JUDGMENT OF THE COURT (Third Chamber)
26 June 2003 *

In Case C-334/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court between

Glencore Grain Rotterdam BV

and

Bundesanstalt für Landwirtschaft und Ernährung,

on the interpretation of the second indent of the second paragraph of Article 8(2) of Commission Regulation (EC) No 2372/95 of 10 October 1995 on the issuing of standing invitations to tender for the sale of common wheat of breadmaking quality held by the French and German intervention agencies for export to certain ACP countries in the 1995/96 marketing year (OJ 1995 L 242, p. 3) and of Article 47(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), as amended by Commission Regulation (EC) No 2955/94 of 5 December 1994 (OJ 1994 L 312, p. 5),

* Language of the case: German.

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, F. Macken (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Glencore Grain Rotterdam BV, by B. Festge, Rechtsanwältin,

— the Commission of the European Communities, by M. Niejahr, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Glencore Grain Rotterdam BV and the Commission at the hearing on 28 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2003,

gives the following

Judgment

1 By order of 17 July 2001, received at the Court on 7 September 2001, the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the second indent of the second paragraph of Article 8(2) of Commission Regulation (EC) No 2372/95 of 10 October 1995 on the issuing of standing invitations to tender for the sale of common wheat of breadmaking quality held by the French and German intervention agencies for export to certain ACP countries in the 1995/96 marketing year (OJ 1995 L 242, p. 3) and of Article 47(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), as amended by Commission Regulation (EC) No 2955/94 of 5 December 1994 (OJ 1994 L 312, p. 5), ('Regulation No 3665/87').

2 That question was raised in proceedings between Glencore Grain Rotterdam BV ('Glencore') and the Bundesanstalt für Landwirtschaft und Ernährung (Federal Office for Agriculture and Food; 'the Bundesanstalt') concerning the latter's refusal to release a part of the security provided by Glencore in the context of a tendering procedure relating to the export of common wheat to certain African, Caribbean and Pacific States ('the ACP States').

Legal background

Community rules

Regulation (EEC) No 1766/92

3 Article 4(1) of Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals (OJ 1992 L 181, p. 21), as amended by Council Regulation (EC) No 3290/94 of 22 December 1994 (OJ 1994 L 349, p. 105), provides that the intervention agencies designated by the Member States are to buy in certain types of cereals, including common wheat, which are offered to them and have been harvested in the Community, provided that the offers comply with the conditions laid down, in particular in respect of quality and quantity.

4 In accordance with Articles 5 and 23 of Regulation No 1766/92, the Commission is authorised to lay down detailed rules concerning the procedures and conditions for the taking over and sale of cereals by the Member States' intervention agencies.

Regulation (EEC) No 2131/93

5 Commission Regulation (EEC) No 2131/93 of 28 July 1993 laying down the procedures and conditions for the sale of cereals held by intervention agencies (OJ 1993 L 191, p. 76), as amended by Commission Regulation (EC) No 120/94

of 25 January 1994 (OJ 1994 L 21, p. 1), ('Regulation No 2131/93') establishes two different tendering procedures, one for the sale of cereals on the Community market and the other for sale for export.

6 In both cases, Article 13(4) of Regulation No 2131/93 provides for the lodging of a security. According to that provision, once tenders have been submitted, they may not be amended or withdrawn and they are valid only if they are accompanied by proof that the tenderer has lodged the necessary security.

7 Article 17 of Regulation No 2131/93 provides:

'1. The securities referred to in this regulation shall be lodged in accordance with Title [III] of Commission Regulation (EEC) No 2220/85.

2. The security provided for in Article 13(4) shall be released where it covers quantities for which:

...

— the selling price has been paid within the period laid down, and in the case of sales for export and where the price paid is less than the minimum price for resale on the Community market, in accordance with Article 5(1), (2) and

(3), a security covering the difference between those two prices has been lodged.

3. The security provided for in the second indent of paragraph 2 shall be released where it covers quantities in respect of which:

...

— the proof referred to in Article 18 of Regulation (EEC) No 3665/87 has been provided. However, the security shall be released where the operator provides proof that a quantity of at least 1 500 tonnes of cereal products has left the customs territory of the Community on a vessel suitable for sea transport....

...

5. Except in cases of *force majeure*, the security provided for in the second indent of paragraph 2 shall be forfeited in respect of quantities for which the proof referred to in the second indent of paragraph 3 has [not] been provided within the period laid down in Article 47 of Regulation (EEC) No 3665/87.'

