OPINION OF ADVOCATE GENERAL GULMANN
delivered on 24 March 1994 *

Mr President,
Members of the Court,

1. The Cour d'Appel, Brussels, has referred questions to the Court of Justice for a preliminary ruling in a case between a Belgian company and the Belgian authorities concerning that company's right to refunds on the export of butter to Switzerland.

2. The following facts are apparent from the order for reference:

— in 1968 Boterlux SPRL was granted eight licences for exports from the Community to Switzerland;

— the exports were carried out between 30 May 1968 and 20 September 1968 and related to 396 tonnes of butter;

— Boterlux gave the following declaration in connection with those exports:

'The goods will be duly imported into the country of destination stated on the exit certificate or into a country in the same area. The company on whose behalf the transaction is being carried out undertakes to repay refunds wrongly paid if the goods are diverted to a country in an area other than that of the country for which the exit certificate has been drawn up';

— the Belgian authorities paid out some BFR 7 million in refunds for the first three exports which took place between 30 May and 18 June 1968;

— for the last exports, which took place between 8 August and 20 September 1968, the refunds — amounting to some BFR 21 million — were not paid even though Boterlux in January 1969 submitted to the Belgian authorities documentation with a view to having those refunds paid, including the forwarding

* Original language: Danish.

agent's certification of export and Form 61B authenticated by customs;

— in a letter to the Belgian authorities of 4 March 1969 Boterlux stated that it had not learned until October 1968 that certificates of exit and entry were required for exports of butter to Switzerland but those documents were useless without a certificate of entry for home use which, until then, had never been mentioned;

— the butter exported to Switzerland was re-imported into Belgium under false documentation and ultimately sold in Italy;

— by letter of 20 July 1971 the Belgian authorities refused to pay the refunds on the grounds that it had not been established that the exported goods had been released into free circulation in a country outside the Community.

3. In 1974 Boterlux brought proceedings against the Belgian State seeking payment of the refunds which had been withheld. The Belgian State counterclaimed for repayment of the refunds that had already been paid. By judgment of 1988 the Tribunal de Première Instance, Brussels, held that the Belgian State was obliged to pay Boterlux the export refunds. While holding that under Community law the goods in question had to have been released into free circulation in the country of importation, which had not been done, that court held that Boterlux could not be held responsible for the fraudulent re-importation of the goods into Italy via Belgium.

4. The Belgian State appealed against that judgment to the Cour d'Appel, Brussels, claiming that the judgment should be overturned and that Boterlux should be ordered to repay the refunds that had been paid to it.

5. It is apparent from the order for reference that the Belgian State primarily argued before the Cour d'Appel that refunds cannot be paid if it is established that the goods were not released into free circulation in a non-member country and that it is not disputed in this instance that the goods were not released into free circulation in Switzerland. Boterlux essentially argues that, pursuant to the relevant Community rules, for the refunds in this instance to be payable it is sufficient if it is established that the goods

have left the Community and that it cannot therefore be required that the goods must have been released into free circulation in Switzerland.

6. That is the background to the first part of Question 1 submitted by the Cour d'Appel which is: 'Are the EEC rules applicable in this case, in particular Regulation No 1041/67/EEC of the Commission [1] and Article 6 of Regulation (EEC) No 876/68 of the Council, [2] to be interpreted as meaning that the payment of refunds is subject to the products being put in free circulation in a non-member country?'

7. Boterlux bases its legal conception on the submission that the refunds for the exports in question were not differentiated according to the country of destination and that pursuant to the relevant Community rules there was no basis for requiring from the exporter anything more than proof that the goods had left the geographical territory of the Community. Boterlux states that under Article 6(1) of Regulation No 876/68 of the Council non-differentiated refunds are to 'be paid upon proof: that the products have been exported from the Community ...' and that by submitting *inter alia* the abovementioned customs documents Boterlux has proved that the goods were exported from the Community.

8. I agree with the Belgian Government and the Commission that that view is untenable.

9. I would first point out that the dispute in the main proceedings concerns the question of the payment of refunds for all the exports carried out by Boterlux between June and September 1968. That means that the relevant Community rules applying to exports carried out before 29 July 1968 are set out in Regulation No 13/64/EEC of the Council on the progressive establishment of a common organization of the market for milk and dairy products with supplementary Community and national rules [3] and that the relevant Community rules for the exports carried out after 29 July 1968 are in Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products [4] together with ancil-

1 — Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system (OJ, English Special Edition 1967, p. 323).

2 — 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 (OJ, English Special Edition 1968(I), p. 234).

3 — *Journal Officiel* 1964 34, p. 549 in conjunction in particular with Regulation No 165/64 on refunds applicable to the export of certain dairy products to third countries (*Journal Officiel* 1964 173, p. 2744.

4 — OJ, English Special Edition 1968(I), p. 176.

lary rules, in particular Regulations Nos 876/68 and 1041/67 referred to in the questions. In the observations submitted to the Court of Justice by Boterlux, the Belgian Government and the Commission, discussion focused in particular on the Community rules applying after 29 July 1968.

10. There is disagreement between Boterlux, on the one hand, and the Belgian Government and the Commission, on the other, as to whether the refunds at issue in this case were non-differentiated or differentiated refunds, that is refunds which are the same for all non-member countries or refunds of an amount varying depending on the non-member country to which the goods are to be exported. It is not possible on the basis of the information available in these proceedings to decide that issue with sufficient certainty.

11. It makes no difference, in my view, whether the case is decided on the basis of the rules applying before 29 July 1968 or those applying thereafter and it also makes no difference whether the refunds are differentiated or non-differentiated.

12. The starting point for answering the national court's questions must be the position that the right to export refunds is only obtained if the goods are in fact exported to a non-member country and that there cannot in any event be an export if the goods have not been released into free circulation in a non-member country.

13. In its 1971 judgment in Case 6/71 *Rheinmühlen* the Court of Justice held that the export refunds at issue 'were intended to offset the price differences' between the Community market and the markets of non-member countries and 'that "exports to third countries" ... presupposed that the goods were offered for sale on the market of a third country, that is to say, that they must at least have been put into free circulation there'. [5]

14. Both before and after the adoption of Regulation No 804/68, the object of the rules

5 — Case 6/71 *Rheinmühlen* v *Einfuhr- und Vorratsstelle Getreide* [1971] ECR 823. The rules at issue in that case were in Regulation No 19 on the progressive establishment of a common organization of the market in cereals (*Journal Officiel* 1962, p. 933).
See also Case 250/80 *Anklagemyndigheder* v *Schumacher, Töpfer and Others* [1981] ECR 2465 concerning 'accession' compensatory amounts in which it was held that 'Since in such circumstances [that is where the goods were in the country of importation solely for the purpose of completion of customs formalities] the objective of offsetting prices has not been attained, an essential condition for application of an "accession" compensatory amount has not been fulfilled' (paragraph 16). In Case 254/85 *Irish Grain Board* v *Minister for Agriculture* [1986] ECR 3309, concerning monetary compensatory amounts, it was held that since the purpose of the compensatory amounts was to counteract currency instability, it followed 'that the monetary compensatory amount granted on importation cannot fulfil its function unless the imported product actually enters the importing Member State for home use' (paragraph 11). The Court's reasoning in those cases can be transposed without difficulty to the field of export refunds.

on refunds in the milk sector, like that of other rules on export refunds, was to facilitate exports to non-member countries by offsetting differences in prices on the Community market and in non-member countries.

The object of export refunds will not be achieved unless the exports are actually carried out and exports are not actually carried out if the goods are brought back to the Community without having been released into circulation in the non-member country.

15. It is established that exportation was not actually carried out in this case. The exporter has, therefore, not fulfilled the fundamental substantive condition for payment of the refunds.

16. Since that substantive condition applied both before and after 29 July 1968, it is immaterial to the answer to the question whether the exports were carried out pursuant to Regulation No 13/64 or pursuant to Regulation No 804/68.

