as embodying and recognizing a general principle whereby procedural flaws which are beyond the control of the person to whom compensatory amounts should normally be granted must not have effects which are unfavourable to him.

2. Member States are both entitled and required to issue retroactively Control Copy T No 5 provided for by Article 10 of Regulation No 223/77 in order to enable proof to be furnished pursuant to Article 11 (2) of Regulation No 1380/75 concerning the payment by the exporting Member State of compensatory amounts which should be granted by the importing Member State where the failure to apply for or to issue the document when the goods were consigned was beyond the control of the person concerned and that person is able to produce the supporting documents required for the issue of the control copy.

3. Where an exporting Member State lays down that the proof required for the purposes of Article 10 (1) of Regulation No 1380/75 concerning the payment by the exporting Member State of compensatory amounts granted by that State is to be furnished in the form of Control Copy T No 5, it is both entitled and required to issue the document retroactively on the same conditions as those which are laid down where Control Copy T No 5 is used as a Community document pursuant to Article 11 (2) of Regulation No 1380/75, since any other solution could only be a source of confusion and legal uncertainty.

In Case 302/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hessisches Finanzgericht [Finance Court, Hesse] for a preliminary ruling in the case pending before that court between

ALFRED EGGERS & CO., Hamburg,

and

HAUPTZOLLAMT [Principal Customs Office] KASSEL

concerning the conditions for the issue of Control Copy T No 5 provided for by Article 10 of Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20),

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: S. Rozès
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

In July 1979 Alfred Eggers & Co. [hereinafter referred to as "Eggers"] exported a consignment of 19 940 kilograms of lard to the United Kingdom. By an oversight on the part of the driver responsible for transporting the goods, the export took place without observance of the customs formalities in the Federal Republic of Germany.

Since there was no proof of exportation in the form of the prescribed control copies, the Hauptzollamt Hamburg-Jonas refused to pay the monetary compensatory amounts applied for in respect of the export consignment. Eggers therefore submitted an application to the Hauptzollamt Kassel for the retroactive issue of the control copies. The Hauptzollamt Kassel rejected the application and the objection lodged against that decision before the Oberfinanzdirektion [Principal Revenue Office] was dismissed. Eggers brought an action before the Hessisches Finanzgericht against the decision dismissing the objection.

The Finanzgericht observes that Community law makes no provision for the retroactive issue of control copies and that such issue was possible only under national provisions which, according to the Administration, were adopted pursuant to an agreement reached by the Committee on Community Transit at its 21st meeting held from 6 to 8 July 1971.

The national court doubts, however, whether that agreement constitutes a legal basis sufficient to authorize the Member States to issue control copies retroactively and, in any event, if it does constitute a sufficient basis, questions

whether such an agreement allows the Member States to subject the retroactive issue of control copies to additional conditions which are not provided for by the agreement concluded at Community level.

Consequently, by order of 9 November 1981 the Hessisches Finanzgericht decided to refer to the Court of Justice for a preliminary ruling the four following questions:

"1. Are the Member States entitled to issue retroactively Control Copy T No 5, provided for by Article 10 of Regulation (EEC) No 223/7, even where Community law does not provide for its retroactive issue?

2. If the first question is answered in the negative, may an agreement reached by the Committee on Community Transit, set up pursuant to Article 55 of Regulation (EEC) No 222/77, which permits under certain conditions the retroactive issue of Control Copy T No 5, for which Community law makes no provision, entitle the Member States to issue the control copy retroactively?

3. If the second question is answered in the affirmative, may a direct legal right to the retroactive issue of the control copy arise under such an agreement in certain circumstances?

4. If the second question is answered in the affirmative, are the Member States entitled to make the retroactive issue of control copies subject to additional conditions not provided for by the agreement?"

The order for reference was received at the Court Registry on 30 November 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, observations were submitted by the Hauptzollamt Kassel, represented by its Director, Mr Nessler, assisted by A. Schwintuchowski, Oberregierungsrätin at the Oberfinanzdirektion Frankfurt, and by the Commission of the European Communities, represented by A. Prozillo, its Legal Adviser, assisted by J. Grünwald, a member of its Legal Department, acting as Agents. Eggers declared that it did not wish to submit observations in this case and confined itself to forwarding to the Court a copy of the written arguments which it had presented to the Hessisches Finanzgericht.

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 and to assign the case to the Third Chamber.

