JUDGMENT OF THE COURT (SECOND CHAMBER)
27 OCTOBER 1983 [1]

Roomboterfabriek "De beste boter" BV v Produktschap voor Zuivel (reference for a preliminary ruling from the College van Beroep voor het Bedrijfsleven)

(Export refunds — Advance fixing — Suspension)

Case 276/82

Agriculture — Common organization of the markets — Milk and milk products — Export refunds — Advance fixing — Suspension — Special measure within the meaning of Regulation No 2044/75 — Application to outstanding applications for advance fixing

(Regulation No 876/68 of the Council; Regulation No 2044/75 of the Commission, Art. 3 (3))

Article 3 (3) of Regulation No 2044/75 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products, which states that export certificates are to be issued on the fifth working day following that on which the application is lodged unless special measures are taken in the intervening period, must be interpreted as meaning that a measure suspending the advance fixing of export refunds, adopted in conformity with Regulation No 876/68, must be regarded as a "special measure" referred to by that provision.

When such a measure of suspension is adopted by the Commission, applications for advance fixing submitted prior to the period of suspension but on which a decision is to be taken during that period must be rejected in the same way as applications submitted during the period of suspension.

In Case 276/82

REFERENCE to the Court of Justice under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry] for a preliminary ruling in the proceedings pending before that court between

1 — Language of the Case: Dutch.

ROOMBOTERFABRIEK "DE BESTE BOTER" BV, Best,

and

PRODUKTSCHAP VOOR ZUIVEL [Dairy Board], Rijswijk,

on the interpretation of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products (Official Journal L 213, p. 15),

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts and procedure in the main proceedings and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Background and proceedings before the national court

The limited liability company Roomboterfabriek "De beste boter" BV, the plaintiff in the main proceedings, applied on 17 November 1980 to the Produktschap voor Zuivel, the defendant in the main proceedings, for the issue of export certificates and for the advance fixing of refunds in respect of invitations to tender from:

The Soviet Union, for 10 000 tonnes of butter-fat (tariff heading No 04.03 ex b 11) and 25 000 tonnes of butter (tariff heading No 04.03 ex a 1v);

Cuba, for 9 000 tonnes of butter;

Portugal, for 400 tonnes of butter.

By circular No EEC 958 of 20 November 1980, the defendant in the main

proceedings notified exporters of milk and milk products that:

"The European Commission has decided to suspend the possibility of advance fixing in respect of refunds on exports of butter and butteroil (tariff heading No 04.03) to non-member countries for the period from 20 to 27 November 1980.

This means that applications for advance fixing submitted between 17 and 19 November 1980, which would, upon the expiry of the five day period, normally be accepted as from 24 November 1980, will be rejected."

Accordingly, the defendant in the main proceedings refused to issue the advance-fixing certificates applied for by the plaintiff on 17 November 1980 and at the same time released the bank guarantees provided by the latter in connection with its applications.

The defendant rejected a complaint lodged by the plaintiff and on 27 January 1981 the plaintiff brought an action before the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry] against the defendant's refusal to grant its applications for the advance fixing of the export refunds.

In support of its case, the plaintiff put forward the following arguments:

The contested decision is based on an interpretation of Article 3 (3) of Regulation No 2044/75 which disregards the unequivocal provisions of Regulation (EEC) No 876/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 234), in particular Article 5 (4) thereof, which provides that applications for certificates accompanied by applications for advance fixing lodged during the period of suspension are to be rejected;

The contested decision is based on an interpretation of Regulation No 2044/75 which is contrary to the manifest aim thereof.

It is also based on an interpretation which is contrary to the principle of legal certainty, mainly on the ground that the possibility of advance fixing of refunds assures exporters to a certain extent of stable refunds. That basic rule may be derogated from only in exceptional circumstances to which certain limits have expressly been set. To give retroactive effect to a decision suspending advance fixing goes beyond those limits.

