JUDGMENT OF THE COURT (Sixth Chamber)

28 March 1996 *

In Case C-299/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court of Ireland for a preliminary ruling in the proceedings pending before that court between

Anglo Irish Beef Processors International and Others

and

Minister for Agriculture, Food and Forestry,

on the interpretation and validity of Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1) and 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 (EEC) No 354/90 of 9 February 1990 (OJ 1990 L 38, p. 34),

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch, G. F. Mancini, F. A. Schockweiler and P. J. G. Kapteyn (Rapporteur), Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Anglo Irish Beef Processors International and Others, by Michael M. Collins, SC, instructed by A. & L. Goodbody, Solicitors,

— Ireland, by Michael A. Buckley, Chief State Solicitor, acting as Agent, and by Aindrias O'Caoimh, SC,

— the United Kingdom, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by David Lloyd Jones, Barrister,

— the Council of the European Union, by Jorge Monteiro and António Tanca, of its Legal Service, acting as Agents,

— the Commission of the European Communities, by Peter Oliver and Claudia Schmidt, of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of Anglo Irish Beef Processors International and Others, represented by Michael M. Collins, SC, and Peter Shanley, SC, of

Ireland, represented by Aindrias O'Caoimh, SC, of the Council of the European Union, represented by António Tanca, and of the Commission, represented by Peter Oliver and Claudia Schmidt, at the hearing on 30 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 18 January 1996,

gives the following

Judgment

1 By order of 25 July 1994, received at the Court on 7 November 1994, the High Court of Ireland referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation and validity of Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1) and 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 (EEC) No 354/90 of 9 February 1990 (OJ 1990 L 38, p. 34).

2 Those questions were raised in proceedings between Anglo Irish Beef Processors International and Others (hereinafter 'the plaintiffs'), a group of eight Irish undertakings engaged in the processing and exportation of beef, and the Minister for Agriculture, Food and Forestry (hereinafter 'the Minister').

3 On 28 March 1990 the plaintiffs concluded two contracts with the Iraq State procurement agency for the supply of specified quantities of boned beef to be delivered C&F Baghdad, Basra and Mosul.

4 The Minister paid the export refunds in advance, pursuant to Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5), as amended by Council Regulation (EEC) No 2026/83 of 18 July 1983 (OJ 1983 L 199, p. 12), and to Regulation No 3665/87, cited above.

5 In accordance with those regulations, the plaintiffs provided a bank guarantee in the Minister's favour, equal to 120% of the amount advanced by way of export refunds.

6 The plaintiffs began shipping the beef to Iraq during May 1990. At approximately the same time, on account of inaccurate reports from the World Health Organization warning of a severe outbreak in the United Kingdom and in Ireland of the disease known as 'spongiform encephalopathy', the Iraqi authorities required the plaintiffs to produce certain clearance certificates attesting that the beef in question was free of the disease. The beef was in cold storage aboard two ships moored at the port of Mersin (Turkey). On 3 August 1990 the Iraqi authorities finally gave permission for the beef to be shipped to Iraq.

7 On 2 August 1990 Iraq invaded Kuwait. On the same day, the UN Security Council adopted Resolution No 660 condemning the invasion. On 4 August 1990 the European Community and its Member States issued a statement condemning the invasion and declaring that they had taken a number of measures, including an embargo on certain imports from Iraq and Kuwait, an embargo on the sale of arms and other military equipment to Iraq and the suspension of certain other measures of cooperation.

8 On 6 August 1990 the UN Security Council adopted Resolution No 661 imposing an embargo on trade with Iraq and Kuwait and, on 8 August 1990, the Council of Ministers of the European Communities adopted Regulation No 2340/90 with

retroactive effect from 7 August 1990. That regulation prohibited the export to Iraq or Kuwait of any product originating in, or coming from, the Community.

9 Because of the trade embargo, Turkey refused to allow transit of the goods across its territory. However, the beef was exported to other non-member countries, all in areas which qualified for a lower export refund than that for Iraq, or even for no refund at all.

10 Under Article 19(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), the Minister claimed reimbursement of the difference between the advance payment made to the plaintiffs and the refund actually due, pending which he refused to release the security. However, as it was common ground that the circumstances which had prevented the plaintiffs from exporting the beef to Iraq constituted *force majeure*, the Minister waived payment of the additional 20% in accordance with Regulation No 3665/87.

11 The plaintiffs consider themselves entitled to retain the full amount of the advance payment and to recover the security. Since the Minister does not accept that argument, the plaintiffs brought proceedings before the High Court of Ireland.