However, the Court requested the Commission to produce the complete minutes of the 21st meeting of the Committee on Community Transit and of the meeting of the Working Party on Trade Mechanisms held on 25 May 1974. Furthermore, it asked the Commission and the Hauptzollamt Kassel to inform it of the additional conditions which were not provided for in the agreement reached by the

Committee on Community Transit, to which the authorities of the Federal Republic of Germany made the retroactive issue of the control copy subject.

II — Written observations submitted to the Court

The *Hauptzollamt Kassel* draws a distinction between control documents according to whether they are intended to furnish proof of exportation from the Federal Republic of Germany and therefore confer the right to receive compensatory amounts from the Federal Republic of Germany on exportation or are intended to furnish proof of importation into another Member State and to confer the right to receive compensatory amounts from that other State on importation.

With regard to proof of exportation, the Hauptzollamt Kassel maintains that the means of proving exportation is not specified in Regulation (EEC) No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts. Consequently, the Member States are free to determine the means of proof themselves and may, within the scope of that discretion, decide to employ as the means of proof an existing Community document such as Control Copy T No 5. That is what the Federal Republic of Germany has done. In so far as it is left to the Member States to determine the means of proof, they are not bound by Community law, in so far as the possibility of retroactively issuing those means and the conditions attaching to such issue are concerned. Those questions are a matter for national law alone.

With regard to the documents proving importation into another Member State, these are determined by Article 11 (2) of Regulation No 1380/75 of the Commission. An agreement was reached by the Committee on Community Transit in July 1971 concerning the possibility of issuing the control copy retroactively. The Commission considered itself bound by that agreement, as is clear from the statements which it made at the meeting of the Working Party on Trade Mechanisms held on 25 May 1974.

In any event, the agreement reached by the Committee on Community Transit permits the Member States to issue the control copies retroactively on such conditions as they may lay down. The agreement in fact confers, subject to certain conditions, a discretion upon the Member States with regard to the retroactive issue of the control copies. It follows that the persons concerned have no right to the retroactive issue of control copies and that the Member States are entitled to subject the retroactive issue of control copies to additional conditions, in any event in so far as the purpose of the conditions is to prevent abuse of procedure.

In conclusion, the Hauptzollamt Kassel proposes that the questions referred to the Court of Justice for a preliminary ruling by the Hessisches Finanzgericht should be answered as follows:

"First and second questions

The agreement reached by the Committee on Community Transit at its 21st meeting held in July 1971 empowered the Member States, as against the Commission, to issue control copies retroactively, provided that the

conditions laid down in that agreement are fulfilled.

Third question

The agreement does not confer a direct right to the retroactive issue of the control copy.

Fourth question

The Member States are entitled to make the retroactive issue of control copies subject to additional conditions which are not provided for in the agreement."

The *Commission* begins its observations by recalling that Control Copy T No 5 was provided for by Article 10 of Commission Regulation No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20). It states next that, under the terms of Article 11 of Regulation No 1380/75 of the Commission, that document must be used as the means of proof conferring the right to monetary compensatory amounts from the importing Member State, whereas the specifying of the means of proof conferring the right to the payment of monetary compensatory amounts by the exporting country is a matter for the Member State concerned, as is clear from Article 10 of Regulation No 1380/75 of the Commission.

Since the Federal Republic of Germany has decided to adopt Control Copy T No 5 as the means of proving exportation, it follows, in the Commission's view, that the control copy is both a Community document and national documentary evidence and that a distinction between the two uses of Control Copy T No 5 must be drawn in the replies to be given to the court making the reference.

1. Control Copy T No 5 as a Community document

The Commission accepts that the retroactive issue of this document is expressly provided for neither in Regulation No 223/77 nor in Regulation No 1380/75 but maintains that Article 11 (5) of the latter regulation lays down the procedure to be followed where the necessary proof in the form of Control Copy T No 5 is lacking. That provision deals expressly with cases where the document has gone astray, but, in the Commission's view, the legal principle which it embodies is of fundamental importance and is applicable in the case of non-issue. According to that principle, procedural flaws which are beyond the control of the person concerned must not have effects which are unfavourable to him and he may produce the supporting documents required for the retroactive issue of the document.

