JUDGMENT OF THE COURT (First Chamber)
16 December 1999 *

In Case C-74/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Østre Landsret, Denmark, for a preliminary ruling in the proceedings pending before that court between

DAT-SCHAUB amba

and

Ministeriet for Fødevarer, Landbrug og Fiskeri

on the interpretation of Article 17(2) 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),

* Language of the case: Danish.

THE COURT (First Chamber),

composed of: L. Sevón (Rapporteur), President of the Chamber, P. Jann and M. Wathelet, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— DAT-SCHAUB amba, by A. Fischer, of the Copenhagen Bar,

— the Ministeriet for Fødevarer, Landbrug og Fiskeri, by K. Hagel-Sørensen and B. Moll Sørensen, of the Copenhagen Bar,

— the Commission of the European Communities, by H.P. Hartvig, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of DAT-SCHAUB amba, the Ministeriet for Fødevarer, Landbrug og Fiskeri and the Commission at the hearing on 6 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 3 June 1999,

gives the following

Judgment

1 By order of 12 March 1998, received at the Court on 17 March 1998, the Østre Landsret (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 17(2) 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).

2 That question was raised in proceedings between DAT-SCHAUB amba and the Ministeriet for Fødevarer, Landbrug og Fiskeri (the Danish Ministry of Food, Agriculture and Fisheries) concerning the Ministry's refusal to grant it export refunds for beef exported to the United Arab Emirates which, after being processed there without first being cleared through customs for release for consumption, was exported to other countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (hereinafter 'GCC countries').

The Community legislation

3 Regulation No 3665/87 lays down common detailed rules for the application of the system of export refunds, *inter alia* under Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187).

4 Article 3(5)(a) of Regulation No 3665/87 prescribes that the document used for export to enable products to qualify for a refund must include *inter alia* a description of the products in accordance with the nomenclature used for refunds.

5 Article 5(1) of that regulation states that, in certain circumstances listed therein, payment of the differentiated or non-differentiated refund is 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.

6 Articles 16 to 18 of that regulation, as amended by Commission Regulation (EEC) No 354/90 of 9 February 1990 amending Regulation (EEC) No 3665/87 as regards proof of arrival at destination in third countries of agricultural products qualifying for a variable refund (OJ 1990 L 38, p. 34), lay down additional conditions for products for which there are differentiated refunds according to destination, relating in particular to proof that they have been cleared for release for consumption in the non-member country.

7 With respect to payment of refunds, Article 17 of Regulation No 3665/87 prescribes:

'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 period may be extended under the conditions laid down in Article 47.

2. Products shall be regarded as having been imported in the unaltered state if there is no evidence whatsoever of processing.

However:

...

— a product which was processed before being imported shall be regarded as having been imported in the unaltered state if the processing took place in the non-member country into which all the products resulting from such processing were imported.

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

8 The products for which refunds are given and the amounts of those refunds are determined, as far as the main proceedings are concerned, by Commission Regulation (EEC) No 2253/90 of 31 July 1990 (OJ 1990 L 203, p. 63) and Commission Regulation No 656/91 of 19 March 1991 (OJ 1991 L 73, p. 9) fixing the export refunds on beef and veal and amending Regulation (EEC) No 3846/87 establishing an agricultural product nomenclature for export refunds.

9 Annex I to each of those regulations specifies the product code, destination and amount of refunds. Under note 7 to the annex, destinations of exports are identified by a numerical code, destination 02 comprising 'North African, Near and Middle East third countries, West, Central, East and South African third

countries, except Lebanon, Cyprus, Botswana, Kenya, Madagascar, Swaziland, Zimbabwe and Namibia'. In this connection, the third countries are stated to be as defined respectively in Commission Regulation (EEC) No 420/90 of 19 February 1990 (OJ 1990 L 44, p. 15) and Commission Regulation No 91/91 of 15 January 1991 (OJ 1991 L 11, p. 5) on the country nomenclature for the external trade statistics of the Community and statistics of trade between Member States. In those regulations each GCC country is mentioned individually.

10 On 30 June 1993 the Commission adopted a decision on the payment of an export refund on beef and veal exported for processing to the United Arab Emirates, in connection with Regulation No 3665/87 (C(93) 1723 final, hereinafter 'the Decision'). Under Article 1(1) of the Decision:

'An export refund may be granted for beef exported to the United Arab Emirates (UAE) and processed there into meat products under temporary admission procedure for inward processing, where the latter products are subsequently exported from there to another non-member country which is a member of the Gulf Cooperation Council (GCC).'