Regulation No 2372/95

8 Article 2 of Regulation No 2372/95 provides:

'Subject to the provisions of this Regulation, the sales of common wheat of breadmaking quality referred to in Article 1 shall take place in accordance with the procedure and conditions laid down by Regulation (EEC) No 2131/93.'

9 Article 4(1) of Regulation No 2372/95 provides that tenders are admissible only if the tenderer provides written proof that he has concluded for the quantity in question, a commercial supply contract for common wheat of breadmaking quality for export to an ACP State or to several States within one of the groups of ACP States listed in Annex I to that regulation and if the tenders are accompanied by an application for an export licence for the destination in question.

10 Under Article 5(3) of Regulation No 2372/95, the export licence obliges the operator to export to the ACP State or States for which the licence application was submitted.

11 Article 8 of Regulation No 2372/95 is worded as follows:

'1. The security lodged pursuant to Article 13(4) of Regulation (EEC) No 2131/93 must be released once the export licences have been issued to the successful tenderers.

2. The obligation to export and import into one of the countries of destination listed in Annex I shall be covered by a security amounting to ECU 60 per tonne of which ECU 20 per tonne shall be lodged upon issue of the export licence, with the balance of ECU 40 being lodged before removal of the cereals.

Article 15(2) of Commission Regulation (EEC) No 3002/92 notwithstanding:

— the amount of ECU 20 per tonne must be released within 20 working days of the date on which the successful tenderer supplies proof that the wheat removed has left the customs territory of the Community,

— the amount of ECU 40 per tonne must be released within 15 working days of the date on which the successful tenderer supplies proof of entry for consumption into the ACP State or States referred to in Article 5(3). This proof shall be supplied in accordance with Articles 18 and 47 of Commission Regulation (EEC) No 3665/87.

...'

Regulation No 3665/87

12 Article 18(1) and (2) of Regulation No 3665/87 provide:

'1. Proof that the product has been cleared through customs for release for consumption shall, at the exporter's choice, be furnished by production of one of the following documents:

(a) the customs document or a copy or photocopy thereof; such copy or photocopy must be certified as being a true copy by the body which endorsed the original document, an official agency of the third country concerned, an official agency of a Member State in the third country concerned or an agency responsible for paying the refund;

(b) a certificate of unloading and release for consumption drawn up by an international control and supervisory agency approved by a Member State. The date and number of the customs document of release for consumption must appear on the certificate concerned.

2. If the exporter cannot obtain the document chosen in accordance with paragraph 1(a) or (b) even after taking the appropriate steps or if there are doubts as to the authenticity of the document furnished, proof that the product has been cleared through customs for release for consumption may be deemed to have been furnished by the production of one or more of the following documents:...'

13 Article 47(2) and (4) of Regulation No 3665/87 state:

'2. Except in cases of force majeure, the documents relating to payment of the refund or release of the security must be submitted within 12 months following the date of acceptance of the export declaration.

...

4. Where the documents required under Article 18 cannot be submitted within the period referred to in paragraph 2, although the exporter has acted with all due diligence to obtain them and communicate them within such period, he may be granted further time for the production of these documents.'

Regulation (EEC) No 2220/85

14 Article 1 of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products (OJ 1985 L 205, p. 5), as amended by Commission Regulation (EEC) No 1181/87 of 29 April 1987 (OJ 1987 L 113, p. 31), ('Regulation No 2220/85') lays down the rules governing securities to be given, *inter alia*, under the regulations laying down the common organisation of markets in the cereals sector, unless other rules are laid down by those regulations.

15 Pursuant to Article 3(a) of Regulation No 2220/85, 'a "security" is an assurance that a sum of money will be paid or forfeited to a competent authority if a particular obligation is not met'.

16 Articles 21, 22 and 28 are worded as follows:

'*Article 21*

Once the evidence laid down by the specific regulation has been furnished that all primary, secondary and subordinate requirements have been fulfilled, the security shall be released.

Article 22

1. A security shall be forfeit in full for the quantity for which a primary requirement is not fulfilled, unless *force majeure* prevented fulfilment.

2. A primary requirement shall be considered to have been breached if the relevant evidence is not produced within the time-limit set for the production of that evidence unless force majeure prevented production of such evidence within that time-limit....

3. Where evidence that all primary requirements have been met is produced within 18 months of the deadline in the first subparagraph of paragraph 2, 85% of the sum forfeited shall be repaid.

