OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 25 May 2005 [1]

I — Introduction

1. The question referred to the Court for a preliminary ruling in this case concerns goods exported to a non-member country, where the corresponding import taxes and duties were paid. Shortly afterwards, after undergoing irreversible processing, the goods were re-introduced into the Community, following reimbursement of those charges: it is sought to establish whether there was a true 'importation' into the non-member country, for the purposes of Article 17(3) of Regulation (EEC) No 3665/87, [2] and whether there is therefore entitlement to an export refund.

2. The closest reference in the case-law is the judgment of 17 October 2000 in *Roquette Frères*. [3] However, as I explain below, that precedent does not apply to the present case.

II — The facts and the question referred to the Court

3. By a decision of 1 February 1996, the Hauptzollamt Hamburg-Jonas (hereinafter 'the Hauptzollamt'), the body responsible for administering EAGGF payments in Germany and the defendant in the main action, granted to Eichsfelder Schlachtbetrieb GmbH (hereinafter 'Eichsfelder'), a meat-producing company and the claimant in the main action, a differentiated export refund in the amount of DEM 36 653.23 (EUR 18 740.50) in respect of 20 135 kg of boneless beef exported to Poland, which at the time was a non-member country.

4. As proof of the release of the goods for free circulation in the country of destination,

1 — Original language: Spanish.

2 — 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), in the version resulting from Commission Regulation (EC) No 1384/95 of 19 June 1995 amending Regulation (EEC) No 3665/87 as regards the adjustments necessary for the implementation of the Uruguay Round Agreement on Agriculture (OJ 1995 L 134, p. 14).

3 — Case C-114/99 *Roquette Frères* [2000] ECR I-8823.

the claimant produced, in accordance with Article 16(1), in conjunction with Article 18 (1)(a), of Regulation No 3665/87, a certified copy of the customs document of 30 December 1995 showing that the claimant had previously sold the exported beef to Appelt GmbH, which is established in Cottbus, Germany.

5. As a result of investigations conducted by the Zollfahndungsamt Hannover, the competent investigating body, the following facts emerged:

In Poland, the beef was made into roulades, by cooking a slice of beef with one or two slices of bacon, onion, cucumber and mustard. They were imported into Germany and the normal Community import duties were levied. This was done on the basis of a contract concluded on 3 October 1995 between Appelt GmbH (as importer) and two other Polish partners.

Under Clause 3(6) of the contract, one of the latter, on 7 February 1996, filed an application, enclosing the notice of assessment and the relevant export documents, for refund of the customs duties paid.

The customs authorities in Torun, Poland, reimbursed the import duties.

6. On 27 October 1999 the Hauptzollamt demanded repayment of the export refund on the ground that inquiries made by the Polish police had revealed that the consignment concerned had been imported into Germany after processing in accordance with the contract.

7. By letter of 19 November 1999 the claimant lodged an appeal against that demand; by decision of 21 October 2002 the Hauptzollamt dismissed the appeal as unfounded.

8. An appeal was brought against that decision before the national court on 26 November 2002.

III — The question referred to the Court for a preliminary ruling

9. In the course of the appeal, the Finanzgericht Hamburg decided to stay its proceed-

ings and refer the following question to the Court of Justice for a preliminary ruling, pursuant to the third paragraph of Article 234 EC.

'Is Article 17(3) of Regulation (EEC) No 3665/87, as amended by Regulation (EEC) No 1384/95, to be interpreted as meaning that a product is considered to have been imported if, after its release for free circulation in a non-member country, it undergoes substantial processing or working within the meaning of Article 24 of Regulation (EEC) No 2913/92 and then is brought back into the Community upon drawback and payment of the normal import duties?'

IV — The relevant Community legislation

10. Article 5(1) of Regulation No 3665/87 provides:

'1. Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a non-member country and, where appropriate, into a specific non-member country within 12 months following the date of acceptance of the export declaration:

(a) where there is serious doubt as to the true destination of the product, or

(b) where, by reason of the difference between the amount of the refund on the exported product and the amount of the import duties applicable to an identical product on the date of acceptance of the export declaration, it is possible that the product may be re-introduced into the Community.

