JUDGMENT OF THE COURT
OF 13 DECEMBER 1973 [1]

Hollandse Melksuikerfabriek v Hoofdproduktschap voor Akkerbouwprodukten (preliminary ruling requested by the College van Beroep voor het Bedrijfsleven)

Case 150/73

In Case 150/73

Reference to the Court under Article 177 of the EEC Treaty by the 'College van Beroep voor het Bedrijfsleven', for a preliminary ruling in the action pending before that court between

HOLLANDSE MELKSUIKERFABRIEK, with registered office at Uitgeest,

and

HOOFDPRODUKTSCHAP VOOR AKKERBOUWPRODUKTEN, of The Hague,

on the interpretation and, if applicable, the validity of Regulation No 204/69 of the Council of the European Communities of 28 January 1969, laying down general rules for the grant of export refunds on certain agricultural products exported ... and the criteria for fixing the amount of such refunds,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart (Raporteur), Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

1 — Language of the Case: Dutch.

JUDGMENT

Issues of fact and of law

A — The facts, the purpose of the application and the views of the parties may be summarized as follows:

I — Facts and procedure

1. The national proceedings are concerned with the system of export refunds on lactalbumin, manufactured from whey, a product which comes under tariff heading 04.02 'milk and cream, preserves, concentrated or sweetened'.

2. The basic Regulation in the milk sector, Regulation No 804/68 of the Council of the EEC (OJ L 148, 28. 6. 1968, p. 13) provides for the possibility of the grants of export refunds for certain milk products — *inter alia* lactalbumin — which do not come within Annex II of the Treaty and which are not therefore in themselves agrciultural products. Under the provisions of Article 17 (1) of Regulation No 804/68 a refund may be granted for 'milk and cream, etc.', likewise in the form of lactalbumin.

Under the provisions of Article 17 (3), the general rules for granting refunds, for fixing their amount and for their advance fixing, are to be adopted by the Council.

Under Article 17 (4) refunds shall be fixed at regular intervals, in conformity with the Management Committee procedure (Vide Articles 29 and 30 of the said Regulation). The Regulations fixing the refunds are made by the Commission.

Pursuant to Article 17 (3) the Council made Regulation No 204/69 of 28 January 1969 (OJ L 29, 5. 2. 1969, p. 1), laying down general rules for granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds.

Article 3 (3) of this Regulation provides that in respect of the goods listed in Annex C, (in particular lactalbumin) the quantity of basic products to be taken in calculating the amount of the refund shall be that shown in that Annex against each of those goods.

Article 4 provides that the rate of the refund shall be fixed for each month per 100 kilogrammes of basic products listed in Annex A.

As regards albumins, Annex C may be represented as follows:

		Eggs in shell kg
35.02	A. II (a) Ovalbumin and lactalbumin	(4)

(4) A quantity resulting from the application of the coefficient fixed for calculating the amount of the import charge'.

By various Regulations the *Commission* fixed the refunds in respect of eggs and egg yolks exported in the form of ovalbumin (e.g. Regulation No EEC 2304/71 of the Commission (OJ L 243, 29. 10. 1971, p. 25)).

3. During the period from 30 December 1971 to 29 November 1972 the plaintiff in the main action exported to third countries 32 lots of lactalbumin containing 80 % dry milk fat.

Since the Melksuikerfabriek considered that Regulation No 204/69 had placed lactalbumin on the same footing as ovalbumin, they applied to the

Hoofdproduktschap for the grant of an export refund in respect of lactalbumin.

By Decision of 11 January 1973, the Hoofdproduktschap voor Akkerbouwprodukten rejected this application on the grounds that:

'nowhere (in Regulation No 204/69) is it stated that whey, a product which must be classified in tariff heading 04.02, is placed on the same footing as another basic milk product that can be the subject of a refund, nor that whey, or any other basic milk product is placed on the same footing as eggs in shell . . ..'

'The coefficient for eggs in shell, as it appears in tariff heading 35.02 in Annex C . . . can therefore only relate to ovalbumin'.

4. The Company Hollandse Melksuikerfabriek appealed on 7 February 1973 against this decision to the 'College van Beroep voor het Bedrijfsleven'.