17. For the same reason it is immaterial whether the refunds were differentiated or non-differentiated. It is certainly correct that the abovementioned rules only require, as a condition for payment of non-differentiated refunds, proof that the goods were exported from the Community. [6] Under normal circumstances it may be presumed that goods that have demonstrably been exported from the Community are also released into free circulation in a non-member country and in any event have not been unlawfully brought back into the Community. But that payment condition does not signify that a trader has an unconditional right to refunds once that evidentiary requirement is met — notwithstanding the fact that it is otherwise established that the goods have not in fact been exported. The rule is precisely just an evidentiary rule and the evidence normally required is not irrefutable. [7]

18. That is borne out by Article 4 of Regulation No 1041/67 — the 'anti-fraud provision' — under which Member States may, in certain circumstances (in practice for example when there is suspicion of irregularities),

6 — The proof required in connection with differentiated refunds is, under Article 6(2) of Regulation No 876/68 'that the product has reached the destination for which the refund was fixed'.

7 — That was most recently confirmed by the Court with regard to differentiated refunds in Case C-27/92 *Möllmann-Fleisch-GmbH* [1993] ECR I-1701, in which it was held that the customs certificate was not sufficient evidence of importation into a non-member country in so far as doubts arose whether the goods had gained actual access to the market.

'require, as a condition for payment of the refund, proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country ...'. That provision is of general application and covers both non-differentiated and differentiated refunds. [8]

19. Since there is no question of evidentiary problems in this case as it is established that the goods were not released into free circulation in Switzerland but in a Member State of the Community and that the fundamental substantive condition for payment of export refunds has therefore not been met, it is ultimately unnecessary to take a position on the submission by Boterlux that the Belgian authorities did not call upon it either specifically or in general terms to demonstrate that the goods had been released into free circulation in Switzerland.

20. It follows that the reply to be given to the first part of the Cour d'Appel's first question should be that refunds cannot be paid if it may be presumed that the goods were not released into free circulation in a non-member country. [9]

21. The second part of Question 1 and Questions 2 and 3 ask whether there may exist circumstances under which an undertaking like Boterlux is entitled to refunds even if the fundamental condition for the payment of those refunds is not met.

22. Those questions are as follows:

(1) If the payment of refunds is subject to the products being put in free circulation in a non-member country, 'do the principles laid down in the Court's judgments in Case 125/75 [10] and in Case 6/71 [11] and in the judgments concerning payment of monetary compensatory amounts which may be equated with refunds

8 — See Case 125/75 *Milch-, Fett- und Eier-Kontor GmbH* [1976] ECR 771.

9 — Boterlux has pointed out that on the occasion of the import into Italy the Italian authorities demanded the import duties applying to third country goods. However that fact cannot alter the interpretation of the rules on export refunds which underlies my proposed answer to the national court's question. Any problems that may arise as a result of the levy of import duties must be resolved independently of these proceedings.

10 — Case 125/75 *Milch-, Fett- und Eier-Kontor* v *Hauptzollamt Hamburg-Jonas* [1976] ECR 771.

11 — Case 6/71 *Rheinmühlen* v *Einfuhr- und Vorratsstelle für Getreide* [1971] ECR 823.

(Case 250/80 and Case 254/85 [12]) make the exporter responsible for the objective performance of that obligation, which would preclude his being relieved on the ground that he did not participate in the fraud or acted in good faith, which Advocate General Dutheillet de Lamothe treated as equivalent to *force majeure* in his Opinion in Case 6/71?

23. In principle export refunds cannot be paid unless the conditions applying under Community law for such payment are met. The good faith of the exporter is immaterial in that regard. [14]

It is the exporter who is responsible for the conditions being met and, in principle therefore it is the exporter who must bear the risk of non-compliance with those conditions.

(2) Can re-importation into the Community, that is where the products have not been put into free circulation in a non-member country — whether or not any fraud has taken place — be described as an "unforeseeable" event when the Community rules regard it as a risk, a possibility against which the Community's regulations guard?

The position may be different, however, if non-compliance is attributable to *force majeure* and that proviso is expressly apparent from the relevant Community rules or if it may be read into the scheme of rules in question. [15]

(3) Can the exporter's good faith be treated in the same way as a case of *force majeure* when he could have avoided the consequences of the failure to put the products into free circulation by ensuring through contractual means that the purchasers did not fraudulently divert the products from the required destination (judgment in Case 1/68 [13] — definition of *force majeure* — judgment in Case 254/85 *Irish Grain Board*, cited above, at paragraphs 12 and 13)?'

