JUDGMENT OF THE COURT (Fourth Chamber)
9 August 1994 *

In Case C-347/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel, Brussels, for a preliminary ruling in the proceedings pending before that court between

Belgian State

and

Boterlux SPRL,

on the interpretation of Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system (OJ, English Special Edition 1967, p. 323) and Article 6 of Regulation (EEC) No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (OJ, English Special Edition 1968(I), p. 234),

* Language of the case: French.

THE COURT (Fourth Chamber),

composed of: M. Diez de Velasco, President of the Chamber, C. N. Kakouris and P. J. G. Kapteyn (Rapporteur), Judges,

Advocate General: C. Gulmann,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Belgian State, by Régine Orfinger-Karlin and Véronique Laurent, of the Brussels Bar,

— Boterlux SPRL, by Claude Magin, of the Brussels Bar,

— the Commission of the European Communities, by Xénophon Yataganas, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgian Government, Boterlux SPRL and the Commission at the hearing on 24 February 1994,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1994,

gives the following

Judgment

1 By judgment of 30 June 1993, received at the Court on 7 July 1993, the Cour d'Appel (Court of Appeal), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions on the interpretation of Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system (OJ, English Special Edition 1967, p. 323) and Article 6 of Regulation (EEC) No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (OJ, English Special Edition 1968(I), p. 234).

2 Those questions were raised in proceedings between the Belgian State and Boterlux SPRL ('Boterlux'), a company governed by Belgian law, relating to the conditions for the grant of refunds for sales of butter outside the Community.

3 It is apparent from the papers before the Court that Boterlux obtained eight licences for the export to Switzerland of 396 tonnes of Luxembourg butter between 30 May 1968 and 20 September 1968. For the three exports prior to 29 July 1968, the date of the entry into force of the common organization of the market in the milk and milk products sector, export refunds were paid by the Belgian State. However the Belgian State refused to pay refunds for the exports after 28 July 1968 on the ground that evidence of the goods having been put into free circulation in the non-member country had not been produced.

4 It is common ground that, after export, the goods were re-imported into a Community country, namely Italy. The Belgian authorities considered that the exporter had failed to establish that it had been impossible for it to prevent that re-importation.

5 Boterlux brought proceedings before the Belgian courts. By judgment of 22 April 1988 the Tribunal de Première Instance (Court of First Instance), Brussels, ordered the Belgian State to pay the refunds at issue on the ground that although Community law requires that the goods have been put into circulation in a non-member country, Boterlux had played no part in the fraudulent practice of re-importing the goods into a Member State.

6 The Belgian State appealed against that decision to the Cour d'Appel, Brussels.

7 Questions of interpretation arose concerning the condition of release for free circulation and release for consumption of the goods in the country of destination and the Cour d'Appel thereupon stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Are the EEC rules applicable in this case, in particular Regulation No 1041/67/EEC of the Commission and Article 6 of Regulation (EEC) No 876/68 of the Council, to be interpreted as meaning that the payment of refunds is subject to the products being put in free circulation in a non-member country?

If so, do the principles laid down in the Court's judgments in Case 125/75 *Eier-Kontor* v *Hauptzollamt Hamburg-Jonas* [1976] ECR 771 and in Case 6/71 *Rheinmühlen* v *Einfuhr- und Vorratsstelle für Getreide* [1971] ECR 823 and in the judg-

ments concerning payment of monetary compensatory amounts which may be equated with refunds (Case 250/80 *Anklagemyndigheden* v *Töpfer* [1981] ECR 2465 and Case 254/85 *Irish Grain Board* v *Minister for Agriculture* [1986] ECR 3309) make the exporter responsible for the objective performance of that obligation, which would preclude his being relieved on the ground that he did not participate in the fraud or acted in good faith, which Advocate General Dutheillet de Lamothe treated as equivalent to *force majeure* in his Opinion in Case 6/71?