...

In addition, the competent authorities of the Member States may require that additional evidence be provided such as to satisfy them that the product has actually been placed on the market in the non-member country of import in the unaltered state.'

11. Under Article 16 of Regulation No 3665/87:

'1. Where the rate of refund varies according to destination, payment of the refund shall be dependent upon the additional conditions laid down under Articles 17 and 18.'

12. Article 17 of Regulation No 3665/87 provides:

'1. The product must have been imported in the unaltered state into the non-member country or one of the non-member countries for which the refund is prescribed within 12 months following the date of acceptance of the export declaration. However, that may be extended under the conditions laid down in Article 47.

...

3. A product shall be considered to have been imported when it has been cleared through customs for consumption in the non-member country concerned.'

13. Article 18 of Regulation No 3665/87 lays down detailed rules for establishing completion of the customs formalities.

14. The first subparagraph of Article 11(3) of Regulation No 3665/87 provides that, where a refund is unduly paid, the beneficiary is to reimburse the amounts unduly received and pay any sanction applicable pursuant to the first subparagraph of Article 11(1), plus interest calculated on the basis of the time elapsing between payment and reimbursement.

V — Procedure before the Court of Justice

15. The question submitted for a preliminary ruling was received at the Registry of the Court of Justice on 9 December 2003. The Commission of the European Communities took part in the proceedings, as did Eichsfelder and the Hauptzollamt.

16. The case was assigned to the Third Chamber of the Court of Justice. Eichsfelder and the Commission attended the hearing on 17 March 2005.

VI — Analysis of the question

A — *Observations submitted to the Court*

1. Eichsfelder

17. The claimant in the main proceedings suggests that Article 17(3) of Regulation No 3665/87 should be interpreted as meaning that a product is considered to have been marketed and imported if, after its release for free circulation in the country of destination, it has undergone substantial processing or working there within the meaning of Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. [4]

18. Where there is such substantial processing in a non-member State, the customs regime (free circulation or inward processing) under which it takes place is irrelevant to the right to a refund. Even if the beef had been used to make roulades and then exported to Germany under the inward processing procedure and the refund procedure, there would have been entitlement to repayment.

19. The subsequent refund of the import duties paid to the Polish authorities has no bearing on the original classification of the importation. To maintain otherwise would have intolerable consequences for the beneficiary of the refund, who would run the risk of being informed after the event that the export operation had not taken place owing to events beyond his control.

20. At the hearing, Eichsfelder claimed that it was unlikely that the roulades imported into Germany were produced from the beef which it had exported, as no identification checks were carried out by the customs authorities at the premises of the Polish producer. It also disputes whether the Polish import duties charged on importation of the beef were reimbursed.

2. The Hauptzollamt

21. The defendant contends that the facts of the main proceedings, in particular the terms

4 — OJ 1992 L 302, p. 1.

of the contract of 3 October 1995, show that the persons involved acted unlawfully, and committed fraud by creating artificial conditions in order to obtain an advantage. Without accusing Eichsfelder of knowing the details of the operation, the Hauptzollamt points out that dishonest behaviour on the part of a third party, in connection with an application for an export refund, is a normal commercial risk. The beneficiary cannot claim that he acted in good faith; it should have ensured, by means of contractual commitments, that the goods were not diverted from their destination.

22. The Hauptzollamt believes, in general, that entitlement to a differentiated refund is conditional on completion of the formalities of release for free circulation in a non-member country, among them payment of the import duties charged; drawback of those duties nullifies the legal basis for the refund, since the exporter would not have entered the market concerned under normal conditions.

23. It is also clear from the order for reference that the Hauptzollamt finds that the identification of the goods and the customs drawback are proved by documentary evidence. In the present case, the route of release for free circulation followed by drawback when the goods had been processed was, in its view, clearly chosen solely in order to obtain an export refund and in that respect was not a normal commercial transaction.

3. The Commission

24. The Commission explains that, since 1998, the German Ministry of Finance has been apprised of its opinion, which concurs with that of the Hauptzollamt. In its view, the goods in question were processed under processing arrangements and a customs refund procedure before being re-introduced into the Community. That repayment, which was made by the competent Polish authorities, establishes that the importation of the goods did not comply with customs procedures. Consequently, there was no release for free circulation, which nullifies the legal basis for the refund.

25. The Commission goes on to specify the conditions which substantial processing of goods must satisfy in order to have an impact on the customs classification.

4. The view of the national court

26. The Finanzgericht Hamburg expresses doubts, in the light of Community law, as to whether in the present case the presumption of placement on the market under Article 17 (3) of Regulation No 3665/87 is rebutted and whether the claimant is obliged, under the first subparagraph of Article 11(3), to repay the export refund granted to it.

B — *Assessment of the merits*

27. I would point out, first, that at the hearing, Eichsfelder's representative made claims of a factual nature that are not consistent with the findings on which the Finanzgericht bases its order for reference. [5] Since, within the framework of cooperation established by Article 234 EC, it is for the national court to determine the facts, I shall begin the assessment with the findings stated, as proven facts, in the order for reference.

28. It is necessary to analyse the content of the question submitted, which seeks to ascertain whether the account of the facts given in the main action falls within the hypothesis set out in Article 17(3) of Regulation No 3665/87, as amended by Regulation No 1384/95. According to that provision, a product is to be considered to have been 'imported', for the purposes of entitlement to a refund, 'when it has been cleared through customs for consumption in the non-member country concerned'. 'Non-member country' means the country declared to be the country of destination, since the provision concerns the differentiated refund scheme, under which the calculation of the refund varies according to the exporting country.

29. The national court wishes to know, specifically, whether the presumption contained in Article 17(3) of Regulation No 3665/87 applies to goods which:

(a) have been released for free circulation in the non-member country;

(b) have undergone substantial processing or working;

(c) have been re-introduced into the Community, after drawback of the import duties paid.

5 — See point 20 above.

30. I admit that the arguments put forward in favour of that approach by Eichsfelder and, in part, by the referring court, and also those raised against it by the Hauptzollamt and the Commission, are persuasive.

On the other hand, in order to weigh up all the submissions, it is necessary to depart from some of the legal characterisations adopted by the referring court. In particular, there is justifiable disagreement as to whether the goods were released for free circulation or whether, at least, the release was of a final nature.

31. The body responsible for managing the German customs takes the view that failure to release goods for consumption in the non-member country constitutes fraudulent use of the refund system, in accordance with Article 4(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests. [6] It adds that the term 'fraud' in this context should be taken to mean an irregularity designed to obtain an advantage wrongfully, and not be given the meaning usually assigned to it in criminal law.

32. The Commission describes the situation at issue in the main action as an abuse of law, in the light of Article 17 of Regulation No 3665/87, not of Article 5(1). The facts of the case constitute an abuse in so far as the parties concerned arranged to conceal an outward processing operation, and obtained a differentiated export refund. In support of its argument, it refers to the judgment of 14 December 2000 in *Emsland-Stärke.* [7]

33. The point of departure must be the finding, in the order for reference, that Eichsfelder submitted, in accordance with Article 16(1), in conjunction with Article 18 (1)(a) of Regulation No 3665/87, a certified copy of the customs import document. In principle, the goods were deemed to have been imported in accordance with Article 17 (3) thereof.

34. However, according to settled case-law, despite the fact that it is one of the most important pieces of evidence, the customs entry certificate is only rebuttable evidence that the transaction in respect of which the

6 — OJ 1995 L 312, p. 1.

