OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 19 September 1996 *

1. By judgment of 7 February 1995, the Belgian Council of State referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 8(2)(b) of Commission Regulation (EEC) No 926/80 of 15 April 1980 be interpreted as meaning that application of that regulation in respect of an export operation must be refused where the products to which the new monetary compensatory amount applies were imported less than six months before the export transaction?

(2) Must Article 8(2)(b) of Commission Regulation (EEC) No 926/80 of 15 April 1980 be interpreted as meaning that application of that regulation must also be refused with regard to an export operation in respect of which monetary compensatory amounts are due, where the export operation was preceded less than six months before by an import operation for which monetary compensatory amounts were received by a person other than the person who exported the products?'

2. The facts of the case may be briefly described as follows. NV ANDRE en Co. ('ANDRE'), a company having its registered office in Belgium, concluded eight contracts with a number of French and Dutch companies for the sale by ANDRE of various quantities of cereals. The terms of the contracts provided that any monetary compensatory amounts ('MCAs') payable were to be borne by the seller. At the same time, in order to obtain the goods to be delivered to the purchasers, ANDRE concluded various contracts with companies established in Belgium for the purchase, this time by ANDRE, of the amount of cereals it required. According to the order for reference, the goods in question were imported into Belgium by those companies. In essence, ANDRE concluded a contract for the export of goods which had in their turn been imported into Belgium by others.

After those commercial transactions had been agreed upon, but before they had been performed, the Belgian franc was devalued. Consequently, an MCA of 8.6% was to be granted where certain agricultural products were imported into Belgium and an MCA of the same amount was to be levied where they were exported from Belgium.

Relying on Regulation No 926/80, [1] ANDRE applied to the Centrale Dienst voor

* Original language: Italian.

1 — Commission Regulation (EEC) No 926/80 of 15 April 1980 on exemption from the application of monetary compensatory amounts in certain cases (OJ 1980 L 99, p. 15).

Contingenten en Vergunningen (Central Quotas and Licences Agency, 'the CDCV') for exemption from payment of MCAs in respect of its exports to the Netherlands and France. That regulation provides that the Member State concerned is authorized to waive 'monetary compensatory amounts (...) on imports or exports effected pursuant to contracts concluded before those amounts were increased or introduced'. [2] However, the CDCV rejected the application. According to the competent authority, the reason for the rejection was to be found in Article 8(2)(b) of Regulation No 926/80, which provides that exemption may not be granted 'where it is established that the product to which the monetary compensatory amount applies is re-exported or re-imported within six months of import or export.' According to the CDCV, that condition was not satisfied in the circumstances of the case, since the goods exported by ANDRE had in their turn been imported into Belgium, albeit by a different trader, before that period of six months began to run.

ANDRE brought an action before the Council of State, in which it challenged the rejection of its application for exemption. The national court accordingly referred the questions set out above to the Court of Justice for a preliminary ruling.

3. Both questions concern the same problem, viewed from two separate angles, and may therefore be considered together. The Court is called upon to ascertain whether the prohibition of exemption laid down in Article 8(2)(b) of Regulation No 926/80 applies even where the goods are imported and subsequently exported within six months by different traders.

The Commission and the Belgian Government propose that the answer should be in the affirmative, essentially on the basis of the consideration that Article 8(2)(b) refers to the fact that the *product* is 're-exported or re-imported within six months of import or export'. That is, therefore, an event which occurs when the same product crosses the frontier twice and which the legislature considered it should take into account 'on objective grounds', that is to say irrespective of whether it is the same person who re-imports or re-exports the product. In their view, that is fully justified: the advantage consisting of the grant of an MCA on import is offset by the disadvantage represented by the obligation to pay an equivalent MCA on the export of the same product. The provision in question is specifically designed to ensure that balance.

4. To my mind, the view of the Commission and the Belgian Government cannot be endorsed. To begin with, their arguments concerning the legislation do not contain decisive elements to resolve the question under consideration. Even if it is accepted —

2 — See the first recital in the preamble to the regulation.

but it is far from evident [3] — that Article 8(2)(b) prohibits the grant of exemption whenever the product to be exported has in its turn been imported into the State concerned within the period of six months, the question whether the prior import was carried out by someone other than the exporter would still remain to be settled. This, to my mind, is the crux of the matter. That article does not expressly provide one way or the other. The solution must therefore be sought in the *ratio*, in the reasons underlying the system introduced by Regulation No 926/80.

The purpose of the regulation is to prevent the exporter from suffering loss as a result of having to pay an MCA introduced after the contract was concluded. That is why the regulation provides that the State in question may exempt such traders from the application of the new MCA. This is an incontrovertible fact and one already evident in the recitals in the preamble to the regulation: 'the basic criterion warranting such exemption must be to protect the operator against unavoidable *disadvantages* arising from the introduction of new monetary compensatory amounts or from an increase in such amounts following a particular monetary measure affecting import or export operations carried out under contracts concluded prior to the monetary measure in question'. [4] For that reason, the exemption provided for by that regulation is defined as an 'equity clause'. [5] That, and nothing else, is the objective of the regulation under consideration, as is confirmed by Article 8(1) which provides: 'Exemption may be granted only where the applicant, or the contracting party on whose behalf he acts, is subject, by virtue of the new monetary compensatory amount, to an *additional expense* which he could not have avoided by taking all the necessary and normal precautions.' Article 8(3) provides to the same effect: 'Where movements on exchange markets yield an *advantage* to the operator concerned, (...) the advantage shall be deducted from the *additional expense*'. That, in my view, confirms that exemption is justified precisely inasmuch as the intention was to prevent traders from bearing additional expense unforeseen when the contract was concluded, as a result of a subsequent monetary measure.

