OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 18 September 2008 [1]

1. Community export refunds on cereals may be granted at differentiated rates. Under the provisions applicable in the present case there was no refund for exports of rye to Switzerland or Liechtenstein whereas refunds were available for exports to all other third countries.

2. On the basis that it is not possible to export goods by sea to Liechtenstein or Switzerland, in some circumstances Community legislation accepts proof of export by sea in lieu of proof of completion of customs formalities at destination in order to qualify for the rate applicable to other countries.

3. What is less clear is whether it nevertheless remains necessary to provide, in addition, transport documents covering shipment to the final destination.

4. The present reference for a preliminary ruling from the Finanzgericht (Finance Court) Hamburg concerns an exporter able to provide proof of export by sea to a non-Community port but not of onward transport by land to the final destination in Russia.

Legislation

Fixation of export refunds

5. Pursuant to Articles 1, 13 and 23 of Council Regulation No 1766/92, [2] refunds for exports of cereals to third countries are fixed periodically (at least once a month) by regulation and/or from time to time under specific invitations to tender. Their purpose is to compensate, where appropriate, for lower prices on the world market than in the Community.

1 — Original language: English.

2 — Regulation of 30 June 1992 on the common organisation of the market in cereals (OJ 1992 L 81, p. 21).

6. In so far as is relevant for the present case, Regulation No 1758/1999 [3] issued an invitation to tender for export refunds on rye for export to all third countries. Under Article 4(1) of that regulation, export licences were to be deemed to have been issued on the day on which the tender was submitted. Regulation No 1851/1999 [4] fixed the maximum refund for tenders notified from 20 to 26 August 1999 at EUR 66.25 per tonne. The regular fixing for the same period was contained in Regulation No 1816/1999, [5] the annex to which showed that no refund was payable on rye (product code 1002 0000 9000) for 'all third countries'.

Horizontal implementing rules

7. Up to 1999, Regulation No 3665/87 [6] governed the system of export refunds on agricultural products in general. Article 18 of that regulation contained, inter alia, various rules concerning documents to be produced by exporters in order to obtain refunds.

8. With effect from 1 July 1999, Regulation No 3665/87 was repealed and replaced by Regulation No 800/1999, [7] under Article 54(2) of which references in Community instruments to Regulation No 3665/87 or to its specific articles are to be construed as referring to Regulation No 800/1999 or to the corresponding articles thereof, as set out in a correlation table contained in an annex. According to that table, Article 16 of Regulation No 800/1999 corresponds to Article 18 of Regulation No 3665/87.

9. The following recitals in the preamble to Regulation No 800/1999 may be helpful in understanding the applicable rules:

'(2) … the general rules laid down by the Council provide for the refund to be paid upon proof being furnished that the products have been exported from the Community; … entitlement to the refund is acquired as soon as the products have left the Community market, when a single refund rate applies for all third countries; … where the rate of refund is differentiated according to the destination of the products, entitlement to the refund is conditional on importation into a third country;

3 — Regulation of 9 August 1999 opening an invitation to tender for the refund or the tax for the export of rye to all third countries (OJ 1999 L 210, p. 3).

4 — Regulation of 26 August 1999 fixing the maximum export refund on rye in connection with the invitation to tender issued in Regulation (EC) No 1758/1999 (OJ 1999 L 226, p. 20).

5 — Regulation of 19 August 1999 fixing the export refunds on cereals and on wheat or rye flour, groats and meal (OJ 1999 L 220, p. 22).

6 — Regulation 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).

7 — Regulation of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11).

…

give assurances that the products exported have arrived at their destination, whilst hindering trade as little as possible;

(15) … where the rate of the refund varies according to the destination of the product, provision should be made for verification that the product has been imported into the third country or countries for which the refund was fixed; … such a measure can be relaxed without difficulty in respect of exports where the refund involved is small and the transaction is such as to offer adequate assurances that the products concerned arrive at their destination; … the purpose of the provision is to simplify the administrative work involved in the submission of evidence;

…’.

10. Chapter 1 of Title II of Regulation No 800/1999 concerns entitlement to refunds on exports to third countries. Section 1 (Articles 3 to 13), contains general provisions.