In the alternative, the plaintiff adds that if the defendant's interpretation is correct, Commission Regulation (EEC) No 2993/80 of 19 November 1980 temporarily suspending advance fixing of the export refund for butter and butter-oil (Official Journal 1980, L 310, p. 18) should be declared invalid or at least inapplicable as against the plaintiff.

2. Community legislation applicable

Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) lays down the basic principles relating, on the one hand, to the issue of export licences (Article 13) and, on the other hand, to the granting of refunds and the determination of the amount thereof (Article 17).

Pursuant to Article 17 of that regulation, Regulation No 876/68 of the Council provides for the possibility of varying the amount of the refund according to the destination of the exports. Article 5 (2) of the latter regulation provides that the amount of the export refund is to be that applicable on the day of exportation and, in order to assure exporters to a certain extent of stable refunds, the first and second subparagraphs of Article 5 (3) provide as follows:

"It may be decided that the refund shall be fixed in advance. In such a case, the export refund applicable on the day on which the application for the export certificate is lodged shall be applied, if the party concerned so requests at the same time as the application for the certificate is made (the request to be made not later than 13.00 hours), to exports effected during the period of validity of the certificate."

Those general provisions on the advance fixing of export refunds were supplemented by the general provisions governing the suspension of the application of the arrangements for advance fixing; those provisions are embodied in Article 9 of Regulation (EEC) No 2429/72 of the Council of 21 November 1972 (Official Journal, English Special Edition 1972 (November), p. 48), which adds a further paragraph (4) to Article 5 of Regulation No 876/68 worded as follows:

"When examination of the market situation shows that there are difficulties due to the application of the provisions concerning the advance fixing of the export refund, or that such difficulties may occur, a decision may be taken, in accordance with the procedure laid down in Article 30 of Regulation (EEC) No 804/68, to suspend the application of these provisions for the period strictly necessary.

In cases of extreme urgency, the Commission may, after examination of the situation, decide on the basis of all the information available to it to suspend advance fixing for a maximum of three days.

Applications for certificates accompanied by applications for advance fixing lodged during the period of suspension shall be rejected."

Regulation (EEC) No 2044/75 lays down special detailed rules for the application of the system for the advance fixing of refunds in respect of milk and milk products, including butter and butter-oil. By way of exception to the general rule, according to which export certificates are issued at the time when the application is lodged, Article 3 (3) of that regulation provides that export certificates for the above-mentioned products "shall be issued on the fifth working day following that on which the application is lodged, unless special measures are taken in the intervening period".

3. Taking the view that those arguments raise several issues of Community law, the national court referred to the Court of Justice the following questions for a preliminary ruling:

"1. Must Article 3 (3) of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 be interpreted as meaning that the expression 'special measures' includes a decision suspending the possibility of advance fixing of refunds pursuant to the provisions of Regulation (EEC) No 876/68 of 28 June 1968.

2. If the first question is answered in the affirmative, does a correct interpretation of Article 3 (3) entail the rejection of applications for advance fixing which were submitted before the period of suspension but on which a decision must be taken during that period?

3. If the second question is also answered in the affirmative, must the view be taken that Article 3 (3) is in conflict with Community law, in particular with Article 5 (4) of Regulation (EEC) No 876/68 of the Council of 28 June 1968, or with the principle of legal certainty which forms part of Community law?"

The order making the reference was registered at the Court of Justice on 15 October 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Roomboterfabriek "De beste boter" BV, represented by B. H. Ter Kuile, and by the Commission of the European Communities, represented by R. C. Fischer, Legal Adviser, acting as Agent.

