OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 18 January 1996 *

1. The questions submitted by the High Court of Ireland, by order of 25 July 1994, concern the interpretation and validity 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 [1] and Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait. [2]

2. The case in which those questions arose may be summarized as follows.

Anglo Irish Beef Processors International ('Anglo Irish Beef') is a group of Irish undertakings engaged in the beef trade. Pursuant to Regulation No 3665/87, [3] it had obtained from the competent Irish authority, the Minister for Agriculture, Food and Forestry ('the Minister'), advance payment of a 'differentiated export refund' in respect of the sale to Iraq of a consignment of beef. It is useful at this point to explain in what sense the refund is defined in the regulation as differentiated. The amount of the refund depends on the destination of the goods and is adjusted accordingly to reflect the market price there. The essential purpose underlying that rule is to facilitate the sale of Community products on the markets of non-member countries, compensating the exporter for any disparity between the Community market price and the price elsewhere, which is generally lower. The refund payable upon the exportation of products to Iraq was considerable.

In accordance with the Community rules in force, Anglo Irish Beef had provided a bank guarantee in the Minister's favour equal to the amount of the advance payment, together with a further 20% of that amount. That guarantee is required as security, since the exporter is paid the amount of the refund in advance, specifically in order to ensure that reimbursement of that amount is made to the authority concerned if it should later be found that 'the conditions for granting the refund are not fulfilled' (see the 22nd recital in the preamble to Regulation No 3665/87) or that 'there was a right to a smaller refund' (Article 6, Regulation No 565/80).

* Original language: Italian.

1 — OJ 1987 L 351, p. 1.

2 — OJ 1990 L 213, p. 1.

3 — The sector in question is governed by the regulation cited above, as last amended by Commission Regulation (EEC) No 354/90 of 9 February 1990 (OJ 1990 L 38, p. 34), in conjunction with Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5), as last amended by Council Regulation (EEC) No 2026/83 (OJ 1983 L 199, p. 12).

As was stated in the order for reference, the beef was still in transit and, to be exact, had only reached Turkey when an embargo was placed on trade with Iraq, following its invasion of Kuwait. That embargo had been imposed by Resolution No 661 of the United Nations Security Council of 6 August 1990 and, additionally, by Council Regulation (EEC) No 2340/90, which was adopted on 8 August 1990 but was applicable retrospectively with effect from 7 August 1990.

On account of the embargo, the Turkish authorities prevented the ship carrying Anglo Irish Beef's cargo from reaching Iraqi territory. Attempts were made in vain to sell the beef in countries subject to the same export refund rate as Iraq. Finally, the consignment was sold on other markets, for which the export refund applicable was lower than the amount already advanced to Anglo Irish Beef. The Minister accordingly asked Anglo Irish Beef to reimburse the difference unduly paid, refusing to release the bank guarantee until it had discharged its obligation to make reimbursement. On the other hand, since it was common ground that the circumstances preventing delivery of the beef to Iraq constituted *force majeure*, the Minister, in accordance with the regulation mentioned above, waived payment of the additional 20%.

3. Anglo Irish Beef thereupon brought proceedings before the High Court of Ireland, challenging the Minister's claim for reimbursement and seeking release of the security in full. The national court accordingly referred the following questions to the Court of Justice for a preliminary ruling:

'— Can Commission Regulation (EEC) No 3665/87 be interpreted in such a manner as to prohibit the drawing down on the security provided by the exporter in the above circumstances whether by reason of *force majeure* or by reason of the disproportionate effect which the drawing down of the security would have in comparison to the circumstances relied upon as justifying such a drawing down or otherwise?

— If Commission Regulation (EEC) No 3665/87 cannot be interpreted in the above manner is it void in whole or in part because of this?

— Can Council Regulation (EEC) No 2340/90 be interpreted as covering goods in transit to Iraq and if so is it void in whole or in part because of its treatment of goods in transit in the present circumstances?'

Question 1

4. In order to answer the first question, it is plainly necessary to refer to the findings — which must be accepted as definitive for the purposes of these proceedings — of which the national court has apprised the Court in the present case. The first fact to be considered is that the beef in respect of which the export refund was granted did not reach the destination specified in the application, but was sold in other countries, which were subject to a lower refund rate. The exporter therefore received a higher amount than was due under the regulation. It is also clear from the order for reference that the circumstances which prevented the beef from reaching its intended destination indisputably constitute *force majeure*.

