OPINION OF ADVOCATE GENERAL ALBER

delivered on 19 May 1998 *

A — Introduction

1. This is an action by the Kingdom of the Netherlands relating to an export refund in respect of cereals amounting to over HFL 3 million which was disallowed by the Commission on the ground that the goods left the customs territory before the declaration was made and that no inspections could therefore have been carried out. The case also turns on the question whether the plaintiff produced the necessary evidence to show that it acted properly in due time.

B — Facts and submissions of the parties

2. The export refund is claimed in respect of barley which had been supplied by the Netherlands to Russia. The barley was exported by ship aboard the *MS Stankov*. The barley left Community territory on Saturday, 25 November 1989.

3. In its October 1993 Summary Report, the Commission gave as its reason for refusing funding the fact that the customs documents were only accepted by the Netherlands customs office in Terneuzen on 27 November 1989, whereas the ship left the customs territory of the Community on 25 November. According to that report, the Netherlands authorities stated that the export documents were submitted at the weekend. Because the customs office which was in fact competent was closed at the weekend, another office [1] dealt with the matter and took samples for later analysis, although no such analysis was ever carried out. The competent office then accepted the documents on Monday, 27 November 1989. However, the Lloyd's register of ship movements makes it clear that the ship did not call at Terneuzen but left Community territory direct from Ghent. Because the export declaration was accepted after shipment and departure of the ship, and there was no firm evidence that the goods had been declared to the competent customs office in order to enable any (physical) inspections to take place, it was not possible to pay the export refund.

4. The inspection by the Commission which formed the basis of the summary report took

* Original language: German.

1 — According to the plaintiff in these proceedings, the other office was also a customs office in Terneuzen.

place in 1991. It related principally to the Netherlands authority responsible for payment, namely the Hoofdproduktschap voor Akkerbouwprodukten (Central Board for Agricultural Products, hereinafter 'the HPA'). The results of that inspection were set out in a report dated 14 January 1992. The various dates of shipment and departure of the ship on the one hand, and the declaration on the other, were also set out in that report. According to the report, that gave rise to uncertainty as to whether the goods were declared for export in due time, that is to say, prior to departure, and as to the question whether customs would in the circumstances have been able to inspect them. The Commission (the EAGGF [2]) accordingly asked the plaintiff for further information to dispel that uncertainty.

5. The Commission subsequently reiterated its request for further information or evidence on several occasions, which led to an exchange of correspondence [3] between the Commission and the Netherlands authorities. In the end, the Commission fixed 15 December 1992 as the deadline for submission of the documents and evidence sought.

6. On 14 December 1992 the Netherlands authorities gave notice that certain documents would be forwarded at a later date. On 19 and 20 July 1993 the Commission received some documents. These included a customs form with manuscript notes made by the competent customs official, from which it appears that the goods were declared and cleared for customs on 25 November 1989, and that the procedure was completed on 27 November. These details were provided by the competent official in December 1989 in response to a query from the HPA.

7. According to the plaintiff, the competent authorities took all necessary steps to comply with the Community provisions. It argues that, as the competent customs office is normally closed at the weekend, another customs office in Terneuzen accepted the goods on 25 November and also took samples. The documents were then left with the competent office, which completed the matter on the next working day, Monday, 27 November, but in doing so did not, due to an oversight, state on the form the actual day of acceptance, namely 25 November but 27 November.

8. In addition, the plaintiff gives comprehensive details in support of its claim that the ship was in fact in Terneuzen on 25 November.

9. In the Commission's view, this last point is of minor importance. Neither does it dispute that the ship set sail on 25 November. The most important question for the Commission is whether the export declaration was accepted before the ship left the customs territory and whether there was an opportunity

2 — European Agricultural Guidance and Guarantee Fund.

3 — See, *inter alia*, Annexes 2 and 3 to the application.

to carry out inspections. According to the Commission, the plaintiff did not produce the necessary evidence to that effect in due time.

10. The plaintiff disagrees and has therefore brought an action seeking

— annulment of Commission Decision 93/659/EC of 25 November 1993, published in the Official Journal of 8 December 1993 (OJ 1993 L 301, p. 13), on the clearance of the accounts presented by the Member States in respect of the expenditure for 1990 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, to the extent that the decision disallows HFL 3 317 344.26 of the export refund in respect of cereals; and

— an order requiring the Commission to pay the costs.

The Commission contends

— that the action should be dismissed as unfounded; and

— that the plaintiff should be ordered to pay the costs.

