Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

9 March 2017 **

(Reference for a preliminary ruling — Regulation (EC) No 543/2008 — Article 15(1) — Article 16 — Frozen or quick-frozen chickens — Maximum limit for water content — Obsolescence of that limit — Practical measures for checks — Counter-analysis — Regulation No 612/2009 — Article 28 — Export refunds on agricultural products — Conditions for granting — Sound and fair marketable quality — Products marketable in normal conditions)

In Case C-141/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal administratif de Rennes (Administrative Court, Rennes, France) made by decision of 20 March 2015, received at the Court on 25 March 2015, in the proceedings

Doux SA, in administration,

v

Établissement national des produits de l'agriculture et de la mer (FranceAgriMer),

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 3 March 2016,

after considering the observations submitted on behalf of:

— Doux SA, by J. Vogel, M. Leroy and M. Lantourne, lawyers,

— the French Government, by D. Colas and R. Coesme and by C. Candat and A. Daly, acting as Agents,

— the European Commission, by B. Schima and A. Lewis and by K. Skelly, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2016,

gives the following

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of the provisions of Commission Regulation (EC) No 543/2008 of 16 June 2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for poultrymeat (OJ 2008 L 157, p. 46), as amended by Commission Implementing Regulation (EU) No 1239/2012 of 19 December 2012 (OJ 2012 L 350, p. 63) and Commission Regulation (EC) No 612/2009 of 7 July 2009 on laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 2009 L 186, p. 1), as amended by Commission Regulation (EU) No 173/2011 of 23 February 2011 (OJ 2011 L 49, p. 16).

2 The request has been made in proceedings between Doux SA, in administration, represented by Maitre Sophie Gautier and the SCP Valliot-Le Guenevé-Abittbol, acting as court appointed administrators and the Établissement national des produits de l'agriculture et de la mer (FranceAgriMer) concerning the grant of refunds for export outside the European Union of batches of frozen and quick-frozen chickens.

Legal background

3 Article 15(1) of Regulation No 543/2008 provides as follows:

'Without prejudice to Article 16(5) and Article 17(3), frozen and quick-frozen chickens may be marketed by way of business or trade within the [Union] only if the water content does not exceed the technically unavoidable values determined by the method of analysis described in Annex VI (drip method) or that in Annex VII (chemical method).'

4 Article 16 of that regulation provides:

'1. Regular checks in accordance with Annex IX on the water absorbed or checks in accordance with Annex VI shall be carried out in the slaughterhouses at least once each working period of eight hours. **Where these checks reveal that the amount of water absorbed is greater than the total water content permitted under the terms of this Regulation, account being taken of the water absorbed by the carcases during the stages of processing which are not subject to checking, and where, in any case, the amount of water absorbed is greater than the levels referred to in point 10 of Annex IX, or in point 7 of Annex VI, the necessary technical adjustments shall be made immediately by the slaughterhouse to the process.**

2. In all cases referred to in the second subparagraph of paragraph 1 and in any case at least once every two months, checks on water content referred to in Article 15(1) shall be carried out, by sampling, on frozen and quick-frozen chickens from each slaughterhouse in accordance with Annex VI or VII, to be chosen by the competent authority of the Member State. These checks shall not be conducted for carcases in respect of which proof is provided to the satisfaction of the competent authority that they are intended exclusively for export.

3. The checks referred to in paragraphs 1 and 2 shall be carried out by or under the responsibility of the competent authorities. The competent authorities may, in specific cases, apply the provisions of paragraph 1, and in particular of points 1 and 10 of Annex IX, and of paragraph 2 more stringently in respect of a given slaughterhouse, where this proves necessary to ensure compliance with the total water content permitted under this Regulation.

They shall, in all cases where a batch of frozen or quick-frozen chickens was deemed not to comply with this Regulation, resume testing at the minimum frequency of checks referred to in paragraph 2 only after three successive checks according to Annex VI or VII, to be carried out by sampling from three different days of production within a maximum of four weeks, have shown negative results. The costs of these checks shall be paid by the slaughterhouse concerned.