11 In accordance with Article 2 thereof, the Decision applies only to exports for which the export declaration was accepted in the period from its notification until 31 December 1994.

12 The Cooperation Agreement between the European Economic Community, of the one part, and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar

and the State of Kuwait), of the other part, approved on behalf of the Community by Council Decision 89/147/EEC of 20 February 1989 (OJ 1989 L 54, p. 1, hereinafter 'the Cooperation Agreement') provides in Article 11:

'1. In the field of trade, the objective of this Agreement is to promote the development and diversification of the reciprocal commercial exchanges between the Contracting Parties to the highest possible level, *inter alia* by studying ways and means of overcoming trade barriers for the access of each Contracting Party's products to the other Contracting Party's market.

2. The Contracting Parties shall enter into discussions concerning the negotiation of an agreement aimed at the expansion of trade in accordance with the provisions of the Joint Declaration annexed hereto.

3. Pending the conclusion of the trade agreement referred to in paragraph 2, the Contracting Parties accord each other most-favoured-nation treatment.'

13 Further, under Article 19 of the Cooperation Agreement:

'In the fields covered by this Agreement and without prejudice to its provisions:

...

— the arrangements applied by the Community in respect of the GCC countries shall not give rise to any discrimination between them, their nationals, or their companies or firms.'

The main proceedings

14 It appears from the order for reference that between 8 November 1990 and 20 December 1992 DAT-SCHAUB exported frozen unboned beef from Denmark to a destination stated in the export declarations to be the United Arab Emirates, and obtained refunds on that basis. The beef was processed in the Jebel Ali Free Zone in the Emirate of Dubai, but without first having been cleared through customs for release for consumption. The processed products were then exported in part to other GCC countries to be marketed there.

15 Since they considered that the products re-exported to countries other than the United Arab Emirates mentioned in the export declarations did not give entitlement to the refunds DAT-SCHAUB had received, the Danish authorities recovered those refunds, in the amount of DKK 9 898 936.75, by setting off the sums they had paid against those corresponding to the securities which had been lodged with a view to obtaining those refunds.

16 The Østre Landsret, before which DAT-SCHAUB brought proceedings against the Ministry for recovery of the sum thus recovered by the latter, stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Having regard to the Cooperation Agreement between the European Economic Community and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf, approved by Council Decision 89/147 of

20 February 1989, must the term "non-member country" in the second subparagraph of Article 17(2) of Regulation No 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products be construed as meaning that countries parties to the Charter are treated as one single non-member country, with the result that a product which, after processing in the Jebel Ali Free Zone in the United Arab Emirates, is imported into and released for consumption in another of the countries parties to the Charter is to be regarded as having been imported in the unaltered state within the meaning of Article 17 of the regulation?'

The question referred for a preliminary ruling

17 By its question the national court is essentially asking whether the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 is to be interpreted as meaning that the GCC countries are regarded, where products are processed before being cleared through customs on the territory of one of those countries and then exported to others, as a single country into which all the products resulting from that processing have been imported.

18 DAT-SCHAUB submits that the question should be answered in the affirmative, as the term 'non-member country' in the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 refers also to a group of States with which the European Community has concluded a cooperation agreement and fixed uniform rates of refunds for each of the States concerned.

19 It submits that an interpretation to the effect that refunds are granted only for products released for consumption in the GCC country where they have been processed would be contrary to the prohibition of discrimination in Article 19 of the Cooperation Agreement and to the principle of proportionality: first, the same refund rate applies to all those countries, and, second, a correct reading of the second indent of the second subparagraph of Article 17(2) of Regulation

No 3665/87 should take into consideration the more flexible wording of paragraph 1 of that article, which states that '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...'. Thus, by assimilating the GCC countries for refund purposes, the Decision merely confirms the existing legal position by clarifying various points, for example with reference to the documents to be produced.