12 Those are the circumstances in which the national court referred the following questions to the Court of Justice:

'Where:

— a Community exporter applies for an export refund in accordance with Commission Regulation (EEC) No 3665/87;

— an advanced payment is made by a Member State to the exporter who provides security for the amount of the advanced payment together with a further 20% of this amount in accordance with the above Commission regulation;

— the goods which are the subject of the export refund application are in transit to Iraq, the country of destination for the purposes of the export refund application when the EC Council of Ministers adopts Regulation (EEC) No 2340/90 which has the effect of *inter alia* prohibiting exports by Community nationals to Iraq;

— the exporter is unable to meet an essential condition namely that the goods must be exported to Iraq for the award of the export refund in question as a result of Council Regulation (EEC) No 2340/90;

— reasonable efforts are made to sell the goods in question in countries of similar export refund status to Iraq but these efforts are largely unsuccessful;

(1) Can Commission Regulation (EEC) No 3665/87 be interpreted in such a manner as to prohibit the drawing down on the security provided by the exporter in the above circumstances whether by reason of *force majeure* or by reason of

the disproportionate effect which the drawing down of the security would have in comparison to the circumstances relied upon as justifying such a drawing down or otherwise?

(2) If Commission Regulation (EEC) No 3665/87 cannot be interpreted in the above manner is it void in whole or in part because of this?

(3) Can Council Regulation (EEC) No 2340/90 be interpreted as covering goods in transit to Iraq and if so is it void in whole or in part because of its treatment of goods in transit in the present circumstances?'

Question 1

13 By its first question, the national court essentially asks whether Regulation No 3665/87, cited above, must be interpreted — bearing in mind that, owing to *force majeure*, the goods were exported to a destination other than that originally intended — as precluding an intervention agency from withholding such proportion of the security lodged as corresponds to the amount that was not payable to the recipient, on account of the disproportionate effect of forfeiture of the security by comparison with the matters set out in the order for reference by way of justification for such forfeiture, or for any other reason.

14 It is important at the outset to note the features of the system of advance payment of export refunds which are relevant in the circumstances of this case.

15 Under Regulation No 565/80, Member States are authorized to pay refunds, in whole or in part, prior to the export of beef, subject to the lodgment of a security guaranteeing reimbursement of the amount paid in the event that the trader proves to have no right to the refund.

16 Regulation No 3665/87 lays down common detailed rules for the application of the system of export refunds, *inter alia* in respect of beef. Article 5(1) thereof provides that payment of the differentiated or non-differentiated refund is conditional not only on the product having left the customs territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a non-member country and, where appropriate, into a specific non-member country within 12 months following the date of acceptance of the export declaration.

17 Under Article 16(1) of Regulation No 3665/87, where the rate of refund varies according to destination, payment of the refund is dependent upon the additional conditions laid down in Articles 17 and 18 of that regulation. Article 17(1) provides that the product must have been imported in an unaltered state into the non-member country or one of the non-member countries for which the refund is prescribed within 12 months following the date of acceptance of the export declaration.

18 Under Article 33(5) of Regulation No 3665/87, where, as a result of a case of *force majeure*, the amount of the refund is smaller than the amount paid in advance, the security forfeited is to be equal to the difference between the amount of the refund advanced and the amount of the refund actually due. However, Article 33(3)(d) of that regulation provides that, except in cases of *force majeure*, where the amount of

the refund is smaller than the amount paid in advance, the security forfeited is to be equal to the difference between the amount paid in advance and the amount of the actual refund, such difference being increased by 20%.

19 Consequently, in a case such as this, in which it is undisputed that the circumstances which prevented the plaintiffs from exporting the beef to Iraq amount to *force majeure*, the intervention agency may withhold the security, as provided for by Article 33(5) of Regulation No 3665/87.

20 The national court also asks whether, in the circumstances set out in the order for reference, Regulation No 3665/87 may be interpreted as precluding forfeiture of the guarantee on account of the disproportionate effect for the exporter, or for some other reason.

21 On that point, it should be noted that, as the Court of Justice emphasized in its judgment in *Hauptzollamt Hamburg-Jonas* v *Dimex* (Case 89/83 [1984] ECR 2815, paragraph 8), the system of differentiated export refunds is intended to gain or to maintain access for Community exports to the markets of the non-member countries concerned, the reason for differentiated refunds being the desire to take account of the particular characteristics of each import market in which the Community wishes to play a part.

22 In paragraph 9 of *Dimex*, the Court also observed that it would go against the purpose of the system of differentiated refunds, were it sufficient, in order to qualify for payment of the refund at a higher rate, for the goods simply to be unloaded, without reaching the market of the territory of destination.

23 Since actual access to the market of destination is in principle conditional on the completion of customs formalities for the release of the goods into free circulation

in the country of destination, the fact that the consignment did not reach that destination and, owing to *force majeure*, had to be exported to other countries rules out the possibility of its being regarded, for the purposes of payment of the differentiated refund, as having been imported within the meaning of Article 5(1) of Regulation No 3665/87.