That is the situation. The national court asks whether the intervention agency may withhold such proportion of the security lodged as corresponds to the amount that was not payable to the recipient, bearing in mind that, owing to *force majeure*, the beef was exported to a destination other than that originally intended.

In my view, the solution is to be found in Article 33(5) of Regulation No 3665/87, which provides: 'Where, as a result of a case of *force majeure*, the amount of the refund [*payable*] is smaller than the amount paid in advance, the security forfeited shall be equal to the difference between ... the amount of the refund advanced and ... the amount of the refund actually due'. [4] Where, however, there is no *force majeure*, the relevant provision would be Article 33(3)(a)(iii), in accordance with which 'the security forfeited shall be equal to the reduction of the refund ... plus 20%'.

Thus, in the circumstances described in the order for reference, the intervention agency may take steps to retain the guarantee provided in its favour by the exporter, subject to the limits set by Article 33(5) on the amount to be forfeited. This being a case of *force majeure*, however, it may not lay claim to the additional 20%.

For the purposes of these proceedings, it is wholly irrelevant whether the beef was prevented from reaching its declared destination by *force majeure* or by some fault on the part of the exporter: the latter is required in any event to repay such part of the refund as was not actually due to him, without prejudice to the fact that — where, by contrast with the present case, there is no *force majeure* — he must also pay the additional 20% provided for as a safeguard against

4 — Emphasis added.

fraud. As the Court itself has stated, moreover, traders are not entitled 'to a differentiated refund for exports ... to a non-member country in a case where the goods exported were destroyed as a result of *force majeure* after leaving the customs territory of the Community and prior to importation ... into the non-member country of destination'. [5]

5. I now turn to the other aspect of Question 1. It is necessary to ascertain whether, in the circumstances described above, Regulation No 3665/87 may be interpreted as precluding forfeiture of the security by the relevant authority, in view of the allegedly disproportionate effects otherwise foreseeable to the detriment of the exporter.

According to Anglo Irish Beef, that question must be answered in the affirmative. I disagree. First, as was mentioned in the order for reference, forfeiture of the security is restricted to the amount unduly paid and therefore does not cover, as Anglo Irish Beef seems to suggest, the whole amount of the refund paid in advance. If that is the case, I am at a loss to identify the disproportionate effect. As I pointed out above, the intention underlying the export refunds — which has been emphasized by the Court in other judgments [6] — is to facilitate the sale of Community products on world markets. To that end, exporters are paid a sum of money which is intended solely as compensation for any disparity between the Community price and the current price on other markets. The refund rate is 'differentiated', precisely in that it is calculated by reference to the various prices charged in the country of destination. That is why it is essential that the products in question actually reach their declared destination: [7] if they were sold on a different market, where the price is higher and for which the refund rate is accordingly lower, the transaction would result in the unjust enrichment of the trader in question. That is to say, he would profit from the higher selling price and, at the same time, retain the higher rate of refund to which, however, he would not be entitled. That said, it is plain that the refund scheme, far from contravening the principle of proportionality, actually applies it: the amount paid by the intervention agency is equal to the difference between the Community price for the product exported and the price charged in the country of destination. Thus the means adopted — differential payment in advance — is suitably proportional to the objective pursued by the Community legislature. When a case of *force majeure* arises, and the trader concerned is compelled to export his products elsewhere than the original destination, his right to the refund remains intact and is not affected by any penalty, except that its exercise must take into account the disparity between the Community price and the price which is charged on the market to which the product

5 — Case C-321/91 *Tara Meat Packers* [1993] ECR I-2811, paragraph 19.

6 — Case 89/83 *Dimex* [1984] ECR 2815, paragraphs 8 and 9.

7 — See *Dimex*, paragraph 16.

has actually been exported. That alone is the rationale behind the regulation. The rules laid down seek its comprehensive and logical implementation.

