JUDGMENT OF THE COURT (Third Chamber)

13 March 2008 *

In Case C-96/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Finanzgericht Hamburg (Germany), made by decision of 23 January 2006, received at the Court on 17 February 2006, in the proceedings

Viamex Agrar Handels GmbH

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

* Language of the case: German.

having regard to the written procedure and further to the hearing on 1 March 2007,

after considering the observations submitted on behalf of:

— Viamex Agrar Handels GmbH, by W. Schedl, Rechtsanwalt,

— the Hauptzollamt Hamburg-Jonas, by G. Seber, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 November 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) of Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport (OJ 1998 L 82, p. 19).

2 The reference was made in a dispute between Viamex Agrar Handels GmbH ('Viamex') and the Hauptzollamt Hamburg-Jonas (Principal Customs Office, Hamburg-Jonas) ('the Hauptzollamt') concerning refunds in respect of the export of live bovine animals to Lebanon.

Legal context

Regulation No 615/98

3 The second subparagraph of Article 13(9) of Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187), as amended by Council Regulation (EC) No 2634/97 of 18 December 1997 (OJ 1997 L 356, p. 13), provides that the payment of export refunds for live animals is subject to compliance with Community legislation concerning animal welfare and, in particular, with that concerning the protection of animals during transport.

4 Detailed rules for the application of Regulation No 805/68, as amended by Regulation No 2634/97, were laid down by Regulation No 615/98.

5 Article 1 of Regulation No 615/98 provides that the payment of export refunds for live bovine animals is to be subject to compliance, during the transport of the animals to the first place of unloading in the non-member country of final destination, with that regulation and with Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and

91/496/EEC (OJ 1991 L 340, p. 17), as amended by Council Directive 95/29/EC of 29 June 1995 (OJ 1995 L 148, p. 52) ('Directive 91/628').

6 Under Article 2 of Regulation No 615/98, checks are to be carried out on animals at the point of departure from the customs territory of the Community. An official veterinarian is to verify and certify that the animals are fit for the intended journey in compliance with Directive 91/628, that the means of transport by which the animals are to leave the customs territory of the Community complies with that directive and that provisions have been made for the care of the animals during the journey in accordance with the directive.

7 Article 2(3) of that regulation provides:

'If the official veterinarian at the exit point is satisfied that the requirements of paragraph 2 are met, he shall certify this by the entry

…

— Checks pursuant to Article 2 of Regulation (EC) No 615/98 satisfactory

— …

and by stamping and signing the document constituting evidence of exit from the customs territory of the Community, either in Section J of the control copy T 5 or in the most appropriate place on the national document. Where appropriate, the official veterinarian shall indicate:

— the number of animals which were no longer fit for the intended journey and therefore were removed from the consignment,

and/or

— the endorsement referred to in Article 3(3).'

8 Article 3(2) of Regulation No 615/98 provides:

'The person responsible for the checks shall draw up a report indicating:

— the number of live animals unloaded from the means of transport,

— the number of animals, among those referred to in the previous indent, which on the basis of their physical condition and/or state of health justify the conclusion that the Community provisions on the protection of animals during transport have not been complied with,

— whether or not the live animals have been put in quarantine.'

9 Article 5(1) of that regulation provides:

'1. The exporter shall inform the competent authority of the Member State where the export declaration is accepted about all necessary details of the journey, at the latest when the export declaration is lodged.

At the same time, or at the latest when he becomes aware [thereof], the exporter shall inform the competent authority about any possible change of the means of transport.'

10 Pursuant to Article 5(2) of Regulation No 615/98, applications for the payment of export refunds must be supplemented by proof that Article 1 of that regulation has been complied with, such proof to be furnished by the production of the control copy T 5 and the report drawn up by a control agency, together with the veterinary certificate.

11 Article 5(3) of Regulation No 615/98 provides, however, that the export refund is not to be paid for animals which have died during transportation or for animals in respect of which the competent authority considers, in the light of the documents

referred to in Article 5(2) of the regulation, the reports on the checks referred to in Article 4 thereof and/or all other elements at its disposal concerning compliance with Article 1 of the regulation, that Directive 91/628 has not been complied with.

12 Article 5(6) of Regulation No 615/98 provides that:

'6. Where the checks referred to in Article 3(1) could not be carried out owing to circumstances beyond the control of the exporter, the competent authority, on a justified request from the exporter, may accept other documents which justify to its satisfaction the conclusion that [Directive 91/628] has been complied with.'

Directive 91/628

13 Pursuant to Article 5(1)(b) and (c) of Directive 91/628, Member States are to ensure that any natural or legal person transporting animals for the purpose of gain uses, for the transportation of animals covered by that directive, means of transport that will enable compliance with the requirements laid down in the annex thereto, and does not transport any animal, or cause any animal to be transported, in a way which is likely to cause injury or undue suffering to that animal.

14 Point 17 of the Annex provides that the fittings of vessels are to be such that animals can be transported without injury or unnecessary suffering.

The main proceedings and the questions referred for a preliminary ruling

15 The order for reference relates that, on 8 March 1999, Viamex declared to the Hauptzollamt Kiel (Principal Customs Office, Kiel) the export to Lebanon of 35 live bovine animals on board the vessel 'Al Hajj Moustafa II' ('the vessel') and applied for an export refund in that respect.

16 By notice of 1 February 2001, the Hauptzollamt refused that application on the ground that at the time of carriage the vessel appeared on a negative list, established by the Commission of the European Communities, of ships considered unfit for the carriage of live animals. In the course of a check carried out on board the vessel on 18 and 19 February 1997, the Commission's Food and Veterinary Office ('the FVO') found that the vessel revealed serious shortcomings and that it did not meet the requirements of Directive 91/628.

17 The FVO plays an important role in the implementation and application of Community legislation on food safety, animal health, plant health and animal welfare.

18 In particular, the FVO has the task — which it performs through its inspections in Member States and the evaluations that it carries out — of promoting effective control systems in the field of safety and quality of foodstuffs, the veterinary field and the plant health field, and of checking compliance with the requirements of Community legislation in those fields in the European Union and in non-member countries exporting to the European Union. In addition, it has the task of contributing to the formulation of Community policy in those fields.

19 The check carried out on the vessel by the FVO revealed, first, that the gangways, the corridor access points and the pens were in such a state that they could cause injury to the animals and, second, that they made it impossible to ensure that the animals could not break loose. In addition, those gangways, corridor access points and pens were worn out and rusty, and their condition made them difficult to cleanse or disinfect.

20 In that regard, it appears from the case-file that Viamex attached to its export refund application, first, a written declaration from the master of the vessel, dated 16 October 1997, noting repair works and countersigned by the chief frontier veterinary officer at Koper (Slovenia) and, second, a report from the average adjusters Kälher & Prinz AG of 22 September 1998.

21 However, the vessel was not removed from the Commission's negative list until 24 January 2000, following an inspection carried out in November 1999, approximately eight months after the export at issue in the main proceedings.

22 By decision of 18 May 2001, the Hauptzollamt rejected Viamex's objection against the refusal notice of 1 February 2001.

23 Viamex brought an action against that decision on the ground that there is no provision to the effect that a vessel has to be authorised for the transportation of live cattle, whether among the provisions governing export refunds or in Directive 91/628.

24 The Hauptzollamt states, for its part, that pursuant to Article 5(3) of Regulation No 615/98, for the competent authority to be able to refuse the right to a refund, it is sufficient for it to have at its disposal elements enabling it to conclude that Directive 91/628 was not complied with. The Hauptzollamt thus considers that that provision does not require the competent authority to prove non-compliance with Directive 91/628.

25 In any event, the Hauptzollamt states that, on 3 December 1999, it received an update of the negative list indicating that the vessel had once again fallen short of the requirements imposed by Directive 91/628.

26 That update had been made following an inspection in November 1999 by officials from the British Ministry of Agriculture, Fisheries and Food. It was clear in particular from that inspection that the vessel had been approved only temporarily and only for the carriage of sheep. Given the difference in size between sheep and cattle, the fact that a ship is suitable for the carriage of sheep does not support the conclusion that it is also suitable for the carriage of cattle.