2. Control Copy T No 5 as national documentary evidence

The Commission considers that since under Article 10 of Regulation No 1380/75 it is for the Member State in question to specify the means of proving exportation, it is necessary to distinguish between the means of proof which is a matter of form and the procedural questions as to the conditions on which Control Copy T No 5 may be issued retroactively. In the Commission's view, the legal principle underlying Article 11 (5) of Regulation No 1380/75, that

procedural flaws which are beyond the control of the person concerned must not have effects unfavourable to that person, is a procedural rule of fundamental importance and applies not only to the procedure for furnishing proof laid down by Article 11 of Regulation No 1380/75 but also extends to the procedure provided for by Article 10 (1) of that regulation. Where the Member States adopt a means of proof other than Control Copy T No 5, that principle must be observed within the framework of the formalities and detailed rules relating to the furnishing of proof laid down by national law. Where, as in this case, the Member State employs Control Copy T No 5 as the documentary evidence, that principle must be observed according to the procedure laid down by Article 11 (2) of Regulation No 1380/75.

Consequently, the Commission proposes that the following reply be given to the questions submitted for a preliminary ruling by the Hessisches Finanzgericht:

"1. The Member States are both entitled and required to issue retroactively Control Copy T No 5 provided for by Article 10 of Regulation No 223/77 in order to enable proof to be furnished pursuant to Article 11 (2) of Regulation No 1380/75, where the failure to apply for or to issue the document when the goods were consigned was beyond the control of the person concerned and that person is able to produce the supporting documents required for the retroactive issue of the control copy.

2. Where a Member State lays down that the proof required for the purposes of Article 10 (1) of Regulation No 1380/75 is to be furnished in the form of Control Copy T No 5, applying *mutatis mutandis* the procedural rules applicable to that document, it is both entitled and required to issue the document retroactively on the same conditions."

Eggers did not submit written observations to the Court; however, it forwarded to the Court the written statement which it had presented to the Hessisches Finanzgericht. In that statement, Eggers claims that 19 940 kilograms of lard were actually exported to the United Kingdom from the Federal Republic of Germany and that it was merely as a result of an oversight on the part of the lorry driver transporting the goods that the Control Copies T No 5 were not obtained at the time of exportation. It further stresses that the United Kingdom importer also sustained a loss as a result of the failure to issue Control Copy T No 5 since he thereby lost the benefit of the compensatory amounts on importation.

III — Oral procedure

At the sitting on 17 June 1982, oral argument was presented by J. Grünwald, a member of the Commission's Legal Department, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered her opinion at the sitting on 16 September 1982.

Decision

1 By order of 9 November 1981, which was received at the Court on 30 November 1981, the Hessisches Finanzgericht [Finance Court, Hesse] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions concerning the conditions for the issue of Control Copy T No 5 as defined by Article 10 of Commission Regulation No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure [Official Journal 1977, L 38, p.20).

2 The dispute before the national court arose out of the exportation by Alfred Eggers & Co. (hereinafter referred to as "Eggers") of a consignment of lard to the United Kingdom. Because the export took place without the issue of Control Copy T No 5, the German customs administration refused to pay to Eggers the monetary compensatory amounts in respect of the goods exported. Following that refusal, Eggers submitted an application to the German customs administration for the retroactive issue of Control Copy T No 5. That application was also rejected. Eggers brought an action before the Hessisches Finanzgericht against that decision refusing retroactively to issue Control Copy T No 5.

3 Considering that the solution of the dispute depended on whether or not the retroactive issue of control copies was permissible under Community law, the Hessisches Finanzgericht referred to the Court the following questions:

"1. Are the Member States entitled to issue retroactively Control Copy T No 5, provided for by Article 10 of Regulation (EEC) No 223/77, even where Community law does not provide for its retroactive issue?

2. If the first question is answered in the negative, may an agreement reached by the Committee on Community Transit, set up pursuant to Article 55 of Regulation (EEC) No 222/77, which permits under certain conditions the retroactive issue of Control Copy T No 5, for which Community law makes no provision, entitle the Member States to issue the control copy retroactively?

3. If the second question is answered in the affirmative, may a direct legal right to the retroactive issue of the control copy arise under such an agreement in certain circumstances?

4. If the second question is answered in the affirmative, are the Member States entitled to make the retroactive issue of control copies subject to additional conditions not provided for by the agreement?"

4 Before an answer is given to the questions submitted by the national court, it is necessary, as the Commission has stressed, to distinguish between the use of Control Copy T No 5 as documentary evidence in application of Community rules (for which purpose it will hereinafter be referred to as a "Community" document) and its use as documentary evidence under a provision of national law (for which purpose it will hereinafter be referred to as a "national" document).