11. The plaintiff first of all disputes that Article 8(2) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy [4] by the Commission applies. It argues that it was not guilty of the slightest irregularity or omission. There can be no doubt that the Netherlands authorities fulfilled their obligations under Article 8(1) of Regulation No 729/70. They ensured in this case that the export declaration was drawn up in compliance with all the requirements arising under the Community legislation, and in particular Articles 3, 4 and 47 of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products. [5]

12. The Commission, on the other hand, does not regard this as the decisive question. In its view, the important issue is rather whether the necessary evidence to support the plaintiff's claim was submitted 'in due time', which in this case means by the deadline of 15 December 1992 set by the Commission.

4 — OJ, English Special Edition 1970 (I), p. 218.
5 — OJ 1987 L 351, p. 1.

C — Relevant legal provisions

13. Article 2(1) of Regulation No 729/70 provides:

'Refunds on exports to third countries, granted in accordance with the Community rules within the framework of the common organisation of agricultural markets, shall be financed under the terms of Article 1(2)(a).'

Article 1(2)(a), to which reference is made, provides:

'The Guarantee Section shall finance:

(a) refunds on exports to third countries;

...'

14. Articles 3, 4 and 47 of Regulation No 3665/87 are also relevant. Article 3(1) provides:

'The day of export means the date on which the customs authority accepts the export declaration in which it is stated that a refund will be applied for.'

Article 3(2) provides:

'The date of acceptance of the export declaration shall determine:

(a) the rate of the refund where the refund is not fixed in advance;

...'

Article 3(4) provides:

'The day of export shall be used to establish the quantity, nature and characteristics of the product exported.'

15. Article 4(1) provides:

'... the refund shall be paid only upon proof being furnished [that] the products for which the export declaration was accepted have, *within 60 days from* the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state'. [6]

16. Article 47 contains provisions on the procedure for payment of the refund.

17. Article 8(1) of Regulation No 729/70 provides:

'The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as the result of irregularities or negligence

...'

6 — Emphasis added.

18. The first sentence of Article 8(2) provides:

'In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.'

D — Opinion

19. It is appropriate to start by examining whether it is not the case that sufficient evidence was already available, before expiry of the time-limit on 15 December 1992, that the export declaration was accepted by the customs authorities before the ship put to sea. In that connection, the plaintiff refers to the HPA's records. At the time when the Commission carried out its inspection in 1991, it would have been possible to have sight of the form filled out by the customs authorities with the manuscript notes made by the competent customs official (the form is annexed to the application as Annex 15). It is apparent from those notes that the export declaration was accepted on 25 November 1989, the goods cleared for customs the same day and the processing of the documents completed on 27 November 1989. On that basis, there can have been no doubt that the goods were declared to the customs authorities before the ship set sail.

20. In that connection, the Commission points out that those notes did not appear on the form found in the HPA's file and attached to the application [7] at Annex 13. Moreover, the Commission points out that the HPA's stamp appears only on the form without the customs official's notes (Annex 13 to the application). The Commission concludes from this that the HPA took its decision to disallow the refund on the basis of the document in Annex 13, in other words, without being aware of the competent customs official's subsequent clarificatory comments.

21. That conclusion does not necessarily follow. As the plaintiff stated, those notes were added following a query from the HPA. The HPA was therefore aware of their content.

22. However, in this case that is of no consequence. What is important is whether the form bearing the customs official's manuscript annotations was submitted to the Commission in due time. The Commission denies

7 — Annex 13, like Annex 15, comprises the customs office form relating to the clearance of the goods in dispute here. However, the competent customs official's notes only appear on the form at Annex 15.

that it was. It maintains that the form (Annex 15 to the application) only reached it on 19 July 1993 by fax.

23. Since the form with the customs official's manuscript notes does not, unlike the form without those notes, bear the HPA's stamp, the Commission's view can certainly be endorsed in so far as the form with the notes was not officially registered by the HPA. It may therefore be assumed that the form was not available to the Commission when it inspected the HPA's files.

24. For that reason, no conclusions can be drawn from a further entry on that form. The word 'conform' (in conformity) has been entered in manuscript under the heading 'Inspection by the departures office' and there is an official stamp dated 27 November 1989. This section of the form does not serve to show that the export declaration had already been accepted on 25 November. Nor, therefore, can it be concluded that an inspection had already been carried out on 25 November leading to the entry 'category: in conformity'.

25. The plaintiff also refers to its letters of 25 June and 17 July 1992 to show that it did provide the necessary evidence within the prescribed period (those letters can be found in Annexes 2 and 3 to the application). These, however, only contain clarificatory statements by the competent authorities.

26. Amongst other things, they state that the Terneuzen customs office was closed during the weekend of 25 and 26 November 1989, but that the export declaration was processed by another customs office. The *MS Stankov* was reportedly moored on 25 November 1989 in Terneuzen. Customs officials took samples there which were subsequently examined by experts from the administrative authorities. The declaration was then processed on the next working day, namely 27 November.