27 Consequently, in the light of that information, the Hauptzollamt formed the view that Directive 91/628 could not possibly have been complied with during the transport operation at issue in the main proceedings and that the conditions laid down in Article 5(3) of Regulation No 615/98 for refusing an export refund were satisfied.

28 Since it considered that the outcome of the case depended on the interpretation of Article 5(3) of Regulation No 615/98, the Finanzgericht Hamburg (Finance Court, Hamburg) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 5(3) of Regulation No 615/98 constitute an exclusion, with the consequence that the burden of proof in respect of the requirements of Article 5(3) of Regulation No 615/98 is on the Principal Customs Office?

(2) If the first question is answered in the affirmative: In order to conclude under Article 5(3) of Regulation No 615/98 that … Directive [91/628] has not been complied with, is it necessary to have proof that there has been an infringement of [that directive] … in the particular case, or does the competent authority discharge its burden of proof if it relies on and provides evidence of circumstances which, viewed as a whole, indicate a material probability that the directive on the protection of animals during transport has not been complied with (also) in relation to the export consignment in question?

(3) Irrespective of the answers to the first and second questions: May the competent authority refuse to pay (all of) the export refund to the exporter under Article 5(3) of Regulation No 615/98 where there are no indications that the (potential) infringement of Directive 91/628 … has in fact been deleterious to the wellbeing of the animals during transport in relation to the export consignment in question?'

The questions referred for a preliminary ruling

The first and second questions

29 By its first and second questions, which should be examined together, the national court is essentially asking whether, if all the documents required pursuant to Article 5(2) of Regulation No 615/98 have been produced by the exporter, it is for the exporter or the competent authority to establish that the conditions laid down in Article 5(3) of that regulation have been fulfilled. If the burden of proof is on the competent authority, the national court wishes to know on which elements that authority may legitimately base a finding that Directive 91/628 has not been complied with, and whether it is sufficient for that authority to refer to those elements or whether it is required to furnish proof of an actual and specific infringement of the directive.

30 In that regard, according to settled case-law, since the system of export refunds is based on voluntary declarations, where the exporter decides on its own initiative to seek a refund, it must provide the relevant information necessary to establish its entitlement to the refund and to determine its amount. In the context 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) and the system of penalties introduced by that regulation, the Court has already held that, since the context is that of a Community aid scheme, the grant of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness (see, to that effect, Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 41, and Case C-309/04 *Fleisch-Winter* [2005] ECR I-10349, paragraph 31).

31 The Court has also held that, by declaring a product under the procedure for export refunds, an exporter implies that the product satisfies all the conditions necessary for the refund. If the declaration is questioned by the competent authority, it is for the exporter to show, in accordance with the national rules of evidence, that the conditions have actually been complied with (see, to that effect, *Fleisch-Winter*, paragraphs 32 and 35).

32 Such a mechanism is provided for in the framework of the arrangements governing export refunds, with regard to the welfare of live bovine animals during transportation, and it is for the exporter to establish in accordance with Article 5(1) and (2) of Regulation No 615/98 that the conditions for the grant of the refund are met.

33 In order to do so, the exporter must, first, pass on to the competent authority of the Member State where the export declaration is accepted all necessary information concerning the journey, at the latest when the export declaration is lodged. Second, the exporter must, in order to obtain payment of the export refund, provide proof of compliance with the provisions of Article 1 of Regulation No 615/98 and, accordingly, of Directive 91/628, by producing the documents referred to in Articles 2(3) and 3(2), respectively, of that regulation. Additionally, Article 5(6) of that regulation makes it possible, under certain conditions, for the exporter to confirm that Directive 91/628 has been complied with by providing the competent authorities of the Member State with other documents.

34 However, as is clear from the aim of Articles 3 and 5 of Regulation No 615/98, presentation by the exporter of those documents does not constitute irrefutable proof of compliance with Article 1 of that regulation, or of compliance with Directive 91/628. That evidence is sufficient only in so far as the competent authority does not have at its disposal elements in the light of which it may find that the directive has not been complied with.