…

11. Under Article 3,‘entitlement to the refund is acquired:

(17) … where the rate of refund is differentiated according to the destination of the exported products, proof should be furnished that the product concerned has been imported into a third country; … completion of customs import formalities consists notably in the payment of import duties applicable in order that the product may be marketed in the third country concerned; … considering the diversity of situations prevailing in the importing third countries, it is advisable to accept the production of customs import documents which

— on leaving the customs territory of the Community, when a single refund rate applies for all third countries,

— on importation into a specific third country, when a differentiated refund applies for that third country’.

12. The first subparagraph of Article 7(1) provides: 'Without prejudice to Articles 14 and 20, payment of the refund shall be conditional upon proof being furnished that the products covered by accepted export declarations have left the customs territory of the Community in their unaltered state within 60 days of such acceptance.'

13. Article 9 lays down special provisions as regards documents to be provided in the case of export by sea (paragraph 1), road, rail or inland waterway (paragraph 2) and air (paragraph 3). They concentrate essentially on proof that the products have left the customs territory of the Community. Subparagraphs 1(b) and 2(b) indicate that, for such proof, transport documents are to be required covering the products up to their arrival in the third country in which they are to be unloaded; by contrast, for export by air, subparagraph 3(a) requires a transport document indicating a final destination outside the Community. For export by sea, Article 9(1)(c) allows the Member State of exit to stipulate, as an alternative to the conditions in subparagraph 1(b), that the document proving that the products have left the customs territory of the Community is to be endorsed only on presentation of 'a transport document specifying a final destination outside the customs territory of the Community'.

14. Article 10 concerns simplified procedures and again concentrates on 'departure' or 'exit' from the customs territory of the Community.

15. Section 2 (Articles 14 to 19) concerns differentiated refunds.

16. Article 14(1) provides: 'Where the rate of refund varies according to destination, refunds shall be paid subject to the additional conditions laid down under Articles 15 and 16.'

17. Article 15(1) requires products to be 'imported in their unaltered state into the third country or one of the third countries for which the refund applies within 12 months of the date of acceptance of the export declaration'. Article 15(2) provides guidance as to what is an 'unaltered state'. Article 15(3) states that a product is to be considered to have been imported 'when the customs import formalities, in particular those concerning the collection of import duties in the third country have been completed'. Article 15(4) states that the differentiated part of the refund

is to be paid on the mass of the products which underwent the customs formalities for import in the third country, disregarding natural variations occurring in the course of transport.

18. Under Article 16(1), proof of completion of customs import formalities is to be provided, in principle, by the customs document or by a certificate of unloading and importation. Under Article 16(2), if those documents are unobtainable, a number of specified other documents (including certificates drawn up by an approved international control and supervisory agency) may be accepted. Article 16(3) provides: 'Exporters shall in all cases produce a copy or photocopy of the transport documents.' [8] Article 16(4) allows the Commission, in certain specific cases to be determined, to provide for proof of import to be furnished 'by a specific document or in any other way'. Article 16(5) lists minimum requirements for the approval of international control and supervisory agencies.

19. Article 17 provides that 'Member States may exempt exporters from furnishing proof other than the transport document required under Article 16, where an export operation offers adequate guarantees of arrival at destination of products covered by an export declaration granting entitlement to a refund the variable component of which does not exceed' either EUR 1 200 or EUR 6 000, depending on certain circumstances.

20. Section 3 (Article 20) concerns specific measures of protection of the Community's financial interests. Article 20(1) provides, in essence and in so far as is relevant, that, where there are serious doubts as to the real destination of the product or definite suspicions that it will be reimported into the Community duty free or at a reduced rate of import duty, the refund is to be paid only if the product has left the customs territory of the Community, and, in the case of a differentiated refund, has been imported in its unaltered state into a specific third country within 12 months of the date of acceptance of the export declaration. 'In addition,' it continues, 'the competent authorities of the Member States may require additional evidence for all refunds proving to their satisfaction that the product has actually been placed on the market in the importing third country or has undergone substantial processing or working …'.

