Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

18 July 2013 *

(Request for a preliminary ruling — Agriculture — Common organisation of the markets — Regulation (EEC) No 3665/87 — Export refunds — Misappropriation of goods intended for export — Exporter's obligation to reimburse refunds — Failure of the competent authorities to provide information regarding the reliability of a contractor who is suspected of fraud — Force majeure — Absence)

In Case C-99/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de première instance de Bruxelles (Belgium), made by decision of 9 February 2012, received at the Court on 24 February 2012, in the proceedings

Eurofit SA

v

Bureau d'intervention et de restitution belge (BIRB),

THE COURT (Sixth Chamber),

composed of M. Berger, President of the Chamber, E. Levits and J.-J. Kasel (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Eurofit SA, by S. Woog, avocate,

— the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents, and by B. De Moor and V. van Steenkiste, avocats,

— the European Commission, by B. Burggraaf and D. Triantafyllou, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of the concept of *force majeure* for the purposes 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), as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 (OJ 1994 L 310, p. 57) ('Regulation No 3665/87').

2 The request has been made in proceedings between Eurofit SA ('Eurofit') and the Bureau d'intervention et de restitution belge (the Belgian Intervention and Restitution Board, 'the BIRB'), concerning the reimbursement of export funds paid to that company on the basis of falsified documents.

Legal context

3 The first and second recitals in the preamble to Regulation No 2945/94 were worded as follows:

'Whereas the Community rules provide for the granting of export refunds on the sole basis of objective criteria, in particular as to the quantity, nature and characteristics of the product exported, and its geographical destination; whereas in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules;

Whereas to ensure the correct functioning of the system of export refunds, sanctions should be applied regardless of the subjective element of fault; whereas it is nevertheless appropriate to waive the application of sanctions in certain cases notably in cases of an obvious error recognized by the competent authority and to provide for a higher sanction in cases of intent.'

4 Regulation No 3665/87 provided for the possibility for operators exporting agricultural goods outside the territory of the European Community to receive export refunds.

5 Article 5 of Regulation No 3665/87 provided:

'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:

…

3. If the product, after leaving the customs territory of the Community, has perished in transit as a result of force majeure, the amount paid shall be:

— in the case of a differentiated refund, the part of the refund defined in accordance with Article 20 shall be paid,

— in the case of a non-differentiated refund, the total refund shall be paid.'

6 Article 11(1) of Regulation No 3665/87 stated:

‘Where it is found that an exporter, with a view to the grant of an export refund, has requested a refund in excess of that applicable; the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:

(a) half the difference between the refund applied for and that applicable to the actual export;

(b) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.

…

The sanction referred to under (a) shall not apply:

— in cases of *force majeure*,

— in exceptional cases characterised by circumstances beyond the control of the exporter, which occur after the acceptance by the competent authorities of the export declaration or the payment declaration, and provided that he, immediately after he took note of these circumstances but within the time-limit referred to in Article 47(2), notifies the competent authorities, unless the competent authorities have already established that the refund requested was incorrect,

— in cases of obvious error as to the refund requested, recognised by the competent authority;

…

Where the reduction referred to under point (a) or (b) of the first subparagraph results in a negative amount, the exporter shall pay that negative amount.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

7 Eurofit is a company incorporated under Belgian law which is involved in milk processing and the exportation of dairy products to third countries.

8 In July 1996, Eurofit exported butter to Albania via Italy. The goods were to be transported by van to Bari (Italy), and then by boat to Albania.

9 The Italian intermediary responsible for the exportation was the Italian company Di Fenza & Figli (‘Di Fenza’). Payment for the goods was to be made before delivery and the amount of the refund to be covered by a bank guarantee.

10 The first delivery gave raise to suspicions as to the reliability of the intermediary, as the goods were diverted to Naples, the storage place of the goods was unknown and there was no shipping route between Naples and Albania.

11 Having contacted the Belgian consular authorities in Naples, Eurofit decided to repatriate the van and informed the BIRB of that decision.

12 After having been reassured by the intermediary, Eurofit sent a new van containing 22 tonnes of butter. That van arrived in Bari on 14 August 1996.

13 On 10 September 1996, the BIRB confirmed to Eurofit the receipt of the T5 document bearing the required stamps from the competent authorities, and proceeded to pay the first export refund amounting to BEF 1 521 670.