35 That interpretation is confirmed by the wording of Article 5(3) of Regulation No 615/98, under which the competent authority is entitled not to pay the export refund for animals in respect of which it considers — in the light of the documents referred to in Article 5(2), the reports on the checks referred to in Article 4 of that regulation and/or any other element at its disposal concerning compliance with Article 1 of the regulation — that Directive 91/628 has not been complied with.

36 It is clear that, despite the documents produced by the exporter in accordance with Article 5(2) of Regulation No 615/98, the competent authority may consider that the exporter has complied neither with Article 1 of that regulation nor with Directive 91/628, provided, inter alia, that the conditions laid down in Article 5(3) of that regulation are met.

37 Given that it is for the exporter, pursuant to Article 5(2) of Regulation No 615/98, to furnish proof of compliance with Article 1 of that regulation, the obligation incumbent upon the competent authority is to analyse that evidence, together with any other element available to it, in order to reach a finding as to whether or not Directive 91/628 has been complied with and decide whether or not to grant the export refund.

38 However, Article 5(3) of Regulation No 615/98 cannot be interpreted as entitling the competent authority arbitrarily to call into question the evidence attached by the exporter to its export refund application. The Court has held, in that regard, that the discretion which the competent authority enjoys is not unlimited, since it is circumscribed by Article 5 of Regulation No 615/98 (see, to that effect, Joined Cases C-37/06

and C-58/06 *Viamex Agrar Handel and ZVK* [2008] ECR I-69, paragraph 39). That discretion appears, in particular, limited as to the nature and the evidentiary value of the elements on which the competent authority relies.

39 First, regarding the nature of those elements, the Court has held inter alia that it is only in the light of the documents relating to animal health referred to in Article 5(2) of Regulation No 615/98, the reports on the checks referred to in Article 4 of that regulation and/or other elements at its disposal concerning compliance with Article 1 of the regulation and having a bearing on animal welfare that the competent authority may conclude that Directive 91/628 has not been complied with (see *Viamex Agrar Handel and ZVK*, paragraphs 39 to 41).

40 Second, concerning the evidentiary value of the elements capable of being taken into account, the competent authority cannot confine itself to noting mere suppositions or doubts concerning compliance with Directive 91/628, in order to call into question the evidence presented by the exporter in accordance with Article 5(2) of Regulation No 615/98. Such an interpretation would inevitably render Article 5(2) redundant and create legal uncertainty for exporters as to the conditions required for payment of export refunds.

41 The competent authority is thus required, pursuant to Article 5(3) of Regulation No 615/98, to base itself on objective and specific elements relating to the welfare of the animals which are capable of establishing that the documents attached by the exporter to its export refund application do not prove compliance with the provisions of Directive 91/628 during transportation, and it is for the exporter to show, where appropriate, that the elements relied on by the competent authority to substantiate its finding of non-compliance with Regulation No 615/98 and Directive 91/628 are not relevant (see, by analogy, *Fleisch-Winter*, paragraph 35).

42 In any event, the competent authority is required to justify its decision by stating the reasons why it considers the evidence presented by the exporter does not enable it to be concluded that Directive 91/628 was complied with. For that purpose, the authority is required, in particular, to make an objective assessment of the documents presented to it and to show the pertinence of the elements it has relied on in order to establish that the documentation attached to the export refund application was not sufficient to show compliance with the relevant provisions of Directive 91/628. Such a reasoned decision is particularly indispensable to the exporter as it may wish to bring an action against a decision rejecting totally or in part its export refund application.

43 It is for the national court to verify, in the main proceedings, whether, in the light, inter alia, of the documents attached by Viamex to its export refund application and of the negative list referred to at paragraphs 16, 21 and 25 of this judgment, the vessel complied with Directive 91/628 at the time when the animals were transported.