24. It is unnecessary in these proceedings to examine whether there is such an express or

12 — Case 250/80 *Anklagemyndigheden* v *Töpfer* [1981] ECR 2465 and Case 254/85 *Irish Grain Board* v *Minister for Agriculture* [1986] ECR 3309.

13 — As pointed out in the observations submitted by Boterlux, this is presumably a reference to Case 4/68 *Schwarzwaldmilch* v *Einfuhr-und Vorratsstelle* [1968] ECR 377.

14 — In Case 254/85 *Irish Grain Board*, cited above, the Court held:
'The provisions of Community law governing the payment of monetary compensatory amounts ... must be interpreted as meaning that the exporting Member State which has to pay the monetary compensatory amounts that must be granted by the importing Member State is entitled to refuse payment where the product in question has not entered the importing Member State for home use owing to fraud on the part of the purchasers of the said product, even where the customs formalities have been completed, appropriate T 5 forms have been issued and the "exporter" or "person concerned" within the meaning of the regulations in question at all times acted in good faith in relation to the said transaction.' As stated above, I consider that that case-law may be transposed to export refunds.

15 — See in this respect my Opinion in Case C-12/92 *Criminal Proceedings against Huygen* [1993] ECR I-6381, point 26.

implied proviso concerning *force majeure*. I consider that it may in any event be held that the conditions for Boterlux to rely on a plea of *force majeure* are not met.

25. The Court has held that while the concept of *force majeure* 'does not presuppose absolute impossibility, it nevertheless requires the non-performance of the act in question to be due to circumstances beyond the control of the person claiming *force majeure* which are abnormal and unforeseeable and of which the consequences could not have been avoided despite the exercise of all due care'. [16]

26. Few details have been given in this case of the circumstances in which the irregularities detected occurred. However, as mentioned above, it has been established that the goods were not released into free circulation in Switzerland and that they were brought back into the Community using documents that had been issued unlawfully.

We have no certain information of who was responsible for the irregularities since it is to be assumed, according to the questions referred to the Court, that Boterlux did not take part therein. What is important, however, is that it has not been contended that the goods in question were stolen nor has it been contended that they were brought back into the Community by somebody who was not legally entitled to dispose of the goods since Question 3 mentions that the exporter has the possibility of ensuring that 'the purchasers did not fraudulently divert the products from the required destination'.

27. In those circumstances, therefore, it must in my view be held that the non-importation into Switzerland was not an unforeseeable circumstance whose consequences could not have been avoided despite the exercise of all due care.

It represents a commercial risk inherent in commercial transactions which it falls to the exporter to bear. [17]

16 — Case 109/86 *Theodorakis* v *Greece* [1987] ECR 4319.

17 — See Case 109/86 *Theodorakis* [1987] ECR 4319 in which the Court held:
'Where the failure to export goods as planned is not attributable to any fault on the part of the holder of the export licence but is due solely to non-performance by the other party to the sales contract under which the goods were to be exported, it is clear that although such a hindrance to the performance of a contract may be described as a circumstance outside the control of the holder of the licence, it is none the less neither abnormal nor unforeseeable. Such an event is an ordinary commercial risk inherent in commercial transactions and it is for the holder of the licence, who is fully at liberty to select such trading partners as his interests in that respect may dictate, to take the appropriate precautions either by including the requisite clauses in the contract in question or by effecting appropriate insurance' (paragraph 8).

Conclusion

On the basis of the foregoing I propose that the following answer be given to the questions referred to the Court:

An undertaking is not entitled to refunds where it is established that the export which forms the basis for the payment of the refunds was not carried out since the goods in question were not released into free circulation in a non-member country but were brought back into the Community.

The exporter is objectively responsible for complying with the conditions for payment of the refunds which means that it is in principle immaterial that he was not fraudulently involved in the non-compliance or that he otherwise acted in good faith.

Force majeure cannot be pleaded in a situation where goods were, by unlawful acts undertaken by persons who were entitled to dispose of those goods, brought back into the Community without having been released into free circulation in the country of importation.