14 Furthermore, Di Fenza sent Eurofit an Italian Ministry of Finance document that had been sent to the BIRB and a document of placement on the market in Albania of the exported goods.

15 Eurofit made a second delivery, on 26 September 1996, paid for immediately by Di Fenza. However, the cheque issued as a guarantee of the refund proved to be without sufficient funds.

16 On 31 October 1996, the BIRB confirmed the receipt of the T5 document relating to this second delivery.

17 Eurofit thus sent, between July and November 1996, a total of 10 vans, each transporting 22 tonnes of butter.

18 That company received, from the BIRB, for the delivery of the first five vans and the seventh van, export refunds in the sum of BEF 9 266 133 (EUR 229 701.44).

19 However, the BIRB blocked the refunds for the sixth, ninth and tenth vans.

20 As regards the eighth van, which was seized by the Italian authorities, Eurofit filed a complaint before the competent Italian courts against Di Fenza. In 2003, Di Fenza received a criminal conviction for falsification of T1 and T5 documents.

21 It subsequently became apparent that all of the exported goods had, in all likelihood, never left the territory of the European Union ('the Union') and that the transport documents sent to the BIRB were forgeries.

22 On 10 March 1998, the BIRB demanded the repayment by Eurofit of the refunds unduly paid, plus those sums corresponding to the sanction laid down in Article 11(1) of Regulation No 3665/87. Subsequently, however, the BIRB waived its right to claim the fine corresponding to that sanction.

23 In July 1999, Eurofit proposed to reimburse the BIRB the refunds which it had received, stating, however, that that payment did not prejudice its right to bring legal proceedings against the BIRB.

24 In September 2001, Eurofit brought proceedings against BIRB before the referring court seeking an order for the reimbursement by the latter of those refunds, amounting to EUR 229 701.43, as well as the payment of the refunds due for the sixth, eighth, ninth and tenth vans, in the sum of EUR 164 299.79. In addition, Eurofit sought to be released from the payment of the sanctions for non-use of export certificates.

25 Eurofit's application was based on the principle of *force majeure* within the meaning of Regulation No 3665/87, a concept which is characterised by the existence of abnormal and unforeseeable circumstances, outside the control of the exporter, the consequences of which, in spite of the exercise of all due care, cannot be avoided.

26 Eurofit accepts that the mere fact that the malpractice was carried out by its contractor, namely, Di Fenza, cannot be regarded as constituting *force majeure*, since the choice of contractor is regarded as a risk to be assumed by the economic operator. However, it claims, relying on Case C-61/98 *De Haan* [1999] ECR I-5003, that since, in the present case, the competent national authorities, by their conduct,

prevented it from having an accurate idea of the risks involved in the operation concerned and did not dissuade it from either initiating or continuing the exports at issue, it was eligible to benefit from the *force majeure* exception.

27 The BIRB disputes the existence of any fault for which it is liable and considers, on the contrary, that Eurofit failed to exercise the due care necessary to avoid the losses incurred. As regards the judgment in *De Haan*, the BIRB considers that that judgment was delivered in the context of different legislation to that applicable to the dispute in the main proceedings and that it is therefore not applicable to the provisions of Regulation No 3665/87.

28 As regards the BIRB's argument that it had committed no fault, the referring court observes that the *force majeure* exception raised by Eurofit cannot be equated to the concept of fault committed by the competent national authorities. However, it considers that the fact that those authorities sometimes knowingly kept Eurofit in the dark with regard to factors concerning its exportations and the fact that they failed to carry out a verification of the customs documents, even if such an omission was justified by the existence of an on-going criminal investigation, seem relevant in the assessment of the concept of *force majeure*, in so far as Eurofit's assessment of the reliability of its contractor, was thereby distorted.

29 In those circumstances, the tribunal de première instance de Bruxelles decided to stay proceedings and to refer the following question to the Court:

'Is there a case of *force majeure* within the meaning of Regulation No 3665/87, laying down common detailed rules for the application of the system of export refunds on agricultural products, where the competent authorities fail to provide requested information, or deliberately communicate erroneous information to an economic operator, thereby distorting its assessment of the reliability of a contractor who is suspected of fraud?'

The question referred for a preliminary ruling

30 By its question, the referring court asks, in essence, whether the provisions of Regulation No 3665/87 must be interpreted as meaning that the failure by the competent national authorities to inform the exporter of the existence of a likelihood of fraud committed by the exporter's contractor constitutes a case of *force majeure* within the meaning of that regulation.