24 On any other construction of the regulation, the exporter would qualify for a refund at a higher rate than that applicable to the countries into which the goods were actually imported, an outcome which clearly runs counter to Article 33(5) of Regulation No 3665/87.

25 The answer to the first question must therefore be that Article 33(5) of Regulation No 3665/87 is to be interpreted as meaning that where, owing to *force majeure*, goods do not reach their intended country of destination but are exported to other non-member countries which qualify for a lower export refund or none at all, the security forfeited is to be equal to the difference between the amount of the refund paid in advance and that of the refund actually due.

Question 2

26 The second question asks whether Regulation No 3665/87 is invalid in so far as it does not allow the security to be reimbursed in full in cases of *force majeure*.

27 On that point, the plaintiffs observe that the prohibition on reimbursement of the security is contrary to the principle of proportionality and frustrates legitimate expectations.

28 As regards the alleged breach of the principle of proportionality, it should be borne in mind that the purpose of the system of differentiated refunds is to gain or to maintain access for Community exports to the markets of the non-member countries concerned, the reason for differentiated refunds being the desire to take account of the particular characteristics of each import market in which the Community wishes to play a part (see the judgment in *Dimex*, cited above, paragraph 8). It is essential for that purpose that products in respect of which a subsidy is granted in the form of a refund actually reach their destination so that they can be marketed there.

29 It follows that forfeiture of a part of the security equal to the difference between the amount of the refund paid in advance and the amount of the refund actually due, without any penalty being imposed, is commensurate with the objective pursued by the legislature.

30 As regards the alleged breach of the principle of the protection of legitimate expectations, it should first of all be noted that Article 33(5) of Regulation No 3665/87 provides that where, as a result of *force majeure*, the amount of the refund is smaller than the amount paid in advance, the security forfeited is to be equal to the difference between the amount of the refund advanced and that of the refund actually due.

31 Furthermore, Article 33(2)(b) of Regulation No 3665/87 provides that release in full of the security is to be subject to the production of proof that the products concerned confer entitlement to a refund equal to or higher than the amount determined in accordance with Article 29(3) of the regulation.

32 Moreover, as the Advocate General observed in point 7 of his Opinion, the fifth recital in the preamble to Regulation No 565/80 expressly states that a security is to be lodged in order to guarantee the reimbursement of a sum not less than the amount paid where it is subsequently established that there was no right to the export refund or that the products or goods were not actually exported from the Community within the time-limits laid down.

33 It follows that those provisions cannot give rise to any legitimate expectation other than entitlement to a refund subject to the conditions laid down.

34 The plaintiffs also argue that the protection of legitimate expectations entails reimbursement of the security in cases such as this where the goods failed to reach their destination specifically as a result of the adoption of a Community measure.

35 There is no need to consider whether the protection of legitimate expectations has that effect since, according to the order for reference, the Turkish authorities refused to allow the goods to cross their territory because of the trade embargo imposed by the UN; consequently, in the present case, the failure of the goods to reach their destination cannot be attributed to any action on the part of the Community institutions.

36 The answer to the second question must therefore be that consideration of Regulation No 3665/87 has not disclosed any factor capable of affecting its validity.

Question 3

37 By its third question the national court asks essentially whether Regulation No 2340/90 may be interpreted as extending to goods already dispatched and in transit to Iraq and, if so, whether it is wholly or partly invalid, having regard to the treatment which it accords to goods in transit in the circumstances set out in the order for reference.

38 In paragraph 35, the Court observed that if, according to the order for reference, the goods failed to reach their destination, it was because of the measures adopted by the Turkish authorities, who refused to allow transit on account of the trade embargo imposed by the UN.

39 Accordingly, the question of the validity of Regulation No 2340/90 bears no relation to the actual facts of the case or to the purpose of the action. It is established case-law (see, most recently, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 61) that in such cases the Court cannot rule on the question submitted by the national court. Consequently, there is no need to reply to the third question.

Costs

40 The costs incurred by Ireland, the United Kingdom, the Council of the European Union and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Sixth Chamber),

in answer to the questions referred to it by the High Court of Ireland by order of 25 July 1994, hereby rules:

1. **Article 33(5) 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 (EEC) No 354/90 of 9 February 1990, is to be interpreted as meaning that where, owing to *force majeure*, goods do not reach their intended country of destination but are exported to other non-member countries which qualify for a lower export refund or none at all, the security forfeited is to be equal to the difference between the amount of the refund paid in advance and that of the refund actually due.**

2. **Consideration of Regulation No 3665/87 has not disclosed any factor capable of affecting its validity.**

Kakouris Hirsch Mancini

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 28 March 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber