exception to the rule laid down by Article 3 (3).

In Case 109/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Administratif [Administrative Court], Paris, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: French.

INTERAGRA SA, Paris,

and

FONDS D'ORIENTATION ET DE RÉGULARISATION DES MARCHÉS AGRICOLES (FORMA) [Agricultural Markets Guidance and Stabilization Fund], Paris,

on the interpretation of Articles 3 (3) and 6 of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products,

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Lord Mackenzie Stuart and Y. Galmot, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

By Regulation (EEC) No 2943/80 of 13 November 1980 fixing the export refunds on milk and milk products (Official Journal L 305, p. 27) the Commission fixed in advance the refunds on exports of butter to the Soviet Union to be carried out after 1 January 1981 at an amount varying between 113.41 and 197.00 European Currency Units (hereinafter referred to as "ECU") per 100 kg depending on fat content by weight.

On the same day on which that regulation was adopted the Soviet agency V.O. Prodintorg of Moscow invited Interagra SA to participate in an international invitation to tender for the delivery of 100 000 tonnes of butter and 15 000 tonnes of butter-oil between

January 1981 and February 1982. The tenders had to be submitted to Prodintorg by no later than 25 November 1980 and were binding on the tenderers until 5 December 1980.

On 17 November 1980 Interagra answered the invitation to tender by submitting a tender for 25 000 tonnes of butter in reliance on the refund fixed in advance by Commission Regulation No 2943/80. On the same day Interagra submitted an application to the Fonds d'Orientation et de Régularisation des Marchés Agricoles [Agricultural Markets Guidance and Stabilization Fund, hereinafter referred to as "the Fund"] for an advance-fixing certificate for 25 000 tonnes of butter and indicated that its application was to be considered in connection with Prodintorg's invitation to tender.

On 19 November 1980 Interagra agreed to Prodintorg's request to extend the validity of its tender to 20 December 1980.

On 20 November 1980 Commission Regulation (EEC) No 2993/80 of 19 November 1980, temporarily suspending advance fixing of the export refund for butter and butter-oil (Official Journal L 310, p. 18), entered into force. That regulation suspended advance fixing of export refunds until 27 November 1980 which date was extended to 11 December 1980 by Commission Regulation (EEC) No 3070/80 of 28 November 1980 (Official Journal L 322, p. 27).

On 28 November 1980 the Fund informed Interagra that because of the Commission's decision to suspend advance fixing of refunds from 20 to 27 November applications for certificates submitted after 17 November 1980 had become devoid of purpose by virtue of Article 3 (3) of Regulation No 2044/75.

On 27 January 1981 Interagra brought an action before the Tribunal Administratif, Paris, for the annulment of the Fund's decision of 28 November 1980 on the ground of misuse of powers.

In that action Interagra argued that in the case of applications for certificates lodged in connection with an invitation to tender opened in a non-member country it is not Article 3 (3) of Regulation No 2044/75 which is applicable but Article 6 of that regulation which provides that the export certificate is to be valid from the day on which the application was lodged, which, according to Interagra, means that the certificates ought to have been issued by the Fund notwithstanding the Commission's decision suspending advance fixing after its application was lodged.

Faced with those conflicting interpretations the Tribunal Administratif, Paris, decided, by judgment of 16 February 1982, to reserve judgment and submit the following question to the Court of Justice for a preliminary ruling:

"What was the scope, on 17 November 1980, of Articles 3 (3) of Regulation No 2044/75 of the Commission of 25 July?

In particular:

(i) Does Article 6 lay down, in respect of all exports to non-member countries in connection with invitations to tender, a general rule which is nevertheless subject to an exception in the case of the products referred to in Article 3 (3) and which is not capable of preventing the application of the 'special measures' referred to in that paragraph?

(ii) Or, on the contrary, does Article 6 lay down for those transactions special provisions which may be regarded as constituting an exception to the general rules contained in

Article 3 (3), so as to prevent the application of the 'special measures' referred to in the latter provision?"

The order for reference was registered at the Court on 24 March 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were lodged by Interagra SA, represented by Xavier de Roux and Charles-Henri Léger of the Paris Bar, by the Fund, represented by Philippe Villey of the Paris Bar, by the Commission of the European Communities, represented by François Lamoureux, a member of its Legal Department, acting as Agent, and by the French Government, represented by François Bersani, Deputy Secretary General at the Inter-Ministerial Committee for Matters of European Economic Cooperation.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry and to assign the case to the Third Chamber.