4. Where, in the case of air chilling, the results of checks referred to in paragraphs 1 and 2 show compliance with the criteria laid down in Annexes VI to IX during a period of six months, the frequency of the checks referred to in paragraph 1 may be reduced to once every month. Any failure to comply with the criteria laid down in these Annexes shall result in reinstatement of checks as referred to in paragraph 1.

5. If the result of the checks referred to in paragraph 2 is in excess of the admissible limits, the batch concerned shall be deemed not to comply with this Regulation. In that event, however, the slaughterhouse concerned may request that a counter-analysis be carried out in the reference laboratory of the Member State, using a method to be chosen by the competent authority of the Member State. The costs of this counter-analysis shall be borne by the holder of the batch.

6. Where the batch in question is deemed after such counter-analysis not to comply with this Regulation, the competent authority shall take the appropriate measures aimed at allowing it to be marketed as such within the [Union] only on condition that both individual and bulk packaging of the carcases concerned shall be marked by the slaughterhouse under the supervision of the competent authority with a tape or label bearing, in red capital letters, at least one of the indications set out in Annex X.

The batch referred to in the first subparagraph shall remain under the supervision of the competent authority until it is dealt with in accordance with this paragraph or otherwise disposed of. If it is certified to the competent authority that the batch referred to in the first subparagraph is to be exported, the competent authority shall take all necessary measures to prevent the batch in question from being marketed within the [Union].

The indications provided for in the first subparagraph shall be marked in a conspicuous place so as to be easily visible, clearly legible and indelible. They shall not in any way be hidden, obscured or interrupted by other written or pictorial matter. The letters shall be at least 1 cm high on the individual packaging and 2 cm on bulk packaging.’

5 Article 18(2) of Regulation No 543/2008 provides:

‘The Member States shall adopt the practical measures for the checks provided for in Articles 15, 16 and 17 at all stages of marketing, including checks on imports from third countries at the time of customs clearance in accordance with Annexes VI and VII. They shall inform the other Member States and the Commission of these measures. Any changes to the measures shall be communicated immediately to the other Member States and to the Commission.’

6 Annex VI of that regulation, entitled ‘Determination of thaw loss (Drip test)’, provides in point 7 thereof, headed ‘Evaluation of result’:

‘If the average water loss on thawing for the 20 carcases in the sample exceeds the percentages given below, it is considered that the amount of water absorbed during processing exceeds the permissible limit.

The percentages are, in the case of:

air chilling: 1.5%,

air spray chilling: 3.3%,

immersion chilling: 5.1%.

…’

7 Annex VII to the same regulation, entitled ‘Determination of the total water content of chickens (Chemical test)’ describes the chemical procedure to identify that content.

8 Article 28(1) of Regulation No 612/2009 provides:

‘No refund shall be granted on products which are not of sound and fair marketable quality on the date on which the export declaration is accepted.

Products shall be deemed to meet the requirement laid down in the first subparagraph if they can be marketed on the [Union’s] territory in normal conditions under the description appearing in the refund application and if, where such products are intended for human consumption, their use for that purpose is not excluded or substantially impaired by reason of their characteristics or condition.

The conformity of the products with the requirements laid down in the first subparagraph shall be examined in accordance with the standards or practices in force in the [Union].

However, the refund shall also be granted where, in the country of destination, the exported products are subject to specific obligatory conditions, in particular health and hygiene conditions, which do not correspond to the standards or practices in force within the [Union]. It shall be the responsibility of the exporter, at the request of the competent authority, to prove that the products comply with such obligatory conditions in force in the country of destination.

In addition, specific provisions may be adopted for certain products.’

9 Commission Regulation (EC) No 1276/2008 of 17 December 2008 on the monitoring by physical checks of exports of agricultural products receiving refunds or other amounts (OJ 2008 L 339, p. 53), as amended by Commission Regulation (EU) No 278/2010 of 31 March 2010 (OJ 2010 L 86, p. 15), provides in Article 5(4):

‘The customs office of export shall ensure compliance with Article 21 of [Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11)]. Where there are specific grounds for suspecting the sound, fair and marketable quality of a product, the customs office of export shall verify compliance with the applicable Community provisions, in particular those relating to animal and plant health.’