The 'College van Beroep', considering that this raised a question of interpretation of Community law, referred the following questions to the Court:

1. Must what is stated in Annex C of Regulation (EEC) No 204/69 be interpreted as meaning, that the reference (4) in the vertical column 'eggs in shell' after the goods 'ovalbumin and lactalbumin' (appearing under tariff heading 35.02, A II (a)), refers likewise to 'lactalbumin'?

2. If the answer be in the affirmative, does it follow, that pursuant to the provisions of that Regulation the grant of an export refund, as referred to in Article 1 thereof, is likewise available in respect of lactalbumin?

3. If the answer to the second question be likewise in the affirmative, does the refund payable in connexion with the export of the product have to be calculated on the basis of what is mentioned under footnote (4), viz. 'a quantity resulting from the application of the coefficient fixed for calculating the amount of the import charge'?

4. If the above questions are answered in the affirmative, are the provisions of the said Regulation then binding, (insofar as they lead to an affirmative answer to the questions), although lactalbumin is not mentioned in Annex II of the Treaty establishing the European Economic Community and that Regulation was not enacted in the manner provided by Article 235 of the Treaty?

From the judgment of the 'College van Beroep', it appears that the plaintiff in the main action adopted the following arguments:

Annex C, refers, for both ovalbumin and lactalbumin, to the same coefficient of calculation as that which applies to eggs in shell. It follows from this that the same export refund must be granted in respect of lactalbumin as for an equal quantity of ovalbumin, by means of a coefficient for eggs in shell.

Article 1 of Regulation No 170/67 of the Council of 27 June 1967, relating to the common system of trade for ovalbumin and lactalbumin (OJ No 130 of 28 June 1967, p. 2596) provides that import duties shall be applied to ovalbumin and to lactalbumin. The connexion between this provision and the note to Annex C of Regulation 204/69 makes it appear that the Community legislator intended to put both these products on the same footing.

It appears from this judgment that the Hoofdproduktschap, by way of addition to the reasons contained in its decision of 11 January 1973, argued as follows:

It was not possible by Regulation No 204/69 to put lactalbumin on the same footing as ovalbumin and thus enable a refund to be granted in respect of lactalbumin based upon a product coming under another organization of the market. Putting it on the same footing in this way lies outside the framework of the organizations of the

market; it is only possible on the basis of Article 235 of the Treaty, as happened in the case of the import system. (Regulation EEC 170/67).

5. The judgment of the 'College van Beroep' was lodged at the Registry on 16 July 1973.

6. The Hoofdproduktschap voor Akkerbouwprodukten and the Commission of the European Communities filed written observations.

7. Upon hearing the report of the Judge-Rapporteur and upon hearing the Advocate-General, the Court decided not to proceed to a preliminary inquiry.

II — Written observations submitted to the Court

Observations of the Hoofdproduktschap

The Hoofdproduktschap adheres to the arguments it presented in the national proceedings and refers to the judgment in which these are set out.

The reply to the first question ought to be that Annex C of Regulation No 204/69 does not relate to lactalbumin. Lactalbumin could in principle, based on the basic milk product from which it is manufactured give rise to an export refund, but this was not the system of Regulation No 204/69.

Observations of the Commission

The Commission of the European Communities observes that Regulation No 204/69 only supplies rules and criteria which have to be observed in fixing refunds. It does not give rise to any claim for the grant of a refund. This would require an action on the part of the Commission which under the relevant basic regulations is called upon periodically to fix the refunds.

When making the regulations fixing the level of refunds in respect of eggs and egg yolks exported in the form of goods not falling under Annex II of the Treaty (in particular ovalbumin), the Commission did not have the intention of granting refunds upon the export of lactalbumin since, bearing in mind the factors which it had to take into account under Article 4 (2) of Regulation No 204/69, it did not consider it appropriate to do so.

To date no refund has been fixed upon the export of lactalbumin.

On the three first questions

In the Commission's view these three questions must receive an affirmative answer.

The text of Annex C to Regulation No 204/69 of the Council specifically mentions 'ovalbumin and lactalbumin'. As regards the quantity of the basic product — eggs in shell — which has to be taken into account *for the purpose of the calculation of the amount of the refund* this Annex refers to the coefficient used in the system of trade (Regulation No 170/67) for the purpose of determining the import charge on ovalbumin and lactalbumin.

The mention of lactalbumin in Annex C to Regulation No 204/69 accordingly does not arise from an error.