By order of 4 May 1983, the Court assigned the case to the Second Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

The *plaintiff in the main proceedings* maintains *in limine* that in so far as this case concerns the advance fixing of refunds in connection with its participation in certain invitations to tender opened in a non-member country, Article 3 (3) of Regulation No 2044/75 is not the sole provision applicable and that other provisions are relevant, in particular Article 6 of Regulation No 2044/75 and Article 19 (1) and (2) of Regulation (EEC) No 193/75 of the Commission of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal 1975, L 25, p. 10). In its view, it is necessary to ascertain whether the effect of those provisions is to preclude the application of Article 3 (3) of Regulation No 2044/75; that is the question to be resolved in Case 109/82 *(Interagra)*. If the Court were to decide in Case 109/82 that, where an invitation to tender is opened in a non-member country, Article 3 (3) of Regulation No 2044/75 does not apply, that decision might diminish the significance of the three questions raised by the national court.

As regards the first question, the plaintiff is of the opinion that Community law does not provide a definition of the expression "special measures". In its view, therefore, reference must be made to the system comprising all the rules applicable to the agricultural sector and a distinction must be drawn between those which concern the day-to-day management of the organization of the markets and those which are applicable in special circumstances, it being understood that rules relating to the day-to-day management cannot in themselves be described as special measures within the meaning of Regulation No 2044/75. Management of the Community market forms part of the Commission's normal day-to-day responsibilities. It involves not only the regular fixing of refunds but also, in certain cases, the suspension of the option to have such refunds fixed in advance when difficulties arise or threaten to arise.

The plaintiff therefore proposes that the first question shuld be answered as follows:

"Article 3 (3) of Regulation No 2044/75 of the Commission of 25 June 1975 must be interpreted as meaning that a decision suspending the possibility of advance fixing of refunds pursuant to Regulation No 876/68 of the Council of 28 June 1968 is not to be regarded as a 'special measure'."

If the Court considers it appropriate to answer the second question, the plaintiff maintains that the answer should be in the negative on the ground that no express powers to reject applications for advance fixing submitted before the period of suspension are vested in the Commission. Neither Regulation No 193/75 nor Regulations Nos 804/68 and 876/68 confer any such powers. On the contrary, the third subparagraph of Article 5 (4) of Regulation No 876/68 provides that "... applications for advance fixing lodged during the period of suspension shall be rejected". In order for the defendant to be able to reject the applications pending in the present case it would have been necessary for Community law to contain express provisions allowing applications pending during a suspension procedure to be rejected on the sole basis of such suspension.

If, therefore, the Court considers that the first question must be answered in the affirmative, the plaintiff proposes that the second question should be answered as follows:

"Article 3 (3) of Regulation No 2044/75 must be interpreted as meaning that applications for the advance fixing of refunds which were submitted before the introduction of a period of suspension pursuant to measures based on Regulation No 876/68 and on which a decision must be taken during that period cannot be rejected."

As regards the third question, which concerns the validity of the provision in question, the plaintiff observes in the first place that if Article 3 (3) of Regulation No 2044/75 is interpreted as meaning that even applications pending at the time when the suspension was decided upon can be rejected, that would be contrary to the third subparagraph of Article 5 (4) of Regulation No 876/68, which provides that applications for advance fixing shall be rejected during the period of suspension.

The plaintiff observes, secondly, that such an interpretation of Article 3 (3) of Regulation No 2044/75 contravenes the principle of legal certainty. It points out that the issue of export licences imposes an obligation on the exporter to export his goods on pain of forfeiting the security provided. Furthermore, by making it possible to fix refunds in advance, Community law seeks to give exporters a degree of security as regards the amounts which they will receive upon exportation of their goods and exporters obviously conclude their transactions on the basis of the rate of refund in force at the time when they lodge their application. Accordingly, it would be contrary to the principle of legal certainty if the Commission were able, in connection with the normal management of the common organization of a market, to call in question refunds in reliance upon which exporters had assumed commitments. Such a possibility exists only in exceptional circumstances, in connection with the adoption of protective measures within the meaning of Article 21 (1) of Regulation No 804/68.