44 In view of the foregoing, the answer to the first and second questions must be that, despite the documents produced by the exporter in accordance with Article 5(2) of Regulation No 615/98, the competent authority may consider, pursuant to Article 5(3) of the regulation, that Directive 91/628 has not been complied with. However, the competent authority can arrive at that conclusion only if it bases itself on the documents referred to in Article 5 of Regulation No 615/98, on the reports referred to in Article 4 of that regulation concerning the health of the animals, or on any other objective element with implications for the welfare of the animals such as to call into question the documents presented by the exporter, it being for the latter to show, if appropriate, that the elements relied on by the competent authority, in substantiation of its finding of non-compliance with Directive 91/628, are irrelevant.

The third question

45 By its third question, the national court asks essentially whether the competent authority may refuse the export refund pursuant to Article 5(3) of Regulation No 615/98 even in the absence of evidence showing that the welfare of the animals transported was, in fact, adversely affected by reason of the failure to comply with Directive 91/628.

46 In that regard, it should be borne in mind that, in the light of the wording of Articles 1 and 5(3) of Regulation No 615/98 and the purpose of that regulation, compliance with the provisions of Directive 91/628 relating to animal health constitutes a prerequisite for payment of export refunds (see *Viamex Agrar Handel and ZVK*, paragraph 37).

47 Moreover, as the Advocate General pointed out at point 44 of his Opinion, the wording of Article 5(3) of Regulation No 615/98 clearly shows that the Community legislature made the payment of export refunds conditional upon compliance with Directive 91/628, regardless of any proof of actual and specific injury suffered by the animals during their transportation.

48 It appears that the Community legislature considered, on the basis of scientific and veterinary studies as well as assessments of the application of Community legislation carried out in the animal protection field, that once the provisions of Directive 91/628 concerning the health of those animals are no longer complied with, the welfare of the animals is liable to be endangered and can no longer be guaranteed.

49 Such an approach appears moreover to be fully justified by the circumstance that, in practice, it is not always possible for the competent authority to ascertain that the animals have actually suffered, or been injured, as a result of non-compliance with those provisions.

50 In those circumstances, a competent authority which ascertains that, in breach inter alia of point 17 of the Annex to Directive 91/628, the fittings of a vessel are not such as to enable the animals to be transported without being exposed to injury or unnecessary suffering, is entitled to refuse the export refund.

51 It is for the competent authority to assess whether failure to comply with a provision of Directive 91/628 has had an impact on the welfare of the animals, whether such a failure can, if appropriate, be remedied and whether it must result in the export refund being forfeited, reduced or retained. It is also for that authority to decide whether the export refund must be reduced on a pro rata basis according to the number of animals which may, in its view, have suffered as a result of non-compliance with Directive 91/628 or whether that refund should not be paid since the failure to comply with a provision of that directive has inevitably had an impact on the welfare of all the animals (see *Viamex Agrar Handel and ZVK*, paragraph 44).

52 The answer to the third question must therefore be that, pursuant to Article 5(3) of Regulation No 615/98, the competent authority may refuse the export refund for failure to comply with the provisions of Directive 91/628 concerning animal health, even in the absence of evidence showing that the welfare of the animals transported was, in fact, adversely affected.

Costs

53 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 (Third Chamber) hereby rules:

1. Despite the documents produced by the exporter in accordance with Article 5(2) of Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport, the competent authority may consider, pursuant to Article 5(3) of that regulation, that Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, as amended by Council Directive 95/29/EC of 29 June 1995, has not been complied with. However, the competent authority can arrive at that conclusion only if it bases itself on the documents referred to in Article 5 of Regulation No 615/98, on the reports referred to in Article 4 of that regulation concerning animal health, or on any other objective element with implications for the welfare of the animals such as to call into question the documents presented by the exporter, it being for the latter to show, if appropriate, that the elements relied on by the competent authority in substantiation of its finding of non-compliance with Directive 91/628, as amended by Directive 95/29, are irrelevant.

2. Pursuant to Article 5(3) of Regulation No 615/98, the competent authority may refuse the export refund for failure to comply with the provisions of Directive 91/628, as amended by Directive 95/29, concerning animal health, even in the absence of evidence showing that the welfare of the animals transported was, in fact, adversely affected.

[Signatures]