20 Finally, DAT-SCHAUB points to its good faith in the interpretation of Article 17(2) of Regulation No 3665/87.

21 The Ministry and the Commission, on the other hand, contend that that provision must be interpreted as meaning that a right to refunds exists only where the products are imported and released for consumption in the same country in which they are processed. In particular, the wording of the provision, which is unambiguous in using the expression 'non-member country' in the singular, does not lend itself to being read as denoting a whole group of non-member countries.

22 The Ministry refers here to the sixth recital in the preamble to Commission Regulation (EEC) No 568/85 of 4 March 1985 amending for the 10th time Regulation (EEC) No 2730/79 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1985 L 65, p. 5), which is the source of the corresponding passage in the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87. It states: '... however, a product which is processed in the importing non-member country before being released for home use should be regarded as having been imported in the unaltered state when proof is provided that processing took place in the non-member country in which all the products resulting from such processing have been released for home use'.

23 The Ministry and the Commission further submit, the Commission as an alternative submission after observing that the national court has not questioned the Court on this point, that application of the principle of proportionality does

not necessarily imply such an assimilation of the GCC countries to a single non-member country, as the requirement of import in the unaltered state into the declared country of destination is intended to facilitate checking the routeing of the products, in particular that they are actually released for consumption in the country for which the refund is provided. For this purpose it is immaterial that the rate of refund is the same for other countries to which the products are said to have been re-exported. Moreover, the rate is not specific to the GCC countries, but applies also to various other non-member countries.

24 As regards the Cooperation Agreement, the Ministry and the Commission submit that this is only a framework agreement which lays down certain objectives and principles but implies that a proper trade agreement will subsequently be concluded, and therefore cannot be of direct application. In any event, a literal application of the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 to each of the GCC countries would not involve discrimination between them within the meaning of Article 19 of the Cooperation Agreement.

25 As regards the Decision, the Ministry and the Commission submit that it introduces a derogation, for a limited time, from that provision of Regulation No 3665/87, and is not intended to resolve problems of documentation.

26 It should be pointed out that, according to Regulation No 805/68, the granting of refunds on exports of beef and veal to non-member countries, equal to the difference between prices on the world market and those within the Community, is intended to safeguard Community participation in international trade in beef and veal.

27 It should also be noted that, according to settled case-law, the system of differentiated export refunds is intended to gain or to maintain access for Community exports to the markets of the non-member countries concerned, the reason for differentiated refunds being the desire to take account of the particular characteristics of each import market in which the Community wishes to play a

part (see Case 89/83 *Hauptzollamt Hamburg-Jonas* v *Dimex* [1984] ECR 2815, paragraph 8, and Case C-299/94 *Anglo Irish Beef Processors International and Others* v *Minister for Agriculture, Food and Forestry* [1996] ECR I-1925, paragraph 21).

28 It is essential for that purpose of the system of differentiated refunds that products in respect of which a subsidy is granted in the form of a refund actually reach their market of destination so that they can be marketed there (see *Anglo Irish Beef Processors International*, paragraph 28).

29 Thus, in accordance with the provisions of Regulation No 3665/87, payment of refunds is conditional, in the case of differentiated refunds, on the product having been imported into a non-member country and on the formalities for its release for consumption having been completed (see Case C-263/97 *R* v *Intervention Board for Agricultural Produce, ex parte First City Trading and Others* [1998] ECR I-5537, paragraph 27).

30 The fact that the product is re-exported before being released for consumption in the country of destination therefore rules out the possibility of its being regarded, for the purposes of payment of the differentiated refund, as having been imported within the meaning of Article 5(1) of Regulation No 3665/87 (see *Hauptzollamt Hamburg-Jonas* v *Dimex*, paragraph 17, and *Anglo Irish Beef Processors International*, paragraph 23).

31 In the first place, as regards DAT-SCHAUB's argument that the GCC countries should be regarded as forming a single non-member country for the purposes of applying the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87, it must be observed, to begin with, that the wording of that provision is clear and unambiguous in referring, in the singular, to 'the non-member country into which all the products ... were imported' to designate the place where the products may first be processed without the right to the refund being lost.

32 That conclusion is not invalidated by the wording of Article 17(1) of Regulation No 3665/87, which mentions 'non-member countries', thus using the plural to designate the place into which the product must have been imported in the unaltered state. That provision relates to importation in the unaltered state without processing and refers to other agricultural products whose export may attract refunds which are differentiated not by countries but by zones comprising several countries of destination. By contrast, Article 17(2) intentionally, for reasons of supervision, excludes any re-export after processing. There is thus no contradiction between the wording of the first two paragraphs of Article 17 of Regulation No 3665/87.