If, therefore, the Court considers that the second question must also be answered in the affirmative, the plaintiff proposes that the third question should be answered as follows:

"Article 3 (3) of Regulation No 2044/75 is contrary both to Article 5 (4) of Regulation No 876/68 and to the principle of legal certainty if the first-mentioned provision must be taken to mean that applications for the advance fixing of refunds which are lodged before the

introduction of a period of suspension pursuant to a measure adopted on the basis of Regulation No 876/68 and on which a decision must be taken during that period may be rejected."

The *Commission* begins by analysing the reasons underlying the decision to suspend advance fixing. If points out that since in international trade no genuine price fixing takes place for dairy products, international prices are very unstable and that that disrupts to a considerable extent the smooth operation of the system of export refunds. Thus, excessively high refunds can lead to a sudden, notable — and sometimes purely speculative — increase in exports and, in particular, in applications for the advance fixing of export refunds. That is the reason why the Commission decided to tighten controls on exports, particularly of butter, in order to be able to adopt where necessary, appropriate measures in due time. That decision resulted in the adoption of the contested provision and of a number of measures, including Regulation No 2993/80, suspending the system of advance fixing.

The Commission points out in that connection that in the three working days prior to that suspension it had received applications for advance fixing in respect of 352 557.5 tonnes of butter. That quantity is almost ten times greater than the quantity in respect of which applications were lodged shortly before the first suspension from 12 to 14 November inclusive and it exceeds the Community's total exports of butter to non-member countries in 1980, which amounted to 323 219 tonnes. It is therefore quite plain that those applications were highly speculative in nature and that to grant the applications pending would have led to totally unacceptable consequences both for the common agricultural policy and for the budget.

The Commission subsequently conducts a detailed analysis of the Community legislation at issue in this case. It deduces, in particular from Article 5 (4) of Regulation No 876/68, that if the system of advance fixing is suspended, no advance-fixing certificates conferring a right to receive the refund fixed in advance may be issued during the period of suspension. Thus, any applications pending, on which a decision must be taken during the period of suspension, must be rejected in view of the temporary abolition of their legal basis. The Commission also considers that, as a result of the introduction of a waiting period pursuant to Article 3 (3) of Regulation No 2044/75, the right to have the refund fixed in advance could not arise until the fifth working day following that on which the application was lodged; that also permitted certain measures adopted in connection with advance fixing to be extended to applications pending, provided that those measures were in force on the last day of the waiting period. Finally, the Commission takes the view that the practice followed by the Community institutions and by the national authorities confirms that the special measures referred to in Article 3 (3) include suspension of the application of the system of advance fixing and that suspension also gives rise to legal consequences affecting applications for advance fixing which are already pending.

On the basis of its observations concerning the Community legislation applicable, the Commission considers it appropriate to conclude, without further comment, that the first question submitted for a preliminary ruling calls for an answer in the affirmative.

As regards the second question, the Commission is of the opinion that, according to the wording and the

obvious intent of the provision in question, applications for the advance fixing of a refund which were pending could not be accepted and had to be rejected altogether if, on the fifth working day following that on which the application was lodged, the possibility of advance fixing had been suspended in conformity with the first or second subparagraph of Article 5 (4) of Regulation No 876/68. In addition, the Commission points out that an affirmative answer to the second question can be deduced from the combined interpretation and application of Article 3 (3) of Regulation No 2044/75 and Regulation No 2993/80.

As regards the third question, the Commission considers first of all whether the contested provision is compatible with (a) Article 5 (4) of Regulation No 876/68 (b) with the principle of legal certainly.

(a) In the light of the answer proposed by it to the second question, the Commission takes the view the relevant part of the third question should in fact be re-worded as follows: "Is the application of the provisions of Regulation No 2993/80 in conjunction with those of Article 3 (3) of Regulation No 2044/75 compatible with Article 5 (4) of Regulation No 876/68?"

In its answer to that question, the Commission again considers the contested provisions within the general context of Regulation No 804/68, which is the basic regulation; it rejects point by point all the arguments put forward by the plaintiff before the national court and is of the opinion that, in any event, there are more important matters than such problems of interpretation — which it describes as specious — on the ground that "if a measures is to be effective, it must be possible for the protective measure governed by Regulation No 876/68 to be extended to applications pending in a large number of cases, or in most of those cases".