27. The plaintiff considers those letters to be official statements made under oath. However, that is not apparent from the text of the letters. They cannot therefore be viewed as satisfactory evidence. In that connection, reference should be made to the case-law of the Court of Justice on clearance of the EAGGF's accounts. According to that case-law, when the Commission refuses to charge expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules for which a Member State can be held responsible, it is for that State to show that the conditions for obtaining the financing

refused by the Commission are fulfilled. [8] As regards the question whether a Member State carried out the necessary inspections, it is not sufficient for that State to claim that it did so without producing evidence to that effect. [9]

28. In this case, the Commission refused funding because, according to the information in the HPA's files, the customs formalities were only completed after the ship set sail. It is then for the Member State to show that the export declaration had been submitted at the relevant time and thus that the conditions for funding were fulfilled. However, the competent Netherlands authorities did not produce evidence by the prescribed deadline of 15 December 1992 to support the contentions in the letters of June and July 1992.

29. It may none the less be true — despite partially contradictory and incomplete extracts from the register of the Terneuzen Harbour and Locks Department and the Shipping Register and notwithstanding the Commission's assumption to the contrary — that the ship in question passed through Terneuzen on 25 November 1989. (The plaintiff claimed that it is practically impossible for ships of the size of the *MS Stankov* to put to sea direct from Ghent; they have to pass through the Terneuzen locks.) That alone, however, cannot prove that the relevant customs formalities were also completed on that day.

30. The documents submitted by the plaintiff furthermore state that samples for visual analysis were taken and later analysed. The Commission rightly points out that no records of such analyses were supplied. Therefore, the two letters of 25 June and 17 July 1992 do not constitute adequate evidence either.

31. In addition, the plaintiff points to a letter of notification from the customs office in support of its contention that such samples were taken and that the result of the analysis corresponded to the contents of the declaration. (That letter of notification may be found at Annex 14 to the application.) The letter of notification, however, only contains general instructions from which it is not possible to conclude that such samples were in fact taken from the *MS Stankov* on 25 November.

32. Furthermore, on that point, the plaintiff argues that where barley, in respect of which an export refund is payable, is exported, there is no statutory obligation to take samples. The Commission does not dispute that, but points out that the issue here is whether the

8 — Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, paragraph 16, and Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 14.

9 — Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 25 et seq.

competent authority was in a position to take such samples at all. The question is not whether there was a duty to inspect (which there was not), but whether there was an opportunity to inspect.

33. The fifth recital in the preamble to Regulation No 3665/87 might be a basis for arguing that goods should be inspected. It states that: '... the competent authorities must verify that products leaving the Community ... are in fact those which were the subject of customs export formalities.' There is no provision for taking samples here either. However, the point is not that the plaintiff failed to take samples. It is that the goods were no longer on Community territory at the time when the export declaration was accepted. Accordingly, it would no longer have been possible to verify whether an export refund was in fact payable in this case.

34. The question is not, as the plaintiff claims, whether the amount of the refund changed between 25 and 27 November, which is not in dispute. Damage could equally have been sustained as a result of the export refund being granted erroneously.

35. In considering the question whether the plaintiff's letter of 14 December 1992 might have enabled the plaintiff to meet the deadline of 15 December 1992, it should be noted that the letter did not contain any further evidence but merely declared that certain documents would be forwarded later.

36. It cannot therefore be assumed that that letter met the deadline set by the Commission. It cannot have been so time consuming to procure the necessary evidence as to make it impossible to comply with the deadline. The authorities do not plead special circumstances. As the necessary evidence was also not produced immediately after that letter but — as the Commission rightly points out — only seven months later, and without any explanation for the delay, the deadline was not met by the plaintiff's letter of 14 December either.

37. The Kingdom of the Netherlands, therefore, has not, at least not within the deadline set by the Commission, produced the relevant evidence that the export refunds were properly paid.

38. The imposition of such a deadline is made possible by Article 1(3) of Regulation (EEC) No 1723/72 on making up accounts for the EAGGF. [10] That provides:

'Additional information may be forwarded to the Commission up to a deadline to be fixed by the Commission, taking into account in particular the amount of work necessary to supply the information concerned. In the case of failure to submit the aforementioned information within the period fixed, the Commission shall take its decision on the basis of those elements of information in its possession at the deadline, except in cases where the late submission of information is justified by exceptional circumstances.'

Under that provision, the Commission may refuse to finance export refunds if the plaintiff produces the necessary evidence but does not do so within the deadline set by the Commission.

39. The Court of Justice confirmed this, moreover, in *Germany* v *Commission* to which the Commission refers. [11] In relation to the Commission's power to fix a deadline, the Court of Justice refers to the first recital in the preamble to Regulation No 422/86, [12] which states: '... so that Member States' accounts may be scrutinised rapidly, the Commission must be able to set a deadline for the forwarding of new information by the Member States, taking account of the progress made on clearance of the accounts'.