6. Anglo Irish Beef also purports to invoke a general principle according to which, if the *force majeure* which prevented the exports from reaching their declared destination was brought about by Community action, the exporter is entitled to retain the advance payment of the refund in full. That argument is not persuasive. In the first place, it is predicated on the erroneous assumption that the exports failed to reach their destination on account of the embargo imposed by the Community institutions by means of Regulation No 2340/90. However, it is clear from the order for reference that the cargo was detained in Turkey by the Turkish authorities, acting — it must be assumed — in observance of the embargo imposed by the United Nations and, in any event, not in compliance with the regulation mentioned above. Consequently, it is wrong to conclude that the *force majeure* involved here was attributable to conduct on the part of the Community institutions. That is not all. Anglo Irish Beef has failed to take into account the true nature of the exporter's obligation to repay the difference between the amount received and the amount to which he is lawfully entitled. That obligation does not arise by way of a penalty for unlawful conduct, but simply entails reimbursement of a sum unduly paid. In other words, it is an obligation whose purpose is merely to bring about restitution; it is not related to any criterion of guilt or responsibility on the part of the party so obliged and must therefore be discharged even if the cargo failed to reach the declared destination on account of *force majeure*. Although the regulation provides for cases of *force majeure*, it is only to relieve exporters in those circumstances of the liability which they would incur each time they sold products on markets other than that originally specified. Provided the circumstances amount to *force majeure*, there is no need, as I pointed out above, for the additional 20% to be repaid to the intervention agency. Exporters are accordingly exempted from that requirement, which may also be seen as a penalty measure. However, that does not mean that exporters are entitled to retain the whole amount paid to them in advance. No such right is envisaged by Community law, nor could it be, given the nature of the system and the essential purpose of the refund. Where the goods are not exported to the place specified by the exporter, the 'refund' can only refer to the difference between the Community price and the current price on the market where the goods have actually been sold. There are therefore no grounds for maintaining that, in making provision for cases of *force majeure*, the Community rules must confer on the exporter the right to retain the entire amount. That would be incompatible with the rationale behind all the legislation under consideration.

Question 2

7. The second question asks whether, since Regulation No 3665/87 cannot be interpreted as precluding forfeiture of the security in the event of *force majeure*, it should

for that reason be considered invalid. Anglo Irish Beef adduces two arguments in support of that view: breach of the principle of proportionality and frustration of the exporter's legitimate expectations. I have already explained why the first argument should be dismissed. As regards the frustration of legitimate expectations, Anglo Irish Beef seeks to substantiate that allegation by asserting that exporters rely on being able to retain in any case — and especially in the event of *force majeure* — the amount of the refund paid in advance. [8] However, I am unable to discern a basis for that point of view. Any moderately prudent trader has only to read the regulation to realize that the right to retain the full refund paid in advance and consequently to release of the security is necessarily contingent upon the goods actually reaching their declared destination. Article 33(2) of Regulation No 3665/87 provides that 'the release in full of the security shall be subject to the production of proof that ... (b) the products concerned give entitlement to a refund equal to or higher than the amount determined in accordance with Article 29(3)'. Furthermore, the fifth recital in the preamble to Regulation No 565/80 expressly states that security is to be lodged in order 'to guarantee the reimbursement of a sum not less than the amount paid where it is subsequently established that there was no right to the export refund or that the products or goods ... were not actually exported from the Community within the time-limits laid down'. The relevant rules are those set out above and they cannot arouse any legitimate expectation other than the right to a refund, subject, obviously, to the limits within which that right was conferred.

Question 3

8. By its third question, the national court asks the Court to ascertain whether Regulation (EEC) No 2340/90, which imposed the trade embargo, extends to goods which have already been dispatched and are in transit to Iraq. If the answer is in the affirmative, the national court asks whether the regulation is invalid, wholly or in part, precisely because it extends not only to products due to be exported but also to those which are already in the process of being exported.