8 — Of the language versions of this paragraph, the German alone begins with '*Außerdem …*' ('in addition'). The equivalent was, however, present in all versions of the predecessor provision, Article 18(3) of Regulation No 3665/87.

21. In Chapter 2, 'Advances on refunds', Article 24(1) provides that, on application by the exporter, Member States are to pay the refund in advance, in full or in part, once the export declaration has been accepted, on condition that a security equal to the advance, plus 10%, is lodged.

22. Finally, Title IV, Chapter 2 (Articles 51 and 52), provides for amounts overpaid to be recovered and for penalties to be imposed on exporters in the event of applications for refunds which are not due or exceed the applicable rate.

Sectoral implementing rules

23. Commission Regulation No 1501/95 [9] contains further detailed provisions, applicable specifically to export refunds on cereals.

24. The 14th recital in its preamble reads:

'… Commission Regulation (EEC) No 3665/87 … requires that, where refunds vary according to destination, payment of the refund be made conditional in particular on presentation of proof that the product has been imported in its unaltered state into the third country or into one of the third countries for which the refund applies; … as regards cereals, the only refund lower than that applicable to exports to third countries as a whole is that on exports to Switzerland and Liechtenstein; … in order to avoid obstructing most Community exports by requiring proof of arrival at destination, other means must be found to ensure that products on which a refund applying to all third countries has been paid are not exported to the abovementioned countries; … to that end, the need to present proof of arrival should be waived in all cases where export is effected by sea; … certificates drawn up by the competent authorities of the Member States stating that the products have left the customs territory of the Community on board a vessel suitable for sea transport are considered to provide a sufficient guarantee'.

25. Article 13 of Regulation No 1501/95 reads: [10]

9 — Regulation of 29 June 1995 laying down certain detailed rules for the application of Council Regulation No 1766/92 (OJ 1995 L 147, p. 7). It was adopted when Regulation No 3665/87 was still in force but, at the material time in the present case, had not been amended since that regulation was replaced by Regulation No 800/1999.

10 — In the version applicable at the material time, that is to say, as amended by Commission Regulation (EC) No 1259/97 of 1 July 1997 (OJ 1997 L 174, p. 10).

‘Notwithstanding Article 18 of Regulation (EEC) No 3665/87, [11] proof of completion of customs formalities for release for consumption shall not be required for payment of refunds fixed in a contract awarded for refunds on exports to all third countries, provided that the operator provides proof that a quantity of at least 1 500 tonnes of cereal product have left the customs territory of the Community on board a vessel suitable for sea transport.

Such proof shall be provided by the following endorsement certified by the competent authority on the control copy referred to in Article 6 of Regulation (EEC) No 3665/87, on the single administrative document or on the national document proving that the goods have left the Community customs territory:

…

“Export of cereals by sea — Article 13 of Regulation (EC) No 1501/95”

…’

11 — The table in the annex to Regulation No 800/1999 (see point 8 above) shows that Article 18 of Regulation No 3665/87 corresponds to Article 16 of Regulation No 800/1999 (see point 18 above).

26. Article 14 reads:

‘Where the operator provides proof of completion of customs formalities for release for consumption in Switzerland or Liechtenstein, the amount of the export refund for exports to “all third countries” fixed under an invitation to tender shall be reduced by the difference between that amount and the amount of the export refund in force for the abovementioned destinations on the day the contract is awarded.’

Facts, proceedings and question referred

27. According to the order for reference, Glencore Grain Rotterdam BV (‘Glencore’) obtained final customs supervision in February 2000 for the export of 6 725 tonnes of rye to Russia in several part shipments.

28. It transpires from the case-file forwarded by the referring court that the relevant export licences had been issued following a tender submitted on 26 August 1999, pursuant to Regulation No 1758/1999. Consequently, it would appear, the rate of refund was EUR 66.25 per tonne for exports to all third

countries, in accordance with Regulation 1851/1999, with the exception of Switzerland and Liechtenstein, in respect of which, pursuant to Article 14 of Regulation No 1501/1995 read in conjunction with Regulation No 1816/1999, no refund was payable. [12]

29. Export declarations were issued, endorsed: 'Country of destination: all third countries;... "Export of cereals by sea — Article 13 of Regulation (EC) No 1501/95"'.