31 As a preliminary point, it should be noted that, according to the Court's settled case-law, the concept of *force majeure* must be understood as referring to unusual and unforeseeable circumstances which were beyond the control of the party by whom it is pleaded and the consequences of which could not have been avoided even if all due care had been exercised (Case 145/85 *Denkavit België* [1987] ECR 565, paragraph 11; Case C-377/03 *Commission* v *Belgium* [2006] ECR I-9733, paragraph 95; and Case C-218/09 *SGS Belgium and Others* [2010] ECR I-2373, paragraph 44).

32 Since the concept of *force majeure* does not have the same scope in the various spheres of application of European Union law, its meaning must be determined by reference to the legal context in which it is to operate (see, inter alia, Case C-12/92 *Huygen and Others* [1993] ECR I-6381, paragraph 30; Case C-124/92 *An Bord Bainne Co-operative and Compagnie Inter-Agra* [1993] ECR I-5061, paragraph 10; and *SGS Belgium and Others*, paragraph 45).

33 As regards Regulation No 3665/87, it must be noted that Articles 5 and 11 of that regulation, relating to the conditions for the payment of the refunds, the recovery of the amounts unduly paid and the relevant sanctions, explicitly refer to *force majeure*.

34 Those provisions are intended to specify and to limit the effects of *force majeure* with regard to export refunds (see, to that effect, Case C-263/97 *First City Trading and Others* [1998] ECR I-5537, paragraph 41).

35 First, as regards the first subparagraph of Article 5(1) of Regulation No 3665/87, the payment of the refund is conditional not only on the product having left the customs territory of the European Union but also on its having been imported into an non-member country (see, to that effect, *First City Trading and Others*, paragraph 27, and *SGS Belgium and Others*, paragraph 40). The EU rules, in force at the date of the facts in the main proceedings, provide for the granting of export refunds on the sole basis of objective criteria, in particular as to the quantity, nature and characteristics of the product exported, and its geographical destination (Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 40).

36 However, by way of derogation, Article 5(3) of Regulation No 3665/87 provides that the payment of a refund is none the less assured if the product, after leaving the customs territory of the Union, has perished in transit as a result of *force majeure*, so that it was not able to be released for consumption in the non-member country of import (*SGS Belgium and Others*, paragraph 43).

37 In so far as Article 5(3) of that regulation constitutes an exception to the normal export refund procedure, it must be interpreted strictly. Since the existence of *force majeure* is an essential condition of being able to claim payment of refunds for exported goods which have not been released for consumption in the non-member country of import, it follows that that term must be interpreted in such a way that the number of cases capable of benefiting from such payment remains limited (*SGS Belgium and Others*, paragraph 46, and, by analogy, Case C-38/07 P *Heuschen & Schrouff Oriëntal Foods Trading* v *Commission* [2008] ECR I-8599, paragraph 60).

38 Secondly, as regards Article 11 of Regulation No 3665/87, it follows from the first and second recitals to Regulation No 2945/94 that, in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Union budget should be intensified and provision should, therefore, be made for the recovery of amounts unduly paid and the sanctions, the subjective aspect of the fault committed having no impact in that regard (see, to that effect, *Käserei Champignon Hofmeister*, paragraphs 40 and 60). Thus, Article 11 of that regulation makes the exporter responsible, subject to sanctions, for the accuracy of the declaration, taking precise account of the exporter's role as the last participant in the chain of production, processing and export of agricultural products (see, to that effect, *Käserei Champignon Hofmeister*, paragraph 62 and 81).

39 As regards the sanction applicable, the first subparagraph, (a) and (b), of Article 11(1) of Regulation No 3665/87 provides that where the export refund requested by the exporter exceeds that applicable to the product actually exported, that refund will be reduced by an amount corresponding to either half the difference between the refund applied for and that applicable to the actual export, or an amount equal to twice the difference between the refund applied for and the refund applicable where it is apparent that the exporter intentionally provided false information.

40 Therefore, it is only the level of the sanction which increases if there is an intentional act and the sanction provided for in the first subparagraph of Article 11(1) under (a) is applicable even if the exporter has not committed any fault. In the latter case, the sanction provided for in the first subparagraph of Article 11(1) is applicable, except in the cases listed exhaustively in the third subparagraph of Article 11(1) (Case C-143/07 *AOB Reuter* [2008] ECR I-3171, paragraph 17).

41 The exceptions listed in the third subparagraph of Article 11(1) of Regulation No 3665/87 include cases of *force majeure*, certain exceptional cases characterised by circumstances beyond the control of the exporter and cases of obvious error as to the refund requested, recognised by the competent authority.

42 However, it must be pointed out that those provisions release exporters only from the payment of the sanctions, but not from the reimbursement of the refunds paid in advance (see, to that effect, *First City Trading and Others*, paragraph 46).

43 In this regard, the Court has held that it is not possible to add a new exception, based in particular on the absence of fault on the part of the exporter, to the exhaustive list contained in the third subparagraph of Article 11(1) of Regulation No 3665/87. Even if the fault or error committed by the contracting partner is apt to constitute a circumstance beyond the control of the exporter, they are none the less an ordinary commercial risk and cannot be considered to be unforeseeable in the context of commercial transactions. The exporter is fully at liberty to select his trading partners and it is up to him to take the appropriate precautions, either by including the necessary clauses in the contracts which he concludes with them or by effecting appropriate insurance (see, to that effect, Case C-210/00 *Käserei Champignon Hofmeister*, paragraph 80 and the case-law cited, and *AOB Reuter*, paragraph 36).

44 In the present case, it must be observed that the facts at issue in the case in the main proceedings cannot constitute a case of *force majeure* within the meaning of Article 5(3) of Regulation No 3665/87.

45 The goods at issue, which, as is apparent from the decision making the reference, in all likelihood, never left the territory of the European Union, cannot be considered as having perished in transit within the meaning of Article 5(3) of Regulation No 3665/87.

46 Furthermore, Eurofit cannot rely on the exception of *force majeure* provided for by the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87. It is undisputed that Eurofit's contractor had been criminally convicted for falsification of documents in respect of export refunds. In accordance with the case-law cited at paragraph 43 of the present judgment, such a circumstance falls within the scope of an ordinary commercial risk in the context of commercial transactions and cannot, therefore, be considered to be unforeseeable in contractual relations entered into on the occasion of an export qualifying for a refund.

47 Moreover, it is important to note that, even if the behaviour of a customs administration such as that of which the BIRB is accused in the case in the main proceedings, consisting of failing to provide information to the exporter, or knowingly providing false information, is liable to be taken into consideration in the assessment of certain exceptional cases for the purposes of the second indent of the third subparagraph of Article 11(1) of Regulation No 3665/87, such behaviour cannot however release the exporter concerned from its obligation to reimburse refunds unduly received (see, by analogy, *Heuschen & Schrouff Oriëntal Foods Trading* v *Commission*, paragraph 65).

48 That conclusion cannot be called in question by the judgment in *De Haan*. Firstly, the Court considered, at paragraph 32 of that judgment, that the demands of an investigation aimed at identifying and apprehending the persons who have carried out or are planning a fraud, or the accomplices of those persons, may justify a deliberate omission to inform the economic operator concerned about the investigation fully or at all. Secondly, the Court held, at paragraphs 53 and 54 of that judgment, that the demands of such an investigation are, in the absence of any deception or negligence on the part of the person liable and for reasons of equity, might constitute a special situation in the light of the legislation applicable to the facts in this case, namely Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Article 1(6) of Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1).

49 In the light of all the foregoing considerations, the answer to the question is that the failure by the competent customs authorities to inform the exporter of the existence of a likelihood of fraud committed by the exporter's contractor does not constitute a case of *force majeure* for the purposes of

Regulation No 3665/87, and, in particular, the first indent of the third subparagraph of Article 11(1) thereof. While such a failure is liable to constitute an exceptional case within the meaning of the second indent of the third subparagraph of Article 11(1) of Regulation No 3665/87, it cannot, however, release that exporter from its obligation to reimburse export refunds unduly received, that exporter being exempted only from having to pay sanctions due under that article.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

The failure by the competent customs authorities to inform the exporter of the existence of a likelihood of fraud committed by the exporter's contractor does not constitute a case of *force majeure* for the purposes 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 2945/94 of 2 December 1994, and, in particular, the first indent of the third subparagraph of Article 11(1) thereof. While such a failure is liable to constitute an exceptional case within the meaning of the second indent of the third subparagraph of Article 11(1) of Regulation No 3665/87, as amended by Regulation No 2945/94, it cannot, however, release that exporter from its obligation to reimburse export refunds unduly received, that exporter being exempted only from having to pay sanctions due under that article.

[Signatures]