The Commission can see no reason at all why the footnote should not apply to lactalbumin: the Regulation does not supply any other method of calculation on the basis of which the Commission could assess the percentage of the export refund in respect of lactalbumin if it should decide to fix it (which it has not yet done).

Bearing in mind the close similarity of ovalbumin and lactalbumin, both from a technical and from a commercial point of view, it seemed appropriate that — in the event of the Commission fixing export refunds in respect of lactalbumin — both refunds should be at the same level.

On the fourth question

The Council is in principle competent to lay down general rules pursuant to Article 43 of the Treaty and pursuant to an enactment implementing that Article, as regards the grant of refunds in respect of lactalbumin.

Pursuant to the basic regulation for the milk sector (Regulation No 804/68), lactalbumin, being one of the basic products referred to in Article 1 of that regulation, is eligible for an export refund; whey, the substance from which lactalbumin is processed, is one of those products referred to in Article 1, bearing in mind the fact that whey falls under tariff heading 04.02.

The Council made use of this power in its Regulation No 204/69 and has included lactalbumin in Annex C of that Regulation, which is based upon the basic regulation for the milk sector. Even if the *calculation* of the refunds for lactalbumin is based on data referring to a product other than that from which lactalbumin is produced, this does not detract in law from the fact that when the Commission fixes the rates of the refunds, the latter are granted in relation to the agricultural product from which lactalbumin is manufactured.

Regulation No 204/69 does not lay down the refunds in respect of lactalbumin and ovalbumin, but in respect of agricultural products that are exported in the form of lactalbumin and ovalbumin. The Commission sees no reason why this rule might not be made on the basis of Article 43 of the Treaty. The refund is and remains, notwithstanding the method of calculation, an agricultural measure.

As regards Regulation No 170/67, putting lactalbumin and ovalbumin on a par for the purposes of import levy is based upon Article 235, since that levy is imposed on the basis of Article 235.

B — There followed on 14 November 1973 the oral proceedings, in the course of which the parties to the national proceedings and the Commission were heard.

The *Hollandse Melksuikerfabriek* on that occasion repeated its arguments put forward in the national proceedings, in particularly drawing attention to the following:

— lactalbumin and ovalbumin are interchangeable to such a point that they are pratically one and the same product;

— both products are under the provisions of Regulation No 170/67 subject to the same levy on importation;

— the export refunds must be calculated by the same method pursuant to the provisions of Article 3 (3) and (4) of Regulation No 204/69;

— these regulations recognise a link between these two products which are practically identical, so that in fixing the refund in respect of ovalbumin the Commission impliedly fixed a refund for lactalbumin;

— this thesis is confirmed by the fact that the Hoofdproduktschap in 1971 and 1972 on the basis of the same system granted a refund to the Melksuikerfabriek upon exportation of lactalbumin.

The *Hoofdproduktschap,* whilst accepting the Commission's conclusions, disputes the Council's power to lay down a method of calculation — even on a lump-sum basis — for the refund on lactalbumin based on a product not belonging to the milk sector.

The *Commission* confined itself to explaining the economic reasons why it had not fixed any refund in respect of lactalbumin.

The Hollandse Melksuikerfabriek was represented by Meester Scheer, Advocate at The Hague, the Hoofdproduktschap by Meester Schippers and the

Commission of the European Communities by its legal adviser, Mr Bourgeois, as agent.

C — The Advocate-General delivered his opinion at the hearing on 5 December 1973.

Grounds of judgment

1 By judgment of 13 July 1973, filed with the Registry on 16 July 1973, the College van Beroep voor het Bedrijfsleven referred under Article 177 of the Treaty a number of questions to the Court, concerning the interpretation and, if appropriate, the validity of Regulation (EEC) No 204/69 of 28 January 1969, laying down general rules for granting export refunds for certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds.

2 The questions referred are in particular concerned with the interpretation that ought to be given to the descriptions of goods 'ovalbumin and lactalbumin' as they appear in subheading 35.02-A-II-a of Annex C to that Regulation.

3 It appears from the court record that the national proceedings are concerned with the question whether the Council by using that description intended to place lactalbumin on the same footing as ovalbumin so that the regulations of the Commission fixing the refund for eggs exported in the form of ovalbumin would likewise apply to milk exported in the form of lactalbumin.