II — Summary of the observations submitted to the Court

Interagra disputes first of all that Article 3 (3) of Regulation No 2044/75 must apply rather than Article 6 of that regulation because it is a special rule derogating from that article and because that is the Commission's opinion.

In Interagra's view, if Article 3 (3) does indeed constitute an exception to the general rules governing the issue of certificates for milk products, it must not be forgotten that Article 6 constitutes another exception, in the case of tenders, to those general rules. In fact, it appears from the general scheme of Regulation No 2044/75 that the provisions relating to tenders (Articles 5 to 10) derogate *in toto* from Articles 1 to 5 laying down general rules on import and export licences and certificates and advance fixing of refunds.

As far as the Commission's interpretation is concerned, Interagra points out that the Court of Justice has consistently held that the interpretations which the Commission provides to national authorities are for guidance only and are not binding.

Interagra also contends that it is clear from the spirit of Articles 3 (3) and 6 of Regulation No 2044/75 that Article 6 must prevail over Article 3 (3) and that the Commission itself has confirmed this view in adopting Regulation No 3137/80 of 4 December 1980 (Official Journal, 1980, L 329, p. 20).

As regards the spirit of those provisions, Interagra points out that the aim of Article 3 (3) of Regulation No 2044/75 is to enable the Commission to suspend the advance fixing of refunds in the event of speculation or the threat of speculation, a risk which does not occur in the case of tenders. In those cases the rule in Article 6, to the effect that certificates are always issued on the day on which the application is lodged, is particularly well-suited to invitations to tender to which traders are often asked to reply within a very short time, sometimes on the same day, which is incompatible with the obligation to wait for a period of five days, as Article 3 (3) of that regulation requires.

As far as Regulation No 3137/80 is concerned, Interagra takes the view that by that regulation the Commission amended Regulation No 2044/75 in the sense that Article 3 (3) was extended to invitations to tender. It challenges the Commission's argument that the amendment simply clarified the rules. The very language of that regulation and the fact that the Commission believed that it had to make it retroactive demonstrate that the aim of the regulation was not to clarify the rules in force but to amend them.

More specifically, Interagra rejects the arguments advanced by the Commission in Case 217/81 to the effect that the aim of Regulation No 3137/80 was to clarify the conditions for the application of amendments made to Regulation No 2044/75 by Regulations Nos 203/80 and 3015/80, especially on the concept of "issue".

In Interagra's view Regulation No 3137/80 does not accord with the Commission's aim at all. Instead, as the "date of validity" of certificates, it substitutes for the day on which the application is lodged the fifth working day thereafter. This confirms that until then the "date of validity" was that on which the application was lodged and that by means of the new rules the Commission wished to amend Regulation No 2044/75 retroactively in order to impose its interpretation according to which Article 3 (3) of that regulation prevails over Article 6.

In conclusion Interagra proposes that the Court should reply to the question submitted by the Tribunal Administratif, Paris, as follows:

"In view of the wording of Regulation No 2044/75 on 17 November 1980, in the case of export certificates fixing refunds in advance issued for the purpose of a tender concerning products referred to in Article 3 (3) of Regulation No 2044/75 Article 6 of that regulation prevails over Article 3 (3) inasmuch as the exporter's right to the issue of the certificates exists from the date on which his application was lodged."

In its observations the *Commission* sets out the facts and legislative context in which they occurred and then attempts to show, first, that Articles 3 (3) and 6 of Regulation No 2044/75 do not in fact have the same substantive scope and secondly that the amendment made to Regulation No 2044/75 by Regulation No 3137/80 concerns the question of the period of validity and not the question of the waiting period and it cannot therefore be considered as retroactively extending that period to applications for certificates submitted in connection with invitations to tender.

As regards the substantive scope of those two articles, the Commission argues that whereas Article 3 (3) deals with the waiting period for the export certificate Article 6 deals with how the period of validity of that certificate is determined.

The Commission sets out in detail the rules on the period of validity and distinguishes between products which are subject to the waiting period provided for in Article 3 and which are, or are not, to be exported in connection with an invitation to tender and products which are not subject to the waiting period and which are, or are not, to be exported in connection with an invitation to tender.

In the Commission's view, Interagra is in fact confusing the preliminary question of the right to the issue of the certificate, which is governed in particular by Article

3 (3) of the regulation, with that of the period of validity of the certificate once it has actually been issued.

As regards the amendments made to Regulation No 2944/75 by Regulation No 3137/80, the Commission adheres to and repeats the explanations which it provided in Case 217/81, according to which the aims of the amendment were first to remove a difficulty of interpretation inherent in Regulation No 203/80 and secondly to provide for a transitional measure in connection with the implementation of Regulation No 3015/80. In the Commission's view, there is no way in which that amendment, which relates to the term of validity of a certificate, can be construed as extending the waiting period for applications for certificates lodged in connection with invitations to tender as that period already applied to such applications from the time when the system of advance fixing was introduced by Regulation No 445/77 of 2 March 1977 (Official Journal, 1977, L 58, p. 21).

The Commission consequently proposes that the questions submitted by the Tribunal Administratif, Paris, should be answered in the following manner:

"On 17 November 1980 Article 3 (3) of Regulation No 2044/75 applied to all applications for export certificates fixing in advance the refund on the products falling under subheadings 04.02 A II (b) 1, 04.02 B I (b) 2 (aa) and 04.03 (skimmed-milk powder, butter and butter-oil), including applications for such certificates lodged in connection with an invitation to tender opened in an importing non-member country."

In its observations the *Fund* points out, as the Commission does, that the purposes of Article 3 (3) and Article 6 of Regulation No 2044/75 are different. According to the Fund, Article 3 (3) fixes the date on which the competent intervention agency must decide whether the conditions for the issue of the export certificate fixing the refund in advance are statisfied whereas Article 6 fixes the start of the period of validity of the certificate if, on the date stipulated in Article 3 (3), the conditions for the grant of the certificate are fulfilled.

In conclusion the Fund asks the Court of Justice to answer the question submitted by the Tribunal Administratif, Paris, to the effect that there is no contradiction between the general rule contained in Article 6 of Regulation No 2044/75, fixing, in the case of an invitation to tender opened in a non-member country, the start of the period of validity of the certificate, and the specific rule, applicable only to certain milk products, including butter, laid down by Article 3 of the same regulation requiring account to be taken of special measures (like the suspending of the advance fixing of the refund) adopted by the Commission between the day on which the application for the export certificate was lodged and the fifth working day thereafter.

The French Government also takes the view that the question submitted to the Court does not involve any contradiction existing in Regulation No 2044/75 between two provisions or the relationship *ratione materiae* between a general rule and an exception. On the contrary, it is a question of the temporal relationship between a provision relating to the right to and detailed rules on the issue of a certificate (Article 3 (3)) and a provision concerning the period a validity of the certificate (Article 6). The French Government asks the Court to construe the provisions of Regulation No 2044/75 to that effect.

III — Oral procedure

At the hearing on 18 November 1982 oral argument was presented by the following: Xavier de Roux of the Paris Bar, for Interagra, Philippe Villey of the Paris Bar, for the Fund, François Lamoureux, a member of the Commission's Legal Department, acting as Agent, for the Commission and Alexandre Carnelutti, acting as Agent, for the French Government.

The Advocate General delivered his opinion at the sitting on 16 December 1982.

Decision

1 By judgment dated 16 February 1982 which was received at the Court on 24 March 1982 the Tribunal Administratif [Administrative Court], Paris, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 3 (3) and 6 of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products (Official Journal, 1975, L 213, p. 15).

2 The question was raised in an action brought by Interagra SA before the national court for the annulment, on the ground of misuse of powers, of the decision of the Fonds d'Orientation et de Régularisation des Marchés Agricoles [Agricultural Markets Guidance and Stabilization Fund, hereinafter referred to as "the Fund"] of 28 November 1980 by which the Fund declared that in view of Commission Regulation No 2993/80 of 19 November 1980 suspending advance fixing of refunds on exports of butter and butter-oil (Official Journal, 1980, L 310, p. 18) the application for an advance-fixing certificate lodged by Interagra on 17 November 1980 had become devoid of purpose by virtue of Article 3 (3) of Regulation No 2044/75.

3 That application of Regulation No 2044/75 was challenged by Interagra before the Tribunal Administratif, Paris, and prompted that court to submit the following question to the Court of Justice:

"What was the scope, on 17 November 1980, of Articles 3 (3) and 6 of Regulation No 2044/75 of the Commission of 25 July?