Where evidence that all primary requirements have been met is produced within 18 months of that deadline in circumstances where the relevant secondary requirement has not been met, the sum to be repaid shall be the sum that would have been repayable under Article 23(2), less 15% of the relevant part of the sum secured.

4. No repayment shall be made where evidence that all primary requirements have been respected is produced after the 18 month period referred to in paragraph 3 has expired unless *force majeure* prevented production of this evidence within that period.

...

Article 28

1. Where no period is laid down for producing the evidence needed to release a sum secured, such period shall be:

(a) 12 months from the time-limit specified for respecting all primary requirements,

or

(b) where no such time-limit is specified, 12 months from the date by which all primary requirements have been met.

2. The period laid down in paragraph 1 shall not exceed three years from the time the security was assigned to a particular obligation, except in cases of force majeure.'

The main proceedings and the question referred to the Court

17 Glencore took part in the standing invitation to tender opened by Regulation No 2372/95. It was awarded a total quantity of 102 359 tonnes of common wheat and then furnished the security of ECU 60 per tonne provided for in Article 8(2) of Regulation No 2372/95.

18 According to the export licences issued to Glencore, the common wheat was to be delivered to one or more of the ACP States listed in the annex to Regulation No 2372/95. The common wheat in question was cleared through customs and left the territory of the Community by ship between January and March 1996.

19 In accordance with the first indent of the second subparagraph of Article 8(2) of Regulation No 2372/95, the security of ECU 20 per tonne was released by the Bundesanstalt following production of proof that the goods had left the customs territory of the Community.

20 However, the documents proving entry of the goods for consumption into the ACP State or States of destination were not lodged with the Bundesanstalt until 24 June 1997, that is to say more than 18 months after acceptance of the export declaration.

21 The Bundesanstalt declared 15% of the security of ECU 40 per tonne to be forfeit, citing as legal basis Article 22(2) and (3) and Article 29 of Regulation No 2220/85, in conjunction with the second indent of the second subparagraph of Article 8(2) and Article 2 of Regulation No 2372/95, Article 17(5) of Regulation No 2131/93, and Articles 18 and 47(2) of Regulation No 3665/87.

22 After unsuccessfully contesting the decision on the partial forfeiture of its security, Glencore brought an action before the Verwaltungsgericht Frankfurt am Main on 3 April 1998, seeking annulment of that decision.

23 Before the national court, Glencore claimed primarily that the 12-month time-limit laid down by Article 47(2) of Regulation No 3665/87 did not apply in the framework of the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95. It maintained that the 12-month time-limit laid down in Article 28(1)(b) of Regulation No 2220/85 should instead apply. That article,

unlike Article 47(2) of Regulation No 3665/87, does not provide that the time-limit starts to run on the day following acceptance of the export declaration, but merely that the proof necessary for release of the security is to be furnished within 12 months of the date on which the primary requirement has been met.

24 The Bundesanstalt, on the other hand, argues that the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 is the legal basis of the decision declaring the security forfeit. Under those provisions, the security of ECU 40 per tonne must be released within 15 working days of the date on which the successful tenderer supplies proof of entry for consumption into the ACP State or States referred to in Article 5(3) of that regulation. That proof must be supplied in accordance with Articles 18 and 47 of Regulation No 3665/87.

25 Taking the view that the outcome of the dispute before it required an interpretation of the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 and of Article 47(2) of Regulation No 3665/87, the Verwaltungsgericht Frankfurt am Main decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Must the second indent of the second subparagraph of Article 8(2) of Commission Regulation (EC) No 2372/95 of 10 October 1995 be interpreted as meaning that Article 47(2) of Commission Regulation (EC) No 3665/87 of 27 November 1987 must be simply applied by analogy, so that the 12-month time-limit for supplying proof of importation into the ACP State concerned does not begin to run until the primary requirement imposed by that regulation, namely the importation into the ACP State, is fulfilled?'

The question referred

Observations submitted to the Court

26 Glencore submits that on a correct interpretation of the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95, the 12-month time-limit laid down for furnishing proof of importation of the common wheat into the ACP State concerned does not begin to run until importation into that State has been accomplished.

27 According to Glencore, that interpretation is consistent with both the spirit and the purpose of Regulation No 2372/95, which aims to reduce the significant stocks of common wheat of breadmaking quality held by the French and German intervention agencies and to provide regular supplies to the ACP States at stable prices.

28 Glencore submits that, unlike Regulation No 3665/87, Regulation No 2372/95 lays down only a time-limit within which the goods must be exported, but does not expressly set the time-limit within which they must be imported into the ACP State of destination. In making those rules, which relate only to exports to ACP States, the legislature intentionally refrained from fixing a time-limit for completion of importation into the ACP State concerned, because it is often impossible to comply with the 12-month time-limit. As no time-limit was laid down for importation of the common wheat into the ACP State, the necessary implication is that a time-limit likewise cannot be imposed for furnishing proof of such importation.

29 The above interpretation of the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 is also justified by the fact that Regulation No 2220/85 falls to be applied. The security to be provided in connection with exports under Regulation No 2372/95 is a security within the meaning of Article 3(a) of Regulation No 2220/85, and the importation of the cereals into the ACP States of destination is a primary requirement within the meaning of Article 20(2) of that regulation.

30 Since no time-limit is laid down for fulfilling the primary requirement either, Glencore submits that the time-limit for furnishing proof of importation into the State of destination is, in accordance with Article 28(1)(b) of Regulation No 2220/85, 12 months from the fulfilment of the primary requirement, namely importation into the ACP States of destination.

31 Glencore concludes that the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 does not lay down a time-limit for producing proof of importation into the State of destination and that the reference to Article 47 of Regulation No 3665/87 can only be interpreted as meaning that that provision may be given a corresponding interpretation adapted to Regulation No 2372/95. Therefore, the 12-month time-limit can begin to run only when the primary requirement of importation into the ACP State has been met.

32 The Commission maintains that the provisions relating to time-limits set out in Article 47 of Regulation No 3665/87 are automatically applicable by virtue of the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95. Proof of importation of the goods into the ACP State or States concerned, which must be produced before the security can be released, must therefore be provided within 12 months of the date of acceptance of the export declaration, except in cases of *force majeure*.

33 In the Commission's opinion, the wording of the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 is clear and unambiguous. That provision contains nothing to suggest that the reference to Article 47 of Regulation No 3665/87 should not also extend to the time-limit provided for in paragraph 2 of that article, which sets a time-limit of '12 months following the date of acceptance of the export declaration'.

34 The Commission considers that there is no justification for recourse to the time-limits provided for in Article 28 of Regulation No 2220/85, as proposed by Glencore. That regulation, pursuant to Article 1 thereof, applies only in so far as other rules are not laid down by the regulations governing specific sectors which were adopted in the framework of the common market organisation.

35 The Commission also submits that there is nothing to permit the inference that the reference to Article 47 of Regulation No 3665/87 in the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 is a drafting error on the part of the Community legislature. Had such an error occurred, it would have been easy to rectify or amend the latter provision accordingly; however, no such rectification or amendment has been made. Moreover, in relation to the time-limit for releasing the security, Article 17 of Regulation No 2131/93 also refers to Article 47 of Regulation No 3665/87.

36 Even though the Commission takes the view that, given the clear and unambiguous provisions of the second indent of the second paragraph of Article 8(2) of Regulation No 2372/95, there is no need to examine the regulation's objective in order to interpret that article, it submits that that objective does in fact confirm its interpretation. The importation of common wheat into the ACP States was the principal requirement made of the successful

bidders in the standing invitation to tender opened by that regulation, the performance of which was to be ensured by the lodging of the security provided for in Article 8(2). To have allowed a more generous time-limit than the comparable time-limit applicable in the context of the general scheme provided for in Article 17(5) of Regulation No 2131/93 for supplying proof of importation of the goods into the ACP States in question, as Glencore claims, would have jeopardised the important role which that obligation plays in ensuring the success of Regulation No 2372/95 as a whole.

37 Moreover, the Commission submits that, contrary to Glencore's assertions, the second indent of the second paragraph of Article 8(2) of Regulation No 2372/95 is not in breach of the principle of proportionality. First, under Article 47(4) of Regulation No 3665/87, the time-limit laid down in paragraph 2 of that article for production of the documents necessary to prove that the product has been cleared through customs for release for consumption can be extended at the exporter's request should he encounter difficulties in complying with it. Second, Article 22 of Regulation No 2220/85 lays down a graduated system of penalties for failure to fulfil the primary requirements within the time-limits allowed.

Reply of the Court

38 The second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 clearly states that the amount of ECU 40 per tonne, namely the security whose refund is in dispute in the main proceedings, must be released within 15 working days of the date on which the successful tenderer supplies proof of entry for consumption of the common wheat into the ACP State or States concerned.

39 That provision makes express reference to the provisions of Articles 18 and 47 of Regulation No 3665/87 regarding production of that proof.

40 Article 18 of Regulation No 3665/87 lists the documents that an operator must produce to provide proof of clearance through customs for release for consumption.

41 Article 47(2) of Regulation No 3665/87, which appears in Title 4 of that regulation, entitled 'Procedure for payment of the refund', is clear and unambiguous inasmuch as its states that '[e]xcept in cases of force majeure, the documents relating to payment of the refund or release of the security must be submitted within 12 months following the date of acceptance of the export declaration'.

42 There is nothing in the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 to support the contention that the reference to Article 47 of Regulation No 3665/87 should not also apply to paragraph 2 of that provision, which concerns the time-limit by which the documents relating to refund of the security must be submitted.

43 Moreover, the reference in the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 to Article 47 of Regulation No 3665/87 for the purpose of determining the time-limit within which the proof of entry for

consumption must be supplied would be meaningless if it was not intended to refer to the two paragraphs of the latter provision which relate to time-limits, namely paragraphs 2 and 4 of Article 47.

44 Therefore, it is clear from the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 and Article 47(2) of Regulation No 3665/87 that the 12-month period within which the operator must supply proof of entry for consumption of the common wheat into the ACP State or States of destination starts to run on the date of acceptance of the export declaration.

45 The objective pursued by Regulation No 2372/95 does not in any way give rise to a different interpretation from that which clearly follows from the wording of those provisions; on the contrary, it wholly endorses that interpretation.

46 It is evident from the second and third recitals in the preamble to Regulation No 2372/95 that its principle objective is to ensure that the common wheat actually reaches its destination. To that end, the obligation to export to the ACP State or States of destination is subject to a strict time-limit, compliance with which is in part ensured by the security provided for in Article 8(2) of that regulation.

47 Finally, contrary to Glencore's contention, the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 is not in breach of the principle of proportionality.

48 The obligation laid down in Article 47(2) of Regulation No 3665/87 to submit the documents relating to release of the security within 12 months following the date of acceptance of the export declaration ceases to apply where the economic operator in question supplies proof of *force majeure*.

49 Moreover, Article 47(4) of that regulation accords the national authorities the possibility of granting the operator an extension of the deadline for the submission of the documents required, that is to say the proof that the goods exported have arrived at their destination, where he has been unable to produce those documents within the statutory 12-month period, despite having acted with diligence in seeking to obtain and communicate them within that period (Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 146).

50 It is therefore not the purpose of the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 automatically to deprive exporters of the refunds provided for under the Community rules or, in a case such as that before the national court, of the securities provided at the time of sale of the cereals held by the intervention agencies, where the exporters, despite having made every effort required of them, have been prevented, as a result of circumstances beyond their control, from producing the requisite documents within the 12-month period (*Germany* v *Commission*, cited above, paragraph 148).

51 In the light of the foregoing, the answer to the question submitted by the national court must be that the second indent of the second subparagraph of Article 8(2) of Regulation No 2372/95 is to be interpreted as meaning that proof of importation of the goods into the ACP State or States concerned, which is necessary for release of the security of ECU 40 per tonne, must be supplied, in accordance with Article 47(2) of Regulation No 3665/87, within 12 months following the date of acceptance of the export declaration, except in cases of

force majeure or where the exporter, having acted with diligence in seeking to obtain that proof, is unable to submit it within that period and the competent authority has granted an extension of the deadline.

Costs

52 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 (Third Chamber),

in answer to the question referred to it by the Verwaltungsgericht Frankfurt am Main by order of 17 July 2001, hereby rules:

The second indent of the second subparagraph of Article 8(2) of Commission Regulation (EC) No 2372/95 of 10 October 1995 on the issuing of standing

invitations to tender for the sale of common wheat of breadmaking quality held by the French and German intervention agencies for export to certain ACP countries in the 1995/96 marketing year must be interpreted as meaning that proof of importation of the goods into the ACP State or States concerned, which is necessary for release of the security of ECU 40 per tonne, must be supplied, in accordance with Article 47(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, as amended by Commission Regulation (EC) No 2955/94 of 5 December 1994, within 12 months following the date of acceptance of the export declaration, except in cases of *force majeure* or where the exporter, having acted with diligence in seeking to obtain that proof, is unable to submit it within that period and the competent authority has granted an extension of the deadline.

Puissochet Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 26 June 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Third Chamber