In the pleadings of Anglo Irish Beef, the claim to retain the full amount of the refund is based on the assumption that the resolution of the United Nations left the Community free to exempt from the embargo goods already in transit to Iraq. Hence the conclusion that Regulation No 2340/90 is vitiated on grounds of illegality precisely because, in adopting a regulation to implement the system established by the United Nations, the Council of the European Communities failed to use its discretion to accommodate by means of its regulation the needs of exporters. To be more precise, the rules laid down by the Community are said to be invalid, in

8 — According to Anglo Irish Beef, that assertion holds true *a fortiori* where it is the Community itself which prevents the goods from reaching their destination. On that point, however, I need only repeat the following observation: the national court makes it clear that the goods were detained in Turkey by the Turkish authorities on account of the United Nations embargo. In that respect, Regulation No 2340/90 is irrelevant.

that they give rise to discrimination. According to Anglo Irish Beef, their discriminatory character may be inferred from the unjustifiable difference in treatment between, on the one hand, goods in transit from Iraq and the importers of those goods and, on the other, goods already in transit to Iraq and the exporters of those goods, the latter class of goods alone being affected by the embargo. That argument is adduced as a basis for the assertion that, if the regulation had been drafted in such a way as to meet the needs of Anglo Irish Beef and countless other exporters in the same circumstances, the Minister would not have any grounds at present for demanding the reimbursement at issue.

The Council, the Commission, the Irish Government and the United Kingdom have all challenged the merits of that assertion, essentially on the ground that Regulation No 2340/90 faithfully implements the United Nations resolution, which was binding upon the Community and its Member States.

It seems to me, however, that there is a significant aspect to this question which should be considered first. I would recall, for the sake of clarity, that the national court has submitted two regulations for review by the Court: Regulation No 2340/90, which concerns the embargo, is relevant to the present dispute only in so far as it envisages a situation involving *force majeure* for the purposes of the other regulation (No 3665/87). It is the latter regulation which governs the case before the national court. Under that regulation, recognition of the rights asserted by Anglo Irish Beef in the main proceedings is unconditionally predicated on the requirement that the goods must have reached the destination for which the exporter had received advance payment of the refund. In this case, that requirement has not been met and, for that overriding reason, the claims of Anglo Irish Beef no longer have any basis in Community law. However, this is a case of *force majeure*, governed by the relevant provisions of the applicable regulation. These have already been identified: the amount of the refund is not payable to Anglo Irish Beef in full but is differentiated; in order for the security to be released, the exporter must pay the intervention agency any difference between the price fixed by reference to the original destination of the goods and the current price on the market which the goods have actually reached. For the purposes of these proceedings, therefore, the only relevant factor is the operation of *force majeure*, which objectively prevented the goods from reaching the declared destination; for the settlement of the dispute, it is quite simply the fact of the embargo itself which matters, not the provisions, whatever they may be, of Regulation No 2340/90. What would the practical consequences have been if, by means of that regulation, the Community had derogated from the UN resolution in order to exempt from the embargo, as Anglo Irish Beef advocates, products already exported and still in transit? It would certainly have been impossible to enforce such a system in relation to any non-member countries which, in pursuance of the UN resolution or of their own volition, wished nevertheless to prevent the movement of products bound for Iraq. That is, in effect, the case here. Anglo Irish Beef's cargo was detained by order of the Turkish authorities, quite independently of any Community provisions regarding the embargo. The conclusion which must be drawn is therefore plain to see. Verification of the alleged invalidity of Regulation No 2340/90 would not affect in

any way the application in these proceedings of the provisions laid down by Regulation No 3665/87, as described above, in cases of *force majeure*. The third question submitted by the national court is, in other words, purely hypothetical. The Court has always refused to address preliminary questions of that kind. [9] In my view, that wise and consistent criterion in the case-law should also be adhered to in the present case.

Conclusion

In the light of the foregoing considerations, therefore, I am of the opinion that the questions referred to the Court of Justice by the High Court of Ireland, should be answered as follows:

(1) Where, on the basis of Article 33(5) 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, an exporter receives an export refund and, owing to *force majeure*, the goods are sold, not at the declared destination, but in countries in respect of which a lower rate of refund has been fixed, the security to be forfeited is equal to the difference between the amount of the refund advanced and the amount of the refund actually due.

(2) Consideration of Regulation (EEC) No 3665/87 on the basis of the information provided in the order for reference has disclosed no factor of such a kind as to affect its legality.

9 — Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14, and the case-law cited therein.