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

3. Can the exporter's good faith be treated in the same way as a case of *force majeure* when he could have avoided the consequences of the failure to put the products into free circulation by ensuring through contractual means that the purchasers did not fraudulently divert the products from the required destination (judgment in Case 4/68 *Schwarzwaldmilch* v *Einfuhr- und Vorratsstelle* [1968] ECR 377 — definition of *force majeure* — judgment in Case 254/85 *Irish Grain Board*, cited above, at paragraphs 12 and 13)?'

8 Reference should first be made to the relevant provisions of the regulations whose interpretation is sought by the national court.

9 A common organization of the market in milk and milk products was set up by Regulation (EEC) No 804/68 of the Council of 27 June 1968 (OJ, English Special Edition 1968(I), p. 176).

10 The rules on the grant of refunds and the criteria for determining the amount of the refunds were laid down by the abovementioned Regulation No 876/68.

11 Article 4 of Regulation No 876/68 provides that, where the world market situation or the specific requirements of certain markets make this necessary, the refund may be varied according to the destination of the products.

12 Under Article 6(1) the refund is to be paid upon proof that the products have been exported from the Community and that they are of Community origin. Where there are differential amounts of the refund in question, Article 6(2) further requires proof that the product has reached the destination for which the refund was fixed.

13 Article 4(1) of Regulation No 1041/67, cited above, which is applicable from 29 July 1968 to products in the milk and milk products sector by virtue of amending Regulation (EEC) No 1056/68 of the Commission of 23 July 1968 (OJ, English Special Edition 1968(II), p. 343) provides:

'In certain cases, by reason of difference between the rate of the refund and that of the levy, or by reason of the nature of the exported products or of export markets, Member States may require, as a condition for payment of the refund, proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country and, where appropriate, proof of the conditions under which it was imported. Proof of importation into a third country shall be given in accordance with the provisions of Article 8(1).'

14 Article 8(1) lists the documents which the party concerned must produce for this purpose.

15 The parties to the main proceedings disagree as to whether there are differential amounts of the refunds in question. Since the national court has not resolved that issue, it is necessary to examine both hypotheses. It will then be for the national court to decide this point before giving its final judgment.

16 At the hearing the Commission maintained that it was able to establish that the refunds in question were in fact differentiated. However such evidence relates to the facts of the main dispute. Consequently, the Court is not competent to weigh up that evidence which is a matter for the national court.

The first part of Question 1

17 In the first part of Question 1 the national court is essentially asking whether Article 4(1) of Regulation No 1041/67 and Article 6 of Regulation No 876/68 must be interpreted as meaning that payment of a refund is conditional on proof that the product has been released for free circulation in the non-member country of destination.

18 The Court has consistently held that the system of variable export refunds is intended to gain and maintain access for Community exports to the markets of the non-member countries concerned and the variation in the refund is based on the desire to take account of the particular characteristics of each import market in which the Community wishes to play a part (see in particular Case 125/75

Milch-, Fett- und Eier-Kontor v *Hauptzollamt Hamburg-Jonas* [1976] ECR 771, paragraph 5, and Case 89/83 *Hauptzollamt Hamburg-Jonas* v *Dimex* [1984] ECR 2815, paragraph 8).

19 It is clear from that case-law that if it sufficed, in order to qualify for payment of the refund at a higher rate, for the goods simply to be unloaded, the *raison d'être* of the system of varying the refund would be disregarded.

20 That is why Article 6(2) of Regulation No 876/68 requires that it be proved that the product has reached the destination for which the refund was fixed for in that case it is necessary that the goods have been cleared through customs and released into free circulation in the country of destination.

21 On the other hand in the case of a non-differentiated refund granted in order to cover the difference between the price of products in the Community and their price in international trade, the amount of the refund is not fixed by reference to the import market for which the products are destined.

22 That is why Article 6(1) of Regulation No 876/68 requires only proof that the product has been exported from the Community.

23 It is, however, necessary to examine whether the Member States may reinforce that evidential requirement by virtue of Article 4(1) of Regulation No 1041/67 (an 'anti-fraud provision') by requiring additional documents.

24 Article 4(1) is a provision of general application and applies in all cases where there is a refund (see Case 125/75 *Milch-, Fett- und Eier-Kontor*, cited above).