10 Regulation No 800/1999 was repealed by Regulation No 612/2009. The wording of Article 21(1) was identical to that of Article 28(1) of Regulation No 612/2009.

11 Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1, ‘the Customs Code’) repealed by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) provided, in Article 118(2), that the declarant had ‘the right to be present or represented when the goods are examined and when samples are taken’.

12 According to Article 119(1), second indent, of the Customs Code, the declarant could request a further examination or sampling of the goods if he considered that the results obtained by the competent authorities were not valid.

The facts in the main proceedings and the questions referred for a preliminary ruling

13 In connection with its business producing and marketing chicken meat. Doux exports frozen chickens to third countries. In order to receive advance payment of the export refunds it provided guarantees. Among the conditions for granting those refunds is the requirement that the products exported are of 'sound and fair marketable quality', in accordance with Article 28(1) of Regulation No 612/2009.

14 FranceAgriMer, a French public administrative body responsible for grant of national and EU subsidies, carried out checks on chickens produced by Doux which were intended for export and found that their water content exceeded the prescribed limits laid down in Annexes VI and VII to Regulation No 543/2008. As a consequence, by a decision of 22 July 2013, FranceAgriMer froze the release of the securities relating to requests for refunds registered after 21 April 2013.

15 On 20 September 2013, Doux brought an action before the referring court seeking annulment of FranceAgriMer's decision. It submits that that decision is vitiated by an error of law, as it makes the grant of export refunds for the export of frozen chicken meat dependent on the water content of that meat, whereas the limits referred to in Article 15 of that regulation are not applicable to that meat when it is intended for export outside the EU.

16 In addition, Doux argues that exceeding those limits for water content does not affect the 'sound and fair marketable quality' of the exported products, within the meaning of Article 28(1) of Regulation No 612/2009, and that its products comply with the standards and practices of the country of destination. Moreover, Doux claims that, in the absence of revision, those limits have become inappropriate and obsolete.

17 FranceAgriMer considers that, under Article 28(1) of Regulation No 612/2009, export refunds should not be granted where the products concerned cannot be marketed within the European Union in normal conditions and if such products are not of 'sound and fair marketable quality' on the date when the export declaration is accepted. Frozen chicken meat with a water content which exceeds the limits mentioned in Article 15 of Regulation No 543/2008 does not satisfy the conditions laid down in Article 28(1) of Regulation No 612/2009 and, therefore, its export does not give the right to a refund. FranceAgriMer observes that in 2012 and 2013, 98% of the checks carried out on frozen chicken meat exported by Doux produced results which do not comply with that requirement.

18 As regards the checks carried out on water content of the frozen chickens at issue in the main proceedings, Doux submits that they cannot be relied on against it on the ground that the French legislature has not laid down implementing rules for the checks provided for in Articles 15 to 17 of Regulation No 543/2008 at all stages of marketing. That company also challenges the refusal by FranceAgriMer of its request, under Article 16(5) thereof, for a counter-analysis, as provided for in cases in which the results of checks referred to in Article 16(2) of that regulation exceed the admissible limits.

19 In those circumstances, the tribunal administratif de Rennes (Administrative Court, Rennes, France) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does compliance with the water-content threshold laid down by Article 15 of Regulation (EC) No 543/2008, in conjunction with Annexes VI and VII thereto, constitute a requirement of “sound and fair marketable quality” within the meaning of Article 28(1) of Commission Regulation (EC) No 612/2009 and of the judgment [of 7 September 2006, *Nowaco Germany* (C-353/04, EU:C:2006:522)]?

(2) Can frozen poultry with a water content exceeding the threshold laid down by Article 15 of Regulation [No 543/2008], in conjunction with Annexes VI and VII thereto, accompanied by a health certificate issued by the competent authority, be marketed within the European Union in normal conditions, within the meaning of Article 28 of Regulation [No 612/2009], and, if so, in what conditions?