The Commission lays particular emphasis on the purpose of the legislation in question. It considers that the most important argument in favour of its suggested interpretation of Article 3 (3) of Regulation No 2044/75 and of Article 5 (4) of Regulation No 876/68 is provided by the task which it performs, namely ensuring that the system of refunds functions properly; that task was entrusted to it by Regulation No 804/68 and confirmed by Regulation No 876/68. The Commission reiterates that, if it were impossible to extend suspension of the system of advance fixing to applications pending, the measure would lose much of its value and the Commission would find it virtually impossible to carry out its aforementioned task in the proper manner.

The Commission therefore concludes that the application of the provisions of Regulation No 2993/80 in conjunction with those of Article 3 (3) of Regulation No 2044/75 is not incompatible with Article 5 (4) of Regulation No 876/68.

(b) In response to the plaintiff's view that the rejection of applications lodged before the period of suspension confers retroactive effect on decisions suspending advance fixing, the Commission considers that such criticism stems from a misconception of the nature and operation of the system for the advance fixing of refunds and, in particular, of the manner in which and the time at which the right to have a refund fixed in advance arises. It refers once again to the provisions which apply in the present case and deduces therefrom that Regulation No 876/68 determines only the substance of the right to have a refund fixed in advance, whilst all other matters, in particular the manner in which and the time at which the right arises, are governed by the detailed implementing

rules adopted by the Commission. It is therefore pointless to contend that suspension of advance fixing operates retroactively and that acquired rights have been adversely affected since, in the present case, the lodging of an application for an advance-fixing certificate did not confer any right to the issue of such a certificate; that right could not arise until the fifth working day following that on which the application was lodged, provided that the application of the system of advance fixing was not suspended beforehand.

Moreover, since firms cannot rely on the principle of the protection of legitimate expectation to demand the retention of existing legislation where it was foreseeable that such legislation might be amended, it is pointless for the plaintiff to contend, in the present case, that the rejection of the applications lodged before the period of suspension failed to meet its legitimate expectations.

Finally, the Commission adds that if there are any lingering doubts concerning the compatibility of the contested measures with the principle of legal certainty, the validity of those measures should be recognized on the ground that the general interest in the proper functioning of the common organization of the market concerned and, in particular, of the system of refunds in that sector must obviously take precedence over the interests of the exporters concerned.

Therefore, the Commission concludes that the answer to the third question should be that "there is no reason to suppose that Article 3 (3) of Regulation No 2044/75 is invalid on the ground that it is contrary to Community law".

III — Oral procedure

At the hearing on 7 July 1983 H. J. Bronkhorst, Advocate at The Hague, representing Roomboterfabriek "De beste boter" BV, and R. C. Fischer, Legal Adviser, acting as Agent, representing the Commission of the European Communities, presented oral argument and answered questions put by the Court.

The Advocate General delivered his opinion at the sitting on 6 October 1983.

Decision

1 By order dated 12 October 1982, which was received at the Court on 15 October 1982, the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions as to the interpretation and, if appropriate, the validity of Article 3 (3) of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products (Official Journal 1975, L 213, p. 15).

2 Those questions were raised in an action brought before that court by Roomboterfabriek "De beste boter" BV, the plaintiff in the main proceedings, for the annulment of a decision of the Produktschap voor Zuivel [Dairy Board], the defendant in the main proceedings, refusing an application made by the plaintiff on 17 November 1980 for the issue of export certificates with advance fixing of refunds in respect of several invitations to tender opened in non-member countries for the supply of large quantities of butter and butter-oil.