7 — Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569.

refund was granted was in fact carried out.[8] Thus, the probative force which normally attaches to that certificate may be disregarded where there is reason to doubt the actual access of the goods to the market of the territory of destination in order to be marketed there.[9]

35. However, the question must be asked whether the condition laid down by Article 17(3) is to be regarded as satisfied.

36. I agree with the view expressed by the Hauptzollamt and the Commission, which is contrary to the opinion voiced by the national court in its order for reference, namely that the expression 'cleared through customs for consumption in the non-member country concerned' should be interpreted as including, where appropriate, the payment of import duties.

37. There is argument as to the role of the following provisions in this respect:

— Chapter I of Annex B to the International Convention on the simplification and harmonisation of Customs procedures, signed in Kyoto on 18 May 1973, and accepted by the Council, on behalf of the Community, by Decision 85/204/EEC of 7 March 1985;[10]

— Article 79(2) of the Community Customs Code;[11]

— Recital 17 in the preamble to Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products.[12]

38. A strict interpretation of those provisions gives the impression that the customs formalities which must be completed for release for consumption include payment of any import duties, because they have to cover all the formalities prescribed for that procedure.

8 — Case 89/83 *Dimex* [1984] ECR 2815, paragraph 11; and Case C-27/92 *Mollmann-Fleisch* [1993] ECR I-1701, paragraph 13. The judgments in both cases were given on the interpretation of Article 11(1) of Regulation (EEC) No 192/75 of the Commission of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products (OJ 1975 L 25, p. 1) and Article 20(2) and (3) of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1979 L 317, p. 1); however, those provisions are practically identical to Articles 17(3) and 18(1) of Regulation No 3665/87.

9 — *Mollmann-Fleisch*, cited above, paragraph 15.

10 — OJ 1985 L 87, p. 8.

11 — Cited above.

12 — OJ 1999 L 102, p. 11.

39. Accordingly, Chapter I of Annex B to the Kyoto Convention defines 'clearance for home use' as the customs procedure by which goods are released for free circulation in the Customs territory, following payment of any import duties and taxes chargeable and the accomplishment of all the necessary customs formalities.

40. Too literal an interpretation of that definition would lead to the conclusion that the 'customs formalities' are separate operations from the payment of duties and taxes. The national court seems to prefer that reading. However, I think that what should be stressed is not so much the specific technical meaning of those 'procedures' as the aim which they pursue, namely, the release of the goods for free consumption.

41. Under Article 79(2) of the Community Customs Code, release for free circulation 'shall entail application of commercial policy measures, completion of the other formalities laid down in respect of the importation of goods and the charging of any duties legally due'.

42. In spite of some slight terminological differences, there is no doubt that the aforementioned provision reflects the same reasoning as the definition in Annex B to the Kyoto Convention. I repeat that the proper interpretation of Article 17(3) of Regulation No 3665/87 must take account of the ultimate aim of differentiated refunds, which is to ensure that the subsidised products have access to the market in the specifically designated country, for which all the import requirements must be satisfied, including payment of any duties and taxes that may be chargeable.

43. It may also be argued that, so far as concerns the differentiated refund regime, payment of those sums is the most important customs formality, since they are used to calculate the corresponding refund.

44. Recital 17 in the preamble to Regulation No 800/1999 confirms this point, when it mentions that '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'.

45. It is therefore clear that payment of the import duties is one of the requirements to which Article 17(3) of Regulation No 3665/87 refers. It serves as proof of importation and, if necessary, establishes entitlement to the refund.

46. On the other hand, it may be deduced from the above that repayment of the import duties weakens the presumption of importation and at the same time nullifies the legal basis for the refund granted.

47. For the rest, I agree, in essence, with the assessment made by the Hauptzollamt, namely that, in connection with an application for an export refund, the conduct of a third party which frustrates the purpose for which the refund was granted must be regarded as an ordinary commercial risk, so that the beneficiary cannot claim that he acted in good faith because he is required to ensure that the goods are not deflected from their destination.

48. In order to reach that conclusion, it does not even seem necessary to accuse the undertakings involved of plotting a covert processing scheme, as the Hauptzollamt and the Commission have sought to do. Although the outcome of a concocted transaction is similar, in practice, to that of a transaction carried out under that customs regime, it is preferable to concentrate on the fact that one of the conditions for grant of the export refund is not satisfied. The same applies to the suggestion that the transaction in question might be described as fraudulent.