40. Under Article 1(3) of Regulation No 1723/72, therefore, the Commission is to make a decision on the basis of the information available to it when the deadline expires. As Article 4(1) of Regulation No 3665/87 indirectly suggests, the export declaration must be accepted before the goods leave the customs territory. The necessary proof for this — which is also referred to in Article 4(1) — was not adduced, since there was no evidence that the customs declaration had been accepted on 25 November 1989 when the deadline expired.

41. As the plaintiff has not fulfilled the conditions for payment of an export refund under Article 4(1) of Regulation No 3665/87, the Commission considers that financing of the refund under Article 2 of Regulation No 729/70 must be refused. Article 2(1) provides that refunds are to be financed only if they are 'granted in accordance with the Community rules within the framework of the common organisation of agricultural markets'.

42. By contrast, the plaintiff is of the view that the Commission's decision is based on Article 8(2) of the same regulation. The preamble to the decision refers both to Article 2 and to Article 8, and the decision itself does not expressly state the legal basis for rejecting funding in this case. It cannot therefore be

10 — Commission Regulation (EEC) No 1723/72 of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section, OJ English Special Edition, Second Series III EAGGF, p. 109, as amended by Commission Regulation (EEC) No 422/86 of 25 February 1986 amending Regulation (EEC) No 1723/72 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section, OJ 1986 L 48, p. 31.

11 — Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399.

12 — Case C-54/91, cited in footnote 11, paragraph 13.

automatically assumed that the Commission relied on Article 2 in adopting its decision.

43. In that connection, the Commission rightly refers to the fifth recital in the preamble to its decision, which makes express reference to Articles 2 and 3 of Regulation No 729/70 in relation to refunds on exports to third countries.

44. Furthermore, the Commission is also correct in pointing out that the requirements of Article 8(2) are not fulfilled either, since the Netherlands authorities displayed a degree of carelessness, in not forwarding the documents to the Commission until 18 months later, or seven months after expiry of the last deadline to be set, so that the provision of funding cannot be justified.

45. As it is therefore clear that the Kingdom of the Netherlands did not produce the necessary evidence, at least not within the prescribed time-limit, I can see no reason for annulling, in whole or in part, the Commission's decision.

46. The plaintiff takes the view that the decision should also be annulled for infringement of Article 190 of the EC Treaty, which provides that decisions must be accompanied by a statement of reasons. Firstly, the Commission's decision was, according to the plaintiff, adopted on the basis of incorrect facts. Even if this had been the case (the opposite has been shown to be true in the foregoing), it would not result in infringement of Article 190, which merely requires decisions to be reasoned. Whether the reasons given are right or wrong cannot be examined under Article 190.

47. The plaintiff also claims that Article 190 was infringed by the Commission's failure clearly to state in its decision why it rejected what the plaintiff considered to be convincing evidence. The Commission disputes this.

48. According to the case-law of the Court, the extent of the duty to state the reasons on which a decision is based, laid down in Article 190, depends on the nature of the act in question and on the context in which it was adopted. Furthermore, regard must be had to the particular context in which decisions on the clearance of EAGGF accounts are drawn up. [13]

49. In this case, there was extensive correspondence between the Commission (the EAGGF) and the competent authorities. It must therefore be assumed that the authori-

13 — Case 327/85 *Netherlands* v *Commission* [1988] ECR 1065, paragraph 13, and Case C-54/91 *Germany* v *Commission* (cited in footnote 11), paragraphs 10 and 12.

ties were aware of the reasons for the Commission's subsequent decision. Furthermore, it is clear from the report of 14 January 1992 that there were doubts as to whether the goods had been declared for export in due time and whether customs were able to inspect the products. That is why supplementary documentation was requested. The summary report of October 1993 states as a reason for rejection of funding the fact that the export declaration was accepted after the goods had left the customs territory and that there was no firm evidence that the goods had been declared to customs to enable any inspections to be carried out. Furthermore, the Commission contends that in a telex dated 12 November 1992 it requested more specific evidence that the declaration had indeed been made on 25 November 1989 and that samples had been taken.

50. The reasons why funding ought to have been and indeed ultimately was refused and the evidence required of it must therefore have been clear to the plaintiff. In addition, the plaintiff could, in the course of its extensive correspondence with the Commission, have asked the latter for further details as to the evidence required of it.

51. Therefore, there does not appear to have been any infringement of Article 190 of the EC Treaty either.

Costs

52. Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay costs if they have been applied for in the successful party's pleadings.

E — Conclusion

53. I therefore propose that the Court should:

(1) dismiss the action;

(2) order the Kingdom of the Netherlands to pay the costs.