4 The effect of the provisions of Regulation No 204/69 must be looked for not in isolation but in the context of the complete system in the matter of export refunds for milk products not covered by Annex II to the Treaty.

5 The basic system for the milk sector, i.e. Regulation No 804/68 of the Council (OJ L 148, 28.6.1968, p. 13) provides by Article 17 (1) the possibility of the grant of refunds for milk products coming under tariff heading 04.02 that are exported in the form of products mentioned in the Annex, *inter alia* lactalbumin.

6 The general rules concerning the grant — and the fixing of the amount — of refunds are, pursuant to Article 17 (3), to be laid down by the Council.

7 The refunds are pursuant to Article 17 (4), to be fixed periodically by the Commission by the 'Management Committee' procedure.

8 The Council, by its Regulation No 204/69, pursuant to Article 17 (3) of Regulation No 804/68 and a number of basic regulations for other agricultural sectors, laid down general rules for granting export refunds on goods not covered by Annex II to the Treaty.

9 The amount of the refund is, pursuant to Article 2 of that regulation to be obtained by multiplying two factors, i.e. on the one hand the quantity of the basic products listed in Annex A, and on the other hand the rate of refund on the relevant basic product.

10 As regards the quantity of basic products to be taken in respect of the goods included in Annex C, Article 3 lays down the fixed quantities specified in that Annex.

11 As regards lactalbumin and ovalbumin the Annex refers to the same fixed quantity of eggs in shell.

12 Although therefore the provisions of Regulation No 204/69 — as general rules — prescribe an identical method of calculation, by reference to eggs in shell, for refunds upon export of lactalbumin and of ovalbumin, they cannot be interpreted as giving rise to a claim to a refund.

13 A refund for milk exported in the form of lactalbumin could be granted only on the basis of a regulation made by the Commission pursuant to Article 17 (4) of Regulation No 804/68.

14 The Commission has clearly not made such a regulation.

15 Accordingly, whilst the Commission has repeatedly laid down a rate of refund for eggs exported in the form of ovalbumin, this does not give rise to a claim to refund for milk exported in the form of lactalbumin.

16 Accordingly, the reply to the national court must be that though the criteria in Regulation No EEC 204/69, and in particular in Annex C for calculating the amount of export refunds for ovalbumin refer to lactalbumin, this does not imply that the provision of a refund available on export of ovalbumin extends also to export of lactalbumin, in the absence of a special provision in a regulation of the Commission made under Article 17 of Regulation No 804/68.

Costs

17 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, who submitted their observations to the Court, are not recoverable and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the national court, the decision as to costs is a matter for that Court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral arguments of the parties to the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation (EEC) No 804/68 of the Council, especially Article 17;
Having regard to Regulation (EEC) No 204/69 of the Council, especially Articles 1 to 4 and its Annexes;
Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the College van Beroep voor het Bedrijfsleven, by order of that court dated 13 July 1973, hereby rules:

Although the criteria in Regulation No (EEC) 204/69, and particularly in Annex C, for calculating the amount of export refunds for ovalbumin refer to lactalbumin, this does not imply that the provision of a refund available on export of ovalbumin extends also to export of lactalbumin, in the absence of a special provision in a regulation of the Commission made under Article 17 of Regulation No 804/68 of the Council.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 13 December 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 5 DECEMBER 1973[1]

Mr President,

Members of the Court,

The questions to which we have to give our attention are mainly concerned with the interpretation of Regulation No 204/69/EEC of the Council of 28 January 1969, which lays down the general rules for granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty. The questions have been referred in the course of proceedings, pending before the College van Beroep voor het Bedrijfsleven, concerning the validity of the refusal by the competent Netherlands authority to grant the applicant refunds on export to third countries of products designated as lactalbumin and coming under subheading 35.02-A-II-1-b) of the Common Customs Tariff. The said products were exported in the period between 30 December 1971 and 29 November 1972.

In dealing with a product derived from milk, reference must be made to Article 17 (1) of Regulation No 804/68, which provides as follows: 'To the extent necessary to enable the products listed in Article 1 to be exported either in the state referred to therein or in the form of goods listed in the Annex in the case of products listed under Article 1 (a), (b) (c) and (e), on the basis of the prices for

1 — Translated from the Italian.