3 The refusal to issue the certificates followed a circular sent by the Produktschap to exporters of milk and milk products informing them that by Regulation (EEC) No 2993/80 of 19 November 1980 temporarily suspending advance fixing of the export refund for butter and butter-oil (Official Journal 1980, L 310, p. 18) the Commission had decided to suspend the advance fixing of refunds on exports of butter and butter-oil to non-member countries from 20 to 27 November 1980. The Produktschap also informed exporters that according to the same decision applications for advance fixing lodged between 17 and 19 November inclusive were also rejected.

4 The main argument of the plaintiff before the national court was that the decision in question was based on a wrong interpretation of Article 3 (3) of Regulation No 2044/75 and alternatively that if the defendant's interpretation was right Regulation No 2993/80 must be declared invalid or at least inapplicable as against the plaintiff.

5 Those arguments prompted the College van Beroep voor het Bedrijfsleven to refer the following questions to the Court:

"1. Must Article 3 (3) of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 be interpreted as meaning that the expression 'special measures' includes a decision suspending the possibility of advance fixing of refunds pursuant to the provisions of Regulation (EEC) No 876/68 of 28 June 1968?

2. If the first question is answered in the affirmative, does a correct interpretation of Article 3 (3) entail the rejection of applications for

advance fixing which were submitted before the period of suspension but on which a decision must be taken during that period?

3. If the second question is also answered in the affirmative, must the view be taken that Article 3 (3) is in conflict with Community law, in particular with Article 5 (4) of Regulation (EEC) No 876/68 of the Council of 28 June 1968, or with the principle of legal certainty which forms part of Community law?"

First question

6 Article 3 of Regulation No 2044/75 contained on 17 November 1980 a paragraph (3) inserted by Commission Regulation (EEC) No 445/77 of 2 March 1977 supplementing Regulation (EEC) No 2044/75 as regards the advance fixing of the refund for butter (Official Journal, L 58, p. 21) and last amended by Commission Regulation (EEC) No 203/80 of 30 January 1980 (Official Journal, L 24, p. 18) which provided that export certificates for products including butter and butter-oil were to be issued on "the fifth working day following that on which the application is lodged, unless special measures are taken in the intervening period".

7 Since the expression "special measures" is not expressly defined in that provision it is necessary in order to answer the question raised to consider first the purpose of the system of advance fixing of refunds. According to the first recital in the preamble to Regulation (EEC) No 2429/72 of 21 November 1972 concerning the suspension of the application of the provisions for the advance fixing of levies and export refunds in different sectors of the common organization of the market (Official Journal, English Special Edition 1972 (November), p. 48) the system was set up "in the interest of stable trading conditions". The possibility of adopting special measures tends, it is stated, to avoid, "in cases of abnormal resort to this system by the persons concerned, . . . difficulties on the market in question".

8 Moreover, it was for that purpose that Regulation No 445/77 introduced a waiting period, since, according to the preamble to that regulation, that period was introduced "so that the market situation, may be assessed and, if necessary, the appropriate measures may be taken with regard to the applications in question".

9 The decision to suspend the system of fixing refunds in advance is unquestionably such a measure since Article 5 (4) of Regulation (EEC) No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (Official Journal, English Special Edition 1968 (I), p. 234), as amended by Article 9 of Regulation No 2429/72, provides that such a decision may be adopted "when examination of the market situation shows that there are difficulties due to the application of the provisions concerning the advance fixing of the export refund, or that such difficulties may occur".

10 It need only be added that the reason given for the adoption of the relevant decision to suspend advance fixing was that the situation on the market in butter and butter-oil might lead to the speculative fixing of the refund so that it may be concluded that a decision to suspend advance fixing which interrupts the normal operation of the advance-fixing system must be regarded as a "special measure".

11 Consequently the answer to the first question put by the national court should be that Article 3 (3) of Regulation No 2044/75 must be interpreted as meaning that a measure suspending the advance fixing of export refunds, adopted in conformity with Regulation No 876/68, must be regarded as a "special measure".