30. A first consignment, totalling 3041.886tonnes, [13] was shipped by sea from Lübeck in Germany to Klaipėda in Lithuania. The bill of lading dated 8 February 2000, a copy of which is in the national case-file, showed Klaipėda as the port of destination. [14]

31. On 12 July 2000, Glencore applied to Hauptzollamt Hamburg-Jonas ('the customs authority') for advance payment of the corresponding export refund.

32. By letter of 2 August 2000, Glencore was advised of the need to present the transport documents for the onward journey from Klaipėda to the destination in Russia.

33. The refund was none the less paid provisionally by decision of 5 September 2000, subject to proof of legal entitlement being provided in the form and within the period prescribed.

12 — See points 6 and 26 above. Article 14 of Regulation No 1501/1995 (a sectoral implementing rule) operates so as to transform an 'all third countries' export refund in an invitation to tender concerning a product in that sector (Regulation No 1851/1999) into a differentiated refund. It does so by cross-referring to the regular fixing of export refunds for that product, also expressed as being 'for all third countries' (Regulation No 1816/1999).

13 — It was confirmed at the hearing that the dispute does not concern the remaining consignments, in respect of which it may perhaps be inferred that Glencore was able to produce all the documentation requested by the customs authority.

14 — The final destination of the rye is unclear. The order for reference states that final customs supervision was requested for export to Nazran and Minsk in Russia. The bill of lading indicates 'OOO Agroprodservis', of Nazran, Russia, as the consignee. Minsk is in fact in Belarus, while Nazran is in Ingushetia, bordering with Georgia. The national case-file contains a copy of a document in English, dated 23 September 2002, purporting to be from the 'Customs of Whiterussia' in Minsk and confirming the arrival and customs clearance for import of 3 034 150 kg of rye in February 2000,'by waggons ex mv. "VOLGOBALT — 209"' — the vessel indicated on the bill of lading. Overland transport from Klaipėda to Nazran could plausibly pass via Minsk.

34. Despite an extension of the period allowed, Glencore was unable to produce the transport documents requested [15] and, in December 2001, the customs authority demanded repayment of the advance, plus 10%. [16]

35. Glencore's challenge to the customs authority's decision is now before the Finanzgericht Hamburg, which asks the Court:

'Must Article 13 of Regulation (EC) No 1501/95 be interpreted as meaning that production of the proof described in the second paragraph thereof results in waiver of the need not only for proof of completion of customs formalities for release for consumption but also for production of the transport documents (Article 18(3) of Regulation (EEC) No 3665/87, now Article 16(3) of Regulation (EC) No 800/1999)?'

36. Written observations have been submitted by Glencore, the customs authority and the Commission. Glencore and the Commission also presented oral argument at the hearing.

37. Glencore submits that certification of export by sea, as provided for in Article 13 of Regulation No 1501/95, replaces the need for *both* proof of completion of import customs formalities *and* production of the transport documents; the customs authority and the Commission submit that it replaces the need *only* for proof of completion of customs formalities.

Assessment

38. One thing which appears clear from the legislation in issue is an intention to strike a balance between, on the one hand, the need to ensure that export refunds are paid only when the relevant conditions are met and, on the other hand, the desire not to hinder Community export trade by any unnecessary administrative burden. What is less clear is where exactly that balance is intended to be struck.

15 — At the hearing before the Court of Justice, Glencore stated, without contradiction, that it had handed the rye over to the Russian importer at Klaipėda and that Russian importers were frequently unresponsive when asked to provide documentary proof of transport to final destination.

16 — Totalling, it appears from the national case-file, EUR 220561.82.