(3) Is the fact that the water-content threshold remains at 5.1% under Annex VI to Regulation [No 543/2008], and has not been revised for several decades, despite alleged changes in rearing practices and criticism in certain scientific studies that that threshold is obsolete, compatible or incompatible with EU law, and in particular with the principle of legal certainty?

(4) Are Annexes VI and VII to Regulation [No 543/2008] sufficiently precise for the checks provided for by Article 15 of that regulation to be carried out, or was France under an obligation to lay down “practical measures for the checks” “at all stages of marketing”, failing which checks carried out at the stage of exportation of the goods cannot be relied upon?

(5) Can the requests for counter-analyses which are provided for by Article 16(2) and (5) of Regulation No 543/2008 in respect of the results of slaughterhouse checks be extended to checks carried out at the stage of marketing of export products, in the presence of the parties, pursuant to, inter alia, Article 41 of the Charter of Fundamental Rights of the European Union?’

Consideration of the questions referred

The third question

20 Since the third question concerns the validity of the limits for the water content of frozen and quick-frozen chicken meat, referred to in Article 15 of Regulation No 543/2008, it is appropriate to examine that question first.

21 By its third question, the referring court essentially asks the Court to rule on the validity of the limits for water content for frozen and quick-frozen chicken meat, set out in Article 15(1) and Annexes VI and VII of Regulation No 543/2008, regarding whether those limits are obsolete.

22 In that connection, as regards the alleged breach of the principle of legal certainty, it must be recalled that that requires that EU rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (judgments of 10 March 2009, *Heinrich*, C-345/06, EU:C:2009:140, paragraph 44, and of 29 March 2011, *ArcelorMittalLuxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 68).

23 Article 15(1) of Regulation No 543/2008 and Annexes VI and VII thereto clearly define the content and scope of the requirements set out therein. Those provisions unambiguously determine both the products to which they relate, namely frozen and quick-frozen chickens, and the water content limit which must not be exceeded.

24 Moreover, since the absence of revision of the maximum values for water content laid down by the regulation for frozen and quick-frozen chicken meat has the consequence that the legal position of the applicant in the main proceedings remains unchanged, it cannot undermine the principle of legal certainty.

25 As regards Doux's arguments that the limits for water content laid down by Regulation No 543/2008, which correspond to those in Commission Regulation (EEC) No 2891/93 of 21 October 1993, amending Regulation (EEC) No 1538/91 introducing detailed rules for implementing Council Regulation (EEC) No 1906/90 on certain marketing standards for poultrymeat (OJ 1993 L 263, p. 12), are unlawful as they are obsolete, since the physiological water content of poultry has significantly increased since 1993 and those limits are no longer adapted to the new context in which they must be applied, it must be observed that neither the number of years which has elapsed since the adoption of the provisions of EU law relating to the maximum value for water content for frozen chicken meat, nor the scientific studies submitted by the applicant in the main proceedings, which demonstrate the need to raise those limits, are capable of challenging the validity of Article 15(1) of Regulation No 543/2008 and Annexes VI and VII thereto.

26 The EU legislature enjoys a broad discretion when exercising the powers conferred on it in matters of agriculture when it is required to make complex assessments and evaluations (see, to that effect, judgment of 30 June 2016, *Lidl*, C-134/15, EU:C:2016:498, paragraph 47 and the case-law cited). Such is the case as regards the choice of whether to carry out a revision of the rules in force concerning the limits for the water content of frozen and quick-frozen chickens.

27 No evidence relied on by Doux, or the other parties concerned which presented written submissions to the Court, establishes a clear disregard of the limits of the discretion that the EU legislature enjoys in the exercise of its powers with regard to the common agricultural policy.

28 In that connection, it should be noted that, in its submissions, the Commission sets out the developments likely to require modifications to the limits for water content laid down by Regulation No 543/2008 for frozen and quick-frozen chickens, adding that, even if the physiological water content of chickens is currently slightly higher than that observed in 1993, any modifications of the limit values for water content would probably result in lowering not raising them, since technological progress helps to reduce the absorption of extraneous water during the preparation of that meat.