That is the purpose of the regulation. It is therefore understandable that the Community legislature precluded the grant of exemption 'where it is established that the product to which the new monetary compensatory amount applies is re-exported or re-imported within six months of import or

3 — Article 8(2)(b) does not in fact state that exemption is to be refused where the exported product *was* originally imported within the period of six months; instead, it provides for the situation in which the exported product '*is* (...) *re-imported*' within that period. The provision seems therefore to refer to a situation in the future rather than in the past: if the exporter's position, which is what is at issue in this case, is taken into consideration, the condition precluding the grant of exemption will be that the product in question *is* subsequently re-imported; similarly, the importer cannot be granted exemption if the product *is* then re-exported. That interpretation could be borne out by Article 11(3)(j), which provides that the person concerned must, when submitting a written request for exemption, specify 'whether products exported *are intended for re-import*'. That would seem to provide confirmation that the circumstance precluding the grant of exemption is a future event (*are intended for re-import*), rather than a past one (in which case the provision would have read: *were originally imported*).

4 — See the fourth recital.

5 — See the third recital.

export'. In such a case the trader is not exposed to any disadvantage whatsoever: the re-export or re-import by the same trader offsets the disadvantage arising from the failure to grant exemption. It is clear, however, that such offsetting can take place only if the trader involved is one and the same person, operating on the market first as importer and then as exporter. If the product concerned, when it is imported into the relevant State, gives rise to the payment of an MCA, it is the importer alone who will benefit by that advantage. The other person, the exporter, bears for his part only the unfavourable consequences of having to pay an MCA when the goods leave the country. In short, it does not seem to me to be possible to speak of offsetting the advantage of one against the disadvantage of the other, as the Commission does. In view of the MCA mechanism, as envisaged by the regulation, the advantage enjoyed and the corresponding disadvantage suffered must be assessed solely by reference to one and the same person: the trader involved.

Having said that, I consider that Article 8(2)(b) must be interpreted as meaning that exemption may be refused only if the product is re-exported or re-imported by the same person. If that were not the case, the clear intention of the regulation — that of protecting the position of the *individual* trader, as I pointed out — would be thwarted. According to the Commission, however, the person concerned would be denied the benefit of exemption simply because the loss he has incurred as a result of a monetary measure is, as it were, counterbalanced by the advantage derived by another trader from that same measure.

5. The Commission objects, however, that the above solution would easily lend itself to abuse. On import, the trader would receive a sum of money by way of MCA; the product could then be exported at once by another person who, relying upon Article 8(2)(b), would not be required to pay the MCA on export. The importer and exporter could secretly agree to share the advantage consisting, on the one hand, of the receipt of the MCA when the goods enter the Member State and, on the other, of exemption from the obligation to pay an MCA of equal amount when those same goods leave the State. However, I am not swayed by that argument either. I do not deny that the system is open to abuse. Indeed, I agree that it was for that very reason that the legislature abolished it by Regulation No 1084/84 [6] and did not replace it with an equivalent system. The fact remains, however, that at the material time Regulation No 926/80 was still in force and the risk of abuse does not justify its provisions being altered by judicial decision. The provision to be applied leaves no room for doubt: exemption may be granted only where payment of the new MCA renders the applicant subject 'to an

6 — Commission Regulation (EEC) No 1084/84 of 18 April 1984 repealing Regulation (EEC) No 926/80 on exemption from monetary compensatory amounts in certain cases (OJ 1984 L 106, p. 26).

additional expense'. The text of the provision refers to the disadvantage which is borne in that case by the person concerned. As I have pointed out, the provision under consideration cannot be disapplied by means of a ruling on interpretation. It is for the competent national authority — and of course the national court where there is a dispute — to disallow any right to exemption if the importer and exporter are shown to have entered into a clandestine agreement contrary to Community law, as envisaged by the Commission. To deny the benefit of the provision in question to those who have not entered into such agreements in order to prevent the risk of abuse strikes me as excessive and, above all, as being contrary to both the letter and spirit of the regulation.

6. Having regard to the foregoing, I therefore propose that the Court reply as follows to the questions referred by the Council of State of the Kingdom of Belgium:

Article 8(2)(b) of Commission Regulation (EEC) No 926/80 of 15 April 1980, on exemption from the application of monetary compensatory amounts in certain cases, must be interpreted as precluding exemption from the requirement to pay a monetary compensatory amount on export from being granted under the regulation only where the exported goods have previously been imported into the same State within a period of six months by the same trader.