Fourteenth recital in the preamble to Regulation No 1501/95 — the significance of Switzerland and Liechtenstein

39. In the present proceedings, Glencore has laid great stress on the reasoning given in the 14th recital in the preamble to Regulation No 1501/95. That recital states in essence that the only rate of refund lower than that for exports to third countries as a whole is for exports to Switzerland and Liechtenstein and that, in order to avoid undue obstruction to Community exports, all that is needed to guarantee that products are not exported to those countries is for a competent national authority to certify that the products have left the customs territory of the Community on board a vessel suitable for sea transport.

40. That is cogent logic, and one can appreciate Glencore's argument that any ambivalence in the provisions of the regulation should be resolved in accordance with it. If a quantity of at least 1 500 tonnes of cereals has left the Community by sea, it is unlikely to end up in Switzerland or Liechtenstein. [17] Not only are those countries landlocked, they are 'Community-locked'. Any shipment of goods to them must pass through Community territory, where it will in principle be subject to Community customs control. If, in that case, proof of export by sea obviates the need for proof of customs clearance into a third country other than Switzerland or Liechtenstein, why can it not also obviate the need to prove transport to the specific final destination? The rate of export refund is unaffected by that specific destination.

41. I would be able to subscribe more wholeheartedly to that logic if the premiss on which it is based — that, where there is a differentiated rate of export refund, there is always a lower rate for Switzerland and Liechtenstein and a higher, uniform rate for all other third countries — could be confirmed. I find, however, on seeking to verify the actual differential applicable at the material time, that such is far from being the case.

42. On the very day the Commission adopted Regulation No 1501/95 — 29 June 1995 — it also fixed the export refund on rye (and for barley other than seed, product code 1003 0090 000) at ECU 10 per tonne for Switzerland, Liechtenstein, Ceuta and Melilla, ECU 8 per tonne for Slovenia, Hungary, the Czech Republic and the Slovak

17 — Although, of course, nothing can be ruled out. At the hearing, the Commission's agent stressed the audacious inventiveness of export refund fraudsters.

Republic, and zero for other third countries. [18] Thus: first, there was no binary differentiation between Switzerland and Liechtenstein and all other third countries; second, exports to Switzerland and Liechtenstein qualified for the highest, not the lowest, rate of refund; and, third, all three rates applied to third countries which could be reached by sea from a Community port. It rather seems as if the Commission's legislative right hand did not know what its regulatory left hand was doing.

43. Situations embodying one or more of those three features — all of which belie the assumption on which the 14th recital in the preamble to Regulation 1501/95 is based — are frequent over the years. They make it very difficult to feel confident in reading the regulation in the light of that recital. Although — as far as I can ascertain from the regulations applicable at the time [19] — the assumption underlying the recital appears to be valid for the specific transaction at issue in the present case, there are many other cases in which it does not hold true. For instance, under Regulation No 1816/1999, applicable on the relevant date for the transaction in issue, six other cereal products had a uniform rate of refund for all third countries, and one product had a positive rate for Switzerland and Liechtenstein and a zero rate for other third countries. And, to take but one further (later) example, Regulation No 968/2005 [20] applied a refund for exports of five cereal products to all third countries except Albania, Bulgaria, Romania, Croatia, Bosnia and Herzegovina, Serbia and Montenegro, the former Yugoslav Republic of Macedonia (all of which could be reached by sea from a Community port), Liechtenstein and Switzerland, so that the lower (in this case zero) rate was common to all those countries.

44. Consequently, I take the view that the 14th recital in the preamble to Regulation No 1501/95 cannot assist in the interpretation of Article 13 of that regulation.

Article 13 of Regulation No 1501/95 — are transport documents necessary?

45. The wording of Article 13 of Regulation No 1501/95 and of Article 16 of Regulation No 800/1999, read together, does not seem to pose any great difficulty. In the absence of the guidance that might have been derived from

18 — Commission Regulation (EC) No 1525/95 of 29 June 1995 fixing the export refunds on cereals and on wheat or rye flour, groats and meal (OJ L 147, p. 72).

19 — See points 6, 26 and 28 above.

20 — Regulation of 23 June 2005 fixing the export refunds on cereals and on wheat or rye flour, groats and meal (OJ 2005 L 164, p. 33).

the 14th recital in the preamble to Regulation No 1501/95, if the assumption on which it was based [21] had been confirmed, it seems appropriate to read those provisions literally, giving the words their ordinary meaning.