In particular:

(i) Does Article 6 lay down, in respect of all exports to non-member countries in connection with invitations to tender, a general rule which is nevertheless subject to an exception in the case of the products referred to in Article 3 (3) and which is not capable of preventing the application of the 'special measures' referred to in that paragraph?

(ii) Or, on the contrary, does Article 6 lay down for those transactions special provisions which may be regarded as constituting an exception to the general rules contained in Article 3 (3), so as to prevent the application of the 'special measures' referred to in the latter provision?"

4 On 17 November 1980 Article 3 of Regulation No 2044/75 contained a third paragraph providing that export certificates for butter and butter-oil in particular were to be issued on "the fifth working day following that on which the application is lodged, unless special measures are taken in the intervening period". None of the parties which have submitted observations to the Court dispute that a measure suspending the advance fixing of export refunds, such as that decided on by the Commission in Regulation No 2993/80, is a special measure within the meaning of the provision cited above.

5 Interagra's application for an export certificate was lodged on 17 November 1980 and Commission Regulation No 2993/80, introducing special measures within the meaning of Article 3 (3) of Regulation No 2044/75 of the Commission, entered into force on 20 November 1980, that is to say within the five-day period provided for by Article 3 (3) of Regulation No 2044/75. As a result the Fund refused to issue the certificates applied for.

6 Interagra contended, however, that the rule in Article 3 (3) of Regulation No 2044/75 does not apply in the case of invitations to tender opened in an importing non-member country for which Article 6 of the same regulation lays down, so it contends, a special rule concerning the issue of certificates.

7 Article 6 of Regulation No 2044/75 provides that in the case of exports in connection with an invitation to tender opened in a non-member country the export certificate is to be valid from its day of issue within the meaning of

Article 9 (1) of Regulation (EEC) No 193/75. Article 9 (1) of Regulation No 193/75 states that for the purpose of determining their period of validity licences or certificates are to be considered to have been issued on the day on which the application for them was lodged, that day being included in the calculation of such period of validity.

8 It is clear from the very words used in Article 9 (1) of Regulation No 193/75 that the date of issue used for the purpose of determining the period of validity of a certificate is deemed to be the date on which the application for a certificate was lodged and that that date may be different from the date on which the certificate was actually granted or that on which the certificate was physically delivered to the exporting undertaking.

9 It thus appears from the context in which the concepts of day of issue and date of issue are used in Articles 3 (3) and 6 respectively of Regulation No 2044/75 that the first concept relates to the day on which the export certificate is granted and the second to the day from which the period of validity of the certificate granted must be calculated. Consequently, there is no contradiction between those two provisions and Article 6 cannot be considered to be an exception to the rule laid down by Article 3 (3).

10 In its observations Interagra took the view that Regulation No 3137/80 of 4 December 1980, amending Regulation No 2044/75 for the 18th time, provides confirmation of the interpretation which it places on Regulation No 2044/75 as in force in November 1980. It is not necessary for the Court to rule upon the exact scope of that amendment, however, first because the question which the national court has submitted concerns the scope, on 17 November 1980, of Articles 3 and 6 of Regulation No 2044/75 and secondly because the amendment of 4 November 1980 was retroactive only to 22 November 1980, that is to say to a date subsequent to that on which the special measure constituted by Regulation No 2993/80 entered into effect.

11 The answer to the question submitted by the Tribunal Administratif, Paris, should therefore be that on 17 November 1980 Article 3 (3) of Regulation No 2044/75 applied to all applications for export certificates fixing in advance the refund on the products falling under subheadings 04.02 A II (b) 1, 04.02 B I (b) 2 (aa) and 04.03 (skimmed-milk powder, butter and butter-

oil), including applications for such certificates lodged in connection with an invitation to tender opened in an importing non-member country.

Costs

12 The costs incurred by the French Government and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question submitted to it by the Tribunal Administratif, Paris, by judgment of 16 February 1982, hereby rules:

On 17 November 1980 Article 3 (3) of Regulation 2044/75 applied to all applications for export certificates fixing in advance the refund on the products falling under subheadings 04.02 A II (b) 1, 04.02 B I (b) 2 (aa) and 04.03 (skimmed-milk powder, butter and butter-oil), including applications for such certificates lodged in connection with an invitation to tender opened in an importing non-member country.

Everling Mackenzie Stuart Galmot

Delivered in open court in Luxembourg on 27 January 1983.

J. A. Pompe
Deputy Registrar

U. Everling
President of the Third Chamber