5 Control Copy T No 5 is a Community document where it is used under Article 11 of Regulation No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1975, L 139, p. 37) as the means of proof upon which the payment by the exporting Member State of compensatory amounts which should be granted by the importing Member State is conditional.

6 On the other hand, Control Copy T No 5 is a national document when the exporting Member State decides, as the Federal Republic of Germany has done, that it is also to be used as proof for the purpose of the grant of compensatory amounts granted by the exporting Member State.

First question

7 In relation to the use of Control Copy T No 5 as a Community document, although it is correct that its retroactive issue is not expressly provided for in Regulation No 1380/75, Article 11 (5) of that regulation, as amended by Regulation No 1498/76 of 25 June 1976 (Official Journal 1976, L 167, p. 28), nevertheless provides for the grant of a fresh control copy where the first has gone astray "owing to circumstances beyond the control of the person concerned".

8 That provision must be regarded as embodying and recognizing a general principle whereby procedural flaws which are beyond the control of the person to whom compensatory amounts should normally be granted must not have effects which are unfavourable to him.

9 The application of that principle inevitably implies that where Control Copy T No 5, as a Community document, has, for reasons which are beyond the control of the person to whom monetary compensatory amounts should be granted, not been issued, the person concerned is entitled to the retroactive issue of that document provided that he is able to produce the supporting documents required in order to obtain it.

10 With regard to the use of Control Copy T No 5 as a national document, it is correct that Article 10 (1) of Regulation No 1380/75 leaves it to the Member States to specify the means of proof upon which the payment of compensatory amounts granted by the exporting Member State is conditional.

11 However, that does not mean that that Member State may, where it has decided to use Control Copy T No 5 at national level, then refuse to apply the procedural rules concerning the retroactive issue of that control copy which have been laid down by Community law. Any other solution could be only a source of confusion and legal uncertainty.

12 The answer to the first question submitted by the Hessisches Finanzgericht should therefore be that, on the one hand, the Member States are both entitled and required to issue retroactively Control Copy T No 5 provided for by Article 10 of Regulation No 223/77 in order to enable proof to be furnished pursuant to Article 11 (2) of Regulation No 1380/75 concerning the payment by the exporting Member State of compensatory amounts which should be granted by the importing Member State where the failure to apply for or to issue the document when the goods were consigned was beyond the control of the person concerned and that person is able to produce the supporting documents required for the issue of the control copy.

13 On the other hand, where an exporting Member State lays down that the proof required for the purposes of Article 10 (1) of Regulation No 1380/75

on the payment by the exporting Member State of the compensatory amounts granted by that State is to be furnished in the form of Control Copy T No 5, it is both entitled and required to issue the document retroactively on the same conditions as those which are laid down where Control Copy T No 5 is used as a Community document pursuant to Article 11 (2) of Regulation No 1380/75.

Second, third and fourth questions

14 In view of the reply to the first question, it is unnecessary to reply to the second, third and fourth questions.

Costs

15 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 action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Third Chamber)

in answer to the questions submitted to it by the Hessisches Finanzgericht by order of 9 November 1981, hereby rules:

1. **The Member States are both entitled and required to issue retroactively Control Copy T No 5 provided for by Article 10 of Regulation No 223/77 in order to enable proof to be furnished pursuant to Article 11 (2) of Regulation No 1380/75 concerning the payment by the exporting Member State of compensatory amounts which should be granted by the importing Member State where the failure to apply for or to issue the document when the goods were consigned was beyond the control of the person concerned and that person is able to**

produce the supporting documents required for the issue of the control copy.

2. Where an exporting Member State lays down that the proof required for the purposes of Article 10 (1) of Regulation No 1380/75 concerning the payment by the exporting Member State of compensatory amounts granted by that State is to be furnished in the form of Control Copy T No 5, it is both entitled and required to issue the document retroactively on the same conditions as those which are laid down where Control Copy T No 5 is used as a Community document pursuant to Article 11 (2) of Regulation No 1380/75.

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

A. Touffait
President of the Third Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 16 SEPTEMBER 1982 [1]

Mr President,
Members of the Court,

The court is requested by the Hessisches Finanzgericht [Finance Court, Hesse] to give a preliminary ruling concerning the conditions for the issue of Control Copy T No 5 provided for in Article 10 of Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20).

I — The facts are as follows:

On 31 July 1979, Alfred Eggers & Co., Hamburg, [hereinafter referred to as "Eggers"], exported to the United Kingdom 19 940 kg. of lard for industrial use.

1 — Translated from the French.