46. Article 16(1) and (2) of Regulation No 800/1999 require proof of completion of customs formalities for importation to be furnished by means of certain documents; Article 16(4) authorises the Commission to provide for that proof to be furnished 'by a specific document or in any other way'. [22] Article 16(3), by contrast, requires exporters to produce a copy or photocopy of the transport documents 'in all cases' — that is to say, whatever the mode of proof of customs clearance. Production of transport documents is thus clearly viewed as a separate matter from providing proof of completion of customs formalities for importation. In any event, such documents are not designed to attest to the customs status of goods — which will affect to some extent the likelihood of their being shipped onward to a different destination — but merely provide evidence of their conveyance from one point to another.

47. Consequently, when Article 13 of Regulation No 1501/95 states that '[n]otwithstanding [Article 16 of Regulation No 800/1999], proof of completion of customs formalities for release for consumption shall not be required' in the circumstances set out, the word 'notwithstanding' must logically relate only to those provisions of that article which would otherwise have stood in the way of the concession — namely, those concerning proof of completion of customs formalities.

48. Such a conclusion is, moreover, in line with the strict interpretation called for by the status of Article 13 as a (sectoral) derogation from a general (horizontal) rule.

49. It is also consistent with the Court's judgment in *Philipp Brothers*, [23] distinguishing between a requirement to produce customs documents (for which an extension of time was available) and a requirement to produce transport documents (for which it was not). As the Court pointed out, exporters may encounter difficulties in obtaining customs documents from the authorities of a third country, upon whom they have no means of exerting pressure, but not with regard to transport documents: in the case of a cif

21 — See point 41 above.

22 — There is no indication that the Commission has taken such a step.

23 — Case C-155/89 [1990] ECR I-3265, paragraphs 25 to 32, especially at paragraph 27.

contract, the exporter arranges the transport and thus retains a copy of the transport documents, while in the case of a fob contract he may require the purchaser to furnish a copy.

50. I am unconvinced by Glencore's textual arguments to the contrary effect.

51. The use of the word '*Außerdem*' ('in addition') in the German version of Article 16(3) of Regulation No 800/1999, which Glencore invokes as indicating that the obligation to produce transport documents is ancillary to the main obligation to provide proof of completion of customs formalities and falls with it, does not appear to me to be significant. Even if such a value could be ascribed to the term (which I consider doubtful), it is absent from any other language version that I have been able to verify, apparently as a result of an intentional amendment of the text which originally appeared in Article 18(3) of Regulation No 3665/87. The purpose of the amendment may well have been to remove any ambiguity which might have been inferred from the term, and its survival in the German version appears to have been an accident of drafting.

52. Nor am I swayed by Glencore's reference to provisions in other regulations.

53. Commission Regulations No 40/2004 and No 450/2005 [24] each contain an Article 1(1) with essentially identical wording, providing, for specified exports: '… for which the exporter is unable to provide the proof referred to in Article 16(1) and (2) of Regulation (EC) No 800/1999, products shall, by derogation from that Article, be deemed to have been imported into a third country' on presentation of a copy of the transport document, an officially certified declaration of unloading and a bank document certifying payment.

54. Inasmuch as they provide expressly that transport documents may replace 'the proof referred to in Article 16(1) and (2)' of Regulation No 800/1999, if they are produced together with other specified documents, those provisions tend rather to militate against the comparison which Glencore

24 — Regulation No 40/2004 of 9 January 2004 on proof of completion of customs formalities for the import of sugar into third countries as provided for in Article 16 of Regulation No 800/1999 (OJ 2004 L 6, p. 17) and Regulation No 450/2005 of 18 March 2005 on proof that customs formalities for importation of milk and milk products in third countries have been completed as provided for in Article 16 of Regulation (EC) No 800/1999 (OJ 2005 L 74, p. 30).

wishes to draw with Article 13 of Regulation No 1501/95. There is no such express reference in the latter article, nor is there any provision for additional supporting material to be furnished.