49. This approach obviates the need to examine the effect of any substantial processing of the goods that attracted a refund, as occurred in *Roquette Frères*.

50. The facts in that case differ from those under consideration here, in that they involved continuing entitlement to a refund in respect of glucose syrup exported under inward processing arrangements, some of which, converted into penicillin, had subsequently been re-imported.

51. The Cour Administrative d'Appel de Nancy, France, queried the meaning of the final subparagraph of Article 5(1) of Regulation No 3665/87 in so far as its effect was that the refund was to be paid only if the medicinal product had actually been placed on the market in the country of importation in the unaltered state.

52. The Court of Justice considered that, where there had been substantial processing, it was not necessary to require additional proof that the product had been marketed in the unaltered state in the non-member country of importation; it therefore examined the provision from the teleological point of view and considered that its aim was to enable the authorities of the Member States to combat the abuse represented by re-

introduction of the exported product into the Community. [13]

53. According to the Court of Justice, such abuse does not occur where the product has undergone substantial and irreversible processing, as a result of which it has ceased to exist as such and a new product, coming under a different tariff heading, has been created. [14]

54. In his Opinion in *Roquette Frères*, delivered on 3 February 2000, [15] Advocate General Alber pointed out that the Community legislature did not wish to prevent the export of Community products for processing or working in the non-member country of importation and that what was involved was the utilisation of the product in the non-member country. Regardless of whether that process is described as consumption, utilisation or actual placing on the market in the unaltered state, the intention is clear: substantial processing or working of the product satisfies that requirement and the customs regime under which the processing takes place should therefore be of no consequence.

55. When considering the extent to which that case-law is relevant to the present case, it should be pointed out that none of the parties disputes that the goods at issue in this case underwent substantial processing, within the meaning of Article 24 of the Community Customs Code. Furthermore, that is the view taken by the national court.

56. Nor is it sought to draw inferences from the fact that, in *Roquette Frères*, the refund in question was non-differentiated. As is stated in the order for reference, the conditions laid down in Article 5 of Regulation No 3665/87 apply to both differentiated and non-differentiated refunds, and there is no reason to assign any other classification to the possibly unlawful nature of a transaction involving the substantial processing of a product which has qualified for an export refund calculated by reference to the country of destination (differentiated refund).

57. The decisive and specific feature of the present case is that the import duties were repaid, which meant that the goods failed, retroactively, to comply with Article 17(3) of Regulation No 3665/87; the central issue in

13 — Paragraph 17 of the judgment in *Roquette Frères*, which refers to the judgment in Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraphs 45 and 46.

14 — *Roquette Frères*, paragraph 19.

15 — [2000] ECR I-8825, point 56 et seq., which shed light in particular on the possible meaning of the judgment.

Roquette Frères was merely whether, when there had been substantial processing, payment of an export refund could be made conditional, under Article 5(1) of Regulation No 3665/87, upon production of additional evidence of such a kind as to show that the product has been placed on the market in the country of destination. The Court of Justice considered that re-importation into the Community of a product which had undergone irreversible processing was acceptable, because a new product had been created. It therefore merely stated, in paragraph 19 of the judgment, that there was no risk of abuse.

58. In short, although the two cases appear to be similar, a detailed analysis reveals that they differ in subject-matter and that the solution adopted in *Roquette Frères* is not capable of being applied to the circumstances of the present case.

VII — Conclusion

59. In the light of the foregoing, I propose that the Court of Justice give the following answer to the question referred to it for a preliminary ruling:

'Article 17(3) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, as amended by Commission Regulation (EC) No 1384/95 of 19 June 1995, is to be interpreted as meaning that the customs formalities for release for consumption in the country of destination are not considered to have been completed when, following payment of the relevant import duties, the product is re-introduced into the Community after reimbursement of those duties.'