29 As to Doux's argument that the limits at issue in the main proceedings did not comply with the provisions of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1) on the date of their adoption, since that regulation includes the provisions of Council Regulation (EEC) No 1906/90 of 26 June 1990 on certain marketing standards for poultry (OJ 1990 L 173, p. 1) in respect of which the seventh recital mentions the essentially technical nature of the problems raised and the probable need for frequent amendments, it suffices to note that neither of those two regulations imposes a specific obligation to carry out periodic revisions of the limits for water content.

30 Therefore, it follows from the foregoing considerations that the examination of the third question has not brought to light any evidence able to affect the validity of the limits for water content in frozen chicken meat laid down in Article 15(1) and Annexes VI and VII to Regulation No 543/2008.

The first and second questions

31 By its first and second questions, which it is appropriate to examine together, the referring court asks essentially whether Article 28(1) of Regulation No 612/2009 must be interpreted as meaning that frozen or quick-frozen chickens with a water content which exceeds the limits set by Regulation No 543/2008 are sold in normal conditions in the European Union and satisfy the requirement of sound and fair marketable quality if they are accompanied by a health certificate issued by the competent authority.

32 Article 15(1) of Regulation No 543/2008 prohibits, in principle, the sale of frozen or quick-frozen chicken within the EU which has a water content exceeding the limit values set in Annex VI or VII.

33 The marketing of such chicken is possible only by way of derogation, where the conditions laid down in Article 16(6) of that regulation are observed.

34 The marketing standards for frozen or quick-frozen chicken laid down by that regulation apply only to products marketed within the EU and not those exported to third countries.

35 Thus, frozen or quick-frozen chicken may be exported outside the EU without being subject to the checks referred to in Article 16(2) of Regulation No 543/2008, without having to comply with the limits for water content laid down in Annexes VI and VII to that regulation, and without being subject to the labelling obligation laid down in Article 16(6) thereof.

36 Nevertheless, it is clear from the case-law of the Court that a distinction must be made between the right of economic operators to export their products and the right to benefit from an export refund, which means that the exports do not necessarily lead to the grant of export refunds (see, to that effect, judgment of 7 September 2006, *Nowaco Germany*, C-353/04, EU:C:2006:522, paragraphs 35 and 36).

37 Without prejudice to the provisions laid down in Article 28(1), fourth subparagraph, of Regulation No 612/2009, which, as evidenced by the file submitted to the Court, the conditions of application for which do not appear to be satisfied in the present case, Article 28(1), first and second subparagraphs thereof, makes the grant of export refunds subject to the requirement that the products for export are of 'sound and fair marketable quality', which requires that those products may be marketed in the European Union in normal conditions.

38 The marketability of the product 'in normal conditions' is an inherent aspect of 'sound and fair marketable quality' (judgments of 26 May 2005, *SEPA*, C-409/03, EU:C:2005:319, paragraph 26, and of 1 December 2005, *Fleisch-Winter*, C-309/04, EU:C:2005:732, paragraph 21). A product which could not be marketed within the Union under normal conditions and under the description given in the claim for the grant of a refund would not meet these requirements (judgments of 26 May 2005, *SEPA*, C-409/03, EU:C:2005:319, paragraph 22, and of 1 December 2005, *Fleisch-Winter*, C-309/04, EU:C:2005:732, paragraph 20).

39 In such circumstances, it is not possible to give separate answers to the first and second questions referred for a preliminary ruling. If the chickens at issue in the main proceedings cannot be marketed 'in normal conditions' on the territory of the European Union, they also fail to satisfy the requirement of 'sound and fair marketable quality'. However, if the products at issue can be marketed on the territory of the EU in 'normal conditions' it must be accepted that they are of 'sound and fair marketable quality'.

40 Therefore, it must be determined whether the marketing of frozen or quick-frozen chicken meat under the derogating regime laid down in Article 16(6) of Regulation No 543/2008 is carried out 'in normal conditions'.