55. The same applies to Article 1 of Commission Regulation (EC) No 436/2007, [25] except that it makes no reference whatever to Article 16 of Regulation No 800/1999.

56. I am therefore of the view that production of the proof described in the second paragraph of Article 13 of Regulation No 1501/95 obviates the need only for proof of completion of customs formalities for release for consumption but not for the production of transport documents under Article 16(3) of Regulation No 800/1999.

Article 16(3) of Regulation No 800/1999 — what transport documents are required?

57. Although that conclusion strictly answers the referring court's question, I consider that the analysis cannot end there.

58. Article 16(3) of Regulation No 800/1999 requires production of a copy of 'the transport documents', without further defining that term. Glencore produced a copy of the bill of lading, which is a transport document. It establishes that the rye was exported to a third country for which the rate of refund in question was applicable. In such circumstances, is an exporter in Glencore's position required to produce further transport documents attesting to onward transport to the country of final destination, for which the same rate was applicable?

59. It might well be reasoned that, following as it does immediately after Article 16(1) and (2), which are concerned with establishing completion of customs formalities in the third country of importation, the reference to 'the transport documents' in Article 16(3) must be to documents covering transport as far as that destination. That would not appear to be an artificial reading of the provision in that context.

60. However, I find other indications in the wording and scheme of Regulation No 800/1999 which militate against that view.

25 — Regulation of 20 April 2007 on proof of completion of customs formalities for the import of sugar into third countries as provided for in Article 16 of Regulation) No 800/1999 (OJ 2007 L 104, p. 14).

61. Under the general provisions in Title II, Chapter 1, Section 1 (in particular Articles 7 and 9),[26] what is required is in principle limited to documents establishing that the products have left the customs territory of the Community. Where a transport document showing a *final* destination outside the Community is intended, that is expressly stated (as in the alternative requirement for export by sea in Article 9(1)(c) or the requirement for export by air in Article 9(3)(a)).

62. Those general provisions apply to all refunds, whether at a single rate or at differentiated rates, as is clear from the statement in Article 14(1) that Articles 15 and 16 contain *additional* conditions applicable in the latter case.

63. For export by sea, the normal requirement under Article 9(1)(b) is presentation of 'the transport document(s), or a copy or photocopy thereof, covering the products from departure … to arrival in the third country in which they are to be unloaded'. Quite clearly, 'the third country in which they are to be unloaded' is not necessarily the third country of final destination, as is illustrated by the present case, where the rye was unloaded in Lithuania although its final destination was Russia.

64. There is no explicit indication in Articles 15 or 16 that transport documents to the final destination must be presented where the rate of refund varies according to destination, nor do I think that such an indication can be inferred. Proof of importation into a third country for which the appropriate rate of refund applies[27] is to be provided by customs clearance documents, not transport documents. Article 16(3) merely indicates that such proof of importation does not dispense with the need to produce 'the transport documents' — which, in the overall context, must mean those which would have been required in any event, even in the case of an undifferentiated rate of refund.

65. If that is the meaning of Article 16(3) in the normal case, it must also be the meaning even when, pursuant to Article 13 of Regulation No 1501/95, the requirements of Article 16(1) and (2) do not apply.

26 — See point 10 et seq. above.

27 — And it may be noted that nothing in Articles 15 or 16 requires proof of importation into the third country of *final* destination. Article 15(1) is, indeed, quite explicit in requiring importation into 'the third country *or one of the third countries* for which the refund applies' (my emphasis). That wording would surely not have been used if there were a need to establish arrival at a specific final destination among all those qualifying for the same rate of refund.

66. I can appreciate the force of the Commission's submission that a requirement of production of transport documents up to the final destination in the third country of importation would provide a valuable additional safeguard against fraud. But if the Commission has not embodied such a requirement clearly in its own legislation, then it is not the Court's role to impose the requirement by inference.

67. Mention must be made, however, of Article 9(1)(c) of Regulation No 800/1999, under which, as an alternative to the conditions set out in Article 9(1)(b), presentation of 'a transport document specifying a final destination outside the customs territory of the Community' may be required. Thus, if Article 9(1)(c) applies, and not Article 9(1)(b), the transport documents required by Article 16(3) must show such a final destination.