33 It follows, next, from a reading of Article 3(5)(a) of Regulation No 3665/87 in conjunction with Annex I to Regulation No 2253/90 and Annex I to Regulation No 656/91 that an operator seeking a refund for exports of beef and veal is obliged to mention each country of destination individually in his export declaration, in accordance with the country nomenclature in the annex to Regulation No 420/90. That nomenclature does not include any collective entity such as 'the GCC countries'. On the contrary, it makes separate mention of each of the GCC countries, which must therefore be recognised as such as separate destinations for the purposes of export refunds.

34 Finally, as regards DAT-SCHAUB's argument based on Article 19 of the Cooperation Agreement, it is sufficient to observe that the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 applies without distinction to each of the GCC countries and does not discriminate between them.

35 In the second place, as regards the question whether that provision complies with the principle of proportionality, it must be pointed out that effective supervision is essential to the proper functioning of the system of refunds, as the refunds can be paid only if the goods are correctly identified (see Case 276/84 *Metelmann* v *Hauptzollamt Hamburg-Jonas* [1985] ECR 4057, paragraph 11).

36 The Court held in that judgment, with respect to the repackaging of a product in different units, that the principle of proportionality does not preclude it being held that any alteration in the presentation of the goods entails forfeiture of the refund, where it is liable to render customs control more difficult and for that reason to affect the proper functioning of the system of refunds (*Metelmann*, paragraph 13).

37 For similar reasons deriving from the need not to render customs controls more difficult, the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 does not infringe the principle of proportionality.

38 In the third place, as regards the Decision, it is common ground that, as stated in Article 2 thereof, it applies only to exports for which the export declaration was accepted in the period from its notification until 31 December 1994, that is, a period later than that of the facts at issue in the main proceedings. The Decision, which has no retroactive effect, therefore cannot apply to those facts.

39 DAT-SCHAUB's argument that the Decision merely confirms explicitly a previously accepted interpretation of the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 is precluded by the very wording of the Decision.

40 As stated in the second recital in the preamble to the Decision, the above provision precluded the possibility of processing a Community product in the non-member country of destination under a temporary admission procedure in order then to export it to another non-member country while being entitled to an export refund.

41 It was because that situation might entail the loss of markets for Community products, and, according to the eighth recital in the preamble to the Decision, at the request of the Kingdom of Denmark, that it was decided to allow for a fixed period the re-export of processed products to other GCC countries with the benefit of the refunds prescribed for one of them, the United Arab Emirates, which is the country mentioned in the export declaration.

42 It therefore follows from the wording and from the objective of the Decision that it constitutes a derogation for a limited time from the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87. The Decision thus does not have the scope attributed to it by DAT-SCHAUB, namely a confirmation of a previously existing situation resulting from the application of that provision.

43 Finally, DAT-SCHAUB submits that a typical operator could in good faith have understood the provision as allowing re-exports to other GCC countries from one of them, as the rates of refunds applicable to all those countries were the same.

44 On this point, it is sufficient to observe that, as stated in paragraphs 31 and 32 above, the wording of the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 is sufficiently clear to be understood as referring only to processing operations in the territory of the country in which the resulting products are then released for consumption. Consequently, no legitimate expectation as to a broader interpretation of that provision could have been drawn by economic operators from its wording.

45 Accordingly, the answer to the Østre Landsret's question must be that the second indent of the second subparagraph of Article 17(2) of Regulation No 3665/87 must be interpreted as meaning that the GCC countries are not regarded, where products are processed before being cleared through customs on the territory of one of those countries and then exported to others, as a single non-member

country into which all the products resulting from that processing have been imported.

Costs

46 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Østre Landsret by order of 12 March 1998, hereby rules:

The second indent of the second subparagraph of Article 17(2) 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 must be interpreted as meaning that the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf are not regarded,

where products are processed before being cleared through customs on the territory of one of those countries and then exported to others, as a single non-member country into which all the products resulting from that processing have been imported.

Sevón Jann Wathelet

Delivered in open court in Luxembourg on 16 December 1999.

R. Grass L. Sevón

Registrar President of the First Chamber