41 In that connection, it is clear from the case-law of the Court that it must be examined whether a batch of chickens is marketable in the EU 'in normal conditions', on the basis of requirements contained in the regulation which directly concern the quality of the products, and not on the basis of requirements, the sole objective of which is to inform the consumer (see, to that effect, judgment of 7 September 2006, *NowacoGermany*, C-353/04, EU:C:2006:522, paragraph 38).

42 According to Article 16(6) of Regulation No 543/2008, where a batch of frozen or quick-frozen chicken is deemed not comply with that regulation, by reason of the fact that the admissible limits for water content have been exceeded, the competent authority must ensure that the relevant individual and bulk packaging have a badge or a label bearing in red capital letters 'Water content above EC limit'. That indication must be marked in a conspicuous place so as to be easily visible, clearly legible and indelible. The letters must be at least 1 cm high on the individual packaging and 2 cm on bulk packaging.

43 That processing and those indications are not intended only to inform consumers, but they also serve as a warning, signalling to them that the quality of the products concerned has been affected, therefore that the goods are of inferior quality.

44 In those circumstances, the products processed and marked in accordance with Article 16(6) of Regulation No 543/2008 cannot be regarded as being marketable 'in normal conditions' in the EU and do not satisfy the requirement of 'sound and fair marketable quality'.

45 Such a conclusion cannot be invalidated by the fact that the products at issue also comply with the sanitary regulations.

46 Therefore, the answer to the first and second questions is that Article 28(1) of Regulation No 612/2009 must be interpreted as meaning that frozen or quick-frozen chickens with a water content exceeding the limits set by Regulation No 543/2008 are not marketable in normal conditions on the territory of the European Union, and do not satisfy the requirement of sound and fair marketable quality even if they are accompanied by a health certificate issued by the competent authority.

The fourth question

47 By its fourth question, the referring court asks essentially whether Article 18(2) of Regulation No 543/2008 must be interpreted as meaning that it imposes an obligation on Member States to adopt the practical measures on checks for frozen or quick-frozen chickens intended for export with export refunds and that, in the absence of the adoption of such practical measures, the checks carried out for export cannot be relied on against the undertakings concerned.

48 In the case of financial subsidies for export of frozen or quick-frozen chickens outside the EU, the customs office of export must ensure compliance with Article 28(1) of Regulation No 612/2009, in accordance with Article 5(4) of Regulation No 1276/2008. If the customs office has grounds for doubting the 'sound, fair and marketable quality' of an exported product, it must verify compliance with the applicable EU provisions.

49 Given that compliance with the maximum water content for frozen or quick-frozen chickens laid down in Article 15 of Regulation No 543/2008 is a condition necessary so that that meat may be regarded as being of 'sound, fair and marketable quality', within the meaning of Article 28(1) of Regulation No 612/2009, the methods for determining that content in Annexes VI and VII to Regulation No 543/2008 must be used in order to check if that condition is satisfied.

50 In that connection, it must be held that there is no evidence in the referring court's decision which establishes that the techniques and methods laid down in those annexes prevent those checks from being carried out in an appropriate manner.

51 As is clear from paragraph 23 of the present judgment, Annexes VI and VII to Regulation No 543/2008 are sufficiently precise for the purpose of carrying out checks on frozen and quick-frozen chickens intended for export with export refunds.

52 Having regard to the foregoing observations, the answer to the fourth question is that, since Annexes VI and VII to Regulation No 543/2008 are sufficiently precise for the purpose of carrying out the checks on frozen and quick-frozen chickens intended for export with export refunds, the absence of practical measures, whose adoption is provided for in Article 18(2) thereof, does not prevent those checks from being relied on against the undertakings concerned.

The fifth question

53 By its fifth question, the referring court asks essentially whether Article 16(5) of Regulation No 543/2008 must be interpreted as meaning that the right to request a counter-analysis laid down in that provision applies to checks carried out with a view to the export of frozen or quick-frozen chickens with export refunds.