68. However, the alternative conditions cannot, in my view, be applied on a discretionary basis by the national authorities administering the system. Article 9(1)(c) provides that 'the Member State of exit may stipulate' that the alternative conditions are to apply. That, it seems to me, implies a need for some general legislative, regulatory or administrative provision making the position clear to exporters. We have no information as to whether such a provision exists in Germany. If it does not, the authorities cannot in my view insist on production of transport documents to the final destination on the basis of Article 9(1)(c).

69. I thus reach the view that, where products are exported by sea, Article 16(3) of Regulation No 800/1999 requires the production of transport documents establishing that the products have left the customs territory of the Community and covering their transport up to arrival in the third country in which they are to be unloaded or, if the Member State of exit has exercised the option in Article 9(1)(c) of that regulation by means of a legislative, regulatory or administrative provision of general application, up to arrival at their final destination.

Article 20(1) of Regulation No 800/1999 — additional evidence in case of doubt

70. It should not, however, be forgotten that, under Article 20(1) of Regulation No 800/1999, national authorities may in certain circumstances require additional evidence proving to their satisfaction that the product has actually been placed on the

market in the importing third country or has undergone substantial processing or working there.

71. That possibility is available in particular if there are serious doubts as to the real destination of the product or definite suspicions that it will be reimported into the Community duty-free or at a reduced rate of duty.

72. That seems to provide a reasonable safeguard against fraud in cases where, pursuant to Article 13 of Regulation No 1501/95 and Article 16 of Regulation No 800/1999 interpreted in the way I propose, an exporter has produced only transport documents establishing export by sea to a third country in respect of which the relevant rate of refund is applicable and the endorsement prescribed by Article 13 of Regulation No 1501/95.

73. However, it cannot empower national authorities to require such additional evidence systematically in every case. There must first be a serious doubt or definite suspicion of the kind set out. Whether such grounds for requiring evidence are in fact present must remain a matter for the national court to determine in each individual case.

Final remarks

74. The legislation in issue is — understandably, given the subject-matter — complex and technical. It is also, however, flawed by a considerable lack of clarity in detail and a significant inconsistency between the reasons given for one provision and the content of other, simultaneously applicable, provisions.

75. I would remind the Commission of the agreement on drafting which it adopted jointly with the Parliament and the Council.[28] The first two recitals in the preamble to that agreement read as follows:

> '(1) clear, simple and precise drafting of Community legislative acts is essential if they are to be transparent and readily understandable by the public and economic operators. It is also a prerequisite for the proper implementation and uniform application of Community legislation in the Member States;

28 — Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1).

(2) according to the case-law of the Court of Justice, the principle of legal certainty, which is part of the Community legal order, requires that Community legislation must be clear and precise and its application foreseeable by individuals. That requirement must be observed all the more strictly in the case of an act liable to have financial consequences and imposing obligations on individuals in order that those concerned may know precisely the extent of the obligations which it imposes on them'.

76. It seems to me that those principles have not been fully respected in the legislation in issue in the present case.

Conclusion

77. In the light of all the above considerations, I am of the opinion that the Court should answer the question raised by the Finanzgericht Hamburg to the following effect:

— production of the proof described in the second paragraph of Article 13 of Commission Regulation (EC) No 1501/95 obviates the need only for proof of completion of customs formalities for release for consumption but not for the production of transport documents under Article 16(3) of Commission Regulation (EC) No 800/1999;

— where products are exported by sea, Article 16(3) of Regulation No 800/1999 requires the production of transport documents establishing that the products have left the customs territory of the Community and covering their transport up to arrival in the third country in which they are to be unloaded or, if the Member State of exit has exercised the option in Article 9(1)(c) of that regulation by means of a legislative, regulatory or administrative provision of general application, up to arrival at their final destination;

— in the circumstances defined in Article 20(1) of Regulation No 800/1999, national authorities may require additional evidence proving to their satisfaction that the products have actually been placed on the market in the importing third country or have undergone substantial processing or working there.