25 According to the fifth recital in the preamble to Regulation No 1041/67 the aim of authorizing the Member States to require further evidence, before paying refunds, is to prevent abuses.

26 Under Article 4(1) in conjunction with Article 8(1) of Regulation No 1041/67 the Member States are expressly authorized to require proof that the product has been imported into a non-member country and, consequently, cleared through customs and released into free circulation.

27 Additional evidence may thus be required where there is suspicion or proof that abuses have been committed.

28 That was the case in the circumstances underlying the main dispute. It is clear from the order for reference that the products, after leaving the Community, were re-exported under false documents from the country of destination to a Member State.

29 It will therefore be for the national court, if it finds that the national authorities have required additional evidence, to examine whether Boterlux has submitted all the supporting documents in that respect.

30 The reply to the first part of Question 1 should therefore be that Article 4(1) of Regulation No 1041/67 and Article 6 of Regulation No 876/68 must be interpreted as meaning that payment of a differential refund is in principle conditional on proof that the product has been released into free circulation in the non-member country of destination and that Member States may also require such proof before granting a non-differentiated refund if there is suspicion or proof that abuses have been committed.

The second part of Question 1 and Questions 2 and 3

31 It is common ground that the goods in question in the main proceedings were fraudulently re-imported into the Community.

32 These questions, which should be examined together with reference solely to such a case of fraud, seek to establish whether the exporter of a product to a non-member country loses his right to refunds where that product is fraudulently re-imported into the Community or whether the unforeseeability of such re-importation, the fact that the exporter did not take part in the fraud or his good faith allow him to retain his right to a refund.

33 In replying to these questions, it should first be noted that it is clear from the answer to the first part of Question 1 and has moreover been pointed out by the national court itself in Question 2 that the Community legislature has guarded against the risk of such fraudulent re-importation by requiring the exporter to be able to prove that the goods have been released into free circulation.

34 In view of the objective nature of the obligation to release the goods into free circulation, only a case of *force majeure* could justify exemption. The concept of *force majeure* in the sphere of agricultural regulations must be construed as referring to abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided in spite of the exercise of all due care (see, most recently, Case C-12/92 *Criminal proceedings against Huygen* [1993] ECR I-6381, paragraph 31).

35 Even if fraudulent re-importation into the Community may be a circumstance beyond the control of the exporter, it none the less represents an ordinary commercial risk and cannot be regarded as being unforeseeable in the contractual relations entered into on the occasion of an export qualifying for a refund.

36 The exporter's good faith and the fact that he did not take part in the fraud cannot be taken into account either. According to the consistent case-law of the Court, and as the national court rightly pointed out in Question 3, an exporter can ensure, by contractual measures, that purchasers do not fraudulently divert the goods from their destination. It is thus for the exporter to take the appropriate precautions either by including the requisite clauses in the contract in question or by effecting specific insurance (see Case 109/86 *Theodorakis* v *Greece* [1987] ECR 4319, paragraph 8).

37 The reply to be given to the second part of Question 1 and to Questions 2 and 3 should therefore be that the exporter of a product destined for a non-member country loses his right to a refund where the product is fraudulently re-imported into the Community notwithstanding the fact that he did not take part in the fraud

or his good faith and such re-importation cannot be regarded as unforeseeable in the contractual relations entered into in connection with an export qualifying for a refund.

Costs

38 The costs incurred by the Belgian Government 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Cour d'Appel, Brussels, by judgment of 30 June 1993, hereby rules:

1. **Article 4(1) of Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system and Article 6 of Regulation (EEC) No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount**

of such refunds must be interpreted as meaning that payment of a differential refund is in principle conditional on proof that the product has been released into free circulation in the non-member country of destination and that Member States may also require such proof before granting a non-differentiated refund if there is suspicion or proof that abuses have been committed.

2. The exporter of a product destined for a non-member country loses his right to a refund where the product is fraudulently re-imported into the Community notwithstanding the fact that he did not take part in the fraud or his good faith and such re-importation cannot be regarded as unforeseeable in the contractual relations entered into in connection with an export qualifying for a refund.

Diez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass

Registrar

M. Diez de Velasco

President of the Fourth Chamber