54 Since, according to Article 16(2) of Regulation No 543/2008, the checks of water content for frozen and quick-frozen chickens referred to in Article 15(1) thereof need not be conducted for carcases in respect of which proof is provided that they are intended exclusively for export, Article 16(5) is not relevant in the present case. The provisions governing the procedures for examining goods intended for export outside the EU are laid down by the Customs Code.

55 The Court has already had the opportunity to rule on the rights and obligations of exporters and those of the national customs authority concerning the checks on exported goods giving entitlement to the grant of refunds in the case which gave rise to the judgment of 7 September 2006, *Nowaco Germany* (C-353/04, EU:C:2006:522).

56 It observed, specifically as regards the checks on exported goods giving entitlement to refunds, that EU legislation provides for a sort of cooperation between the exporter and the national customs authority, in order to correctly monitor exports qualifying for refunds (see, in the context of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 (OJ 1997 L 17, p. 1), judgment of 7 September 2006, *Nowaco Germany*, C-353/04, EU:C:2006:522, paragraph 63).

57 In that connection, it must be recalled that the Customs Code provided, in particular, in Article 118(2) and Article 119(1), second subparagraph, that an exporter making a customs declaration has the right to be present or represented when the goods are examined and when samples are taken and may request a further examination or sampling of the goods if he considers that the results obtained by the competent authorities are not valid.

58 Thus, the Customs Code gives economic operators a right comparable to that provided for in Article 16(5) of Regulation No 543/2008.

59 Irrespective of the rights laid down by Article 118(2) and Article 119(1), second subparagraph, of the Customs Code, it must be recalled that, according to settled case-law, in so far as the exporter, by lodging an application for a refund, continues to assert either expressly or impliedly that the product in question is of 'sound and fair marketable quality', it is for the exporter, according to the rules of

evidence of national law, to prove that that condition is, in fact, satisfied if a declaration is questioned by the national authorities (judgment of 1 December 2005, *Fleisch-Winter*, C-309/04, EU:C:2005:732, paragraph 35).

60 Finally, Article 41 of the Charter of Fundamental Rights of the European Union, which as the wording clearly states is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (judgment of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 83) is not relevant in the case in the main proceedings.

61 In those circumstances, the answer to the fifth question is that an exporter of frozen or quick-frozen chickens may, in accordance with Article 118(2) and Article 119(1), second subparagraph, of the Customs Code, first, be present or represented when the goods are examined and when samples are taken and, second, may request a further examination or sampling of the goods if he considers that the results obtained by the competent authorities are not valid.

Costs

62 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The examination of the third question did not bring to light any evidence able to affect the validity of the limits for water content in frozen chicken meat laid down in Article 15(1) and Annexes VI and VII to Commission Regulation (EC) No 543/2008 of 16 June 2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for poultrymeat, as amended by Commission Implementing Regulation (EU) No 1239/2012 of 19 December 2012.**

2. **Article 28(1) of Commission Regulation (EC) No 612/2009 of 7 July 2009 on laying down common detailed rules for the application of the system of export refunds on agricultural products, as amended by Commission Regulation (EU) No 173/2011 of 23 February 2011, must be interpreted as meaning that frozen or quick-frozen chickens with a water content exceeding the limits set by Regulation No 543/2008, as amended by Implementing Regulation No 1239/2012, are not marketable in normal conditions on the territory of the European Union and do not satisfy the requirement of sound and fair marketable quality, even if they are accompanied by a health certificate issued by the competent authority.**

3. **Since Annexes VI and VII to Regulation No 543/2008, as amended by Implementing Regulation No 1239/2012, are sufficiently precise for the purpose of carrying out the checks on frozen and quick-frozen chickens intended for export with export refunds, the fact that a Member State has not adopted practical measures, whose adoption is provided for in Article 18(2) of that regulation, does not prevent those checks from being relied on against the undertakings concerned.**

4. **An exporter of frozen or quick-frozen chickens may, in accordance with Article 118(2) and Article 119(1), second subparagraph, of** Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) **may, first, be present or represented when the goods are examined and when samples are taken and, second, may request a further examination or sampling of the goods if he considers that the results obtained by the competent authorities are not valid**.

[Signatures]