Second question

12 Since the first question has been answered in the affirmative it is necessary to consider whether Article 3 (3) of Regulation No 2044/75 also means that applications for advance fixing submitted before the period of suspension but on which a decision had to be taken during that period must be rejected.

13 As to that point it must be observed that it follows from the purpose for which a waiting period in Regulation No 445/77, as amended by Regulation No 203/80, was introduced that an application for advance fixing confers entitlement only if no appropriate measure is adopted during that period in relation to outstanding applications.

14 It is also clear from all the relevant rules that the main purpose of the decision to suspend advance fixing was to protect the operation of the system of advance fixing of the refund against sudden, massive and very often speculative exports.

15 The effectiveness of such a measure would, however, be severely impaired if the effect of the suspension on applications for advance fixing submitted prior to the period of suspension were different from its effect on applications submitted during that period and if Article 5 (4) of Regulation No 876/68 did not apply to them.

16 Consequently, when a decision to suspend advance fixing is adopted by the Commission, an application for advance fixing submitted prior to the suspension but on which a decision is to be taken during the waiting period must be rejected in the same way as applications submitted during the period of suspension.

17 The answer to the second question must therefore be that Article 3 (3) of Regulation No 2044/75 must be interpreted as meaning that applications for advance fixing submitted before the period of suspension but on which a decision is to be taken during that period must be rejected.

Third question

18 The third question put by the national court is whether Article 3 (3) of Regulation No 2044/75, as so construed, is in conflict with Community law, namely first with Article 5 (4) of Regulation No 876/68 and secondly with the principle of legal certainty.

19 As regards the first part of that question, it should first be pointed out that the interpretation indicated above is derived from the purpose of the system of suspension of advance fixing, as revealed also by Article 21 (2) and (3) of Regulation No 804/68 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) in conjunction with Article 2 (1) (b) of Regulation No 2115/71 of 28 September 1971 laying down the conditions for applying protective measures in the market in milk and milk products (Official Journal, English Special Edition 1971 (III), p. 829). Indeed, under the terms of those provisions even

outstanding applications for the issue of export licences may be rejected in the event of a serious disturbance of the market. Next, it should be pointed out that, although Article 5 (4) of Regulation No 876/68 refers only to applications for advance fixing lodged during the period of suspension, the effectiveness of the suspension would be severely impaired if the rule laid down by that provision could not be extended to outstanding applications. It follows that the rejection of such applications is not contrary to Article 5 (4) of Regulation No 876/68.

20 As regards the application of the principle of legal certainty, the first point to be made in this regard is that an application for advance fixing confers only a contingent entitlement since the rules contain the express proviso that "special measures" may be adopted during the waiting period.

21 Secondly, traders in the products in question could not have been unaware that during 1980 advance fixing had already been suspended five times.

22 It follows from those two observations that there were sufficient indications of the uncertainty of the situation on the market in butter and butter-oil in 1980 and that the rejection of outstanding applications is not contrary to the principle of legal certainty.

23 Consequently the answer to the third question should be that Article 3 (3) of Regulation No 2044/75, as interpreted above, is not contrary either to Article 5 (4) of Regulation No 876/68 or to the principle of legal certainty.

Costs

24 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the questions submitted to it by the College van Beroep voor het Bedrijfsleven by order of 12 October 1982, hereby rules:

1. **Article 3 (3) of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products (Official Journal, L 213, p. 15) must be interpreted as meaning that a measure suspending the advance fixing of export refunds, adopted in conformity with Regulation (EEC) No 876/68, must be regarded as a "special measure";**

2. **Article 3 (3) of Regulation No 2044/75 must be interpreted as meaning that applications for advance fixing submitted before the period of suspension but on which a decision is to be taken during that period must be rejected;**

3. **Article 3 (3) of Regulation No 2044/75, as interpreted above, is not contrary either to Article 5 (4) of Regulation No 876/68 or to the principle of legal certainty.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 27 October 1983.

For the Registrar

H. A. Rühl

Principal Administrator

K. Bahlmann

President of the Second Chamber