JUDGMENT OF THE COURT (Third Chamber)

17 January 2008 *

In Joined Cases C-37/06 and C-58/06,

REFERENCES for a preliminary ruling under Article 234 EC from the Finanzgericht Hamburg (Germany), made by decisions of 10 and 12 January 2006, received at the Court on 23 January and 3 February 2006 respectively, in the proceedings

Viamex Agrar Handels GmbH (C-37/06),

Zuchtvieh-Kontor GmbH (ZVK) (C-58/06)

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2007,

after considering the observations submitted on behalf of:

— Viamex Agrar Handels GmbH, by W. Schedl, Rechtsanwalt,

— Zuchtvieh-Kontor GmbH (ZVK), by K. Landry, Rechtsanwalt,

— the Hauptzollamt Hamburg-Jonas, by G. Seber, acting as Agent,

— the Swedish Government, by A. Falk, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2007,

gives the following

Judgment

1 The references for a preliminary ruling concern the validity of Articles 1 and 5(3) of Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport (OJ 1998 L 82, p. 19).

2 Those references were made in proceedings brought by Viamex Agrar Handels GmbH ('Viamex') and Zuchtvieh-Kontor GmbH (ZVK) ('ZVK') against the Hauptzollamt Hamburg-Jonas (Principal Customs Office, 'the Hauptzollamt') concerning refunds in respect of the export of live bovine animals to Lebanon and Egypt respectively.

Legal context

3 The second subparagraph of Article 13(9) of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187), as amended by Council Regulation (EC) No 2634/97 of 18 December 1997 (OJ 1997 L 356, p. 13) ('Regulation No 805/68'), provides that the payment of export refunds for live animals is subject to compliance with Community legislation concerning animal welfare and, in particular, the protection of animals during transport.

4 Detailed rules for the application of Regulation No 805/68 were laid down by Regulation No 615/98.

5 Article 1 of Regulation No 615/98 provides that the payment of export refunds for live bovine animals is to be subject to compliance, during the transport of the animals to the first place of unloading in the non-member country of final destination, with Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ 1991 L 340, p. 17), as amended by Council Directive 95/29/EC of 29 June 1995 (OJ 1995 L 148, p. 52) ('Directive 91/628'), and with the provisions of that regulation.

6 According to Article 2 of Regulation No 615/98, checks are to be carried out on animals exiting the customs territory of the European Community. An official veterinarian must verify and certify that the animals are fit for the intended journey in compliance with Directive 91/628, that the means of transport by which the animals are to leave the customs territory of the Community complies with that directive and that provisions have been made for the care of the animals during the journey in accordance with the directive.

7 Under Article 5(2) of Regulation No 615/98, applications for the payment of export refunds must be supplemented by proof that Article 1 of that regulation has been complied with, such proof to be furnished by the production of the control copy T 5 and the report drawn up by a control agency, together with the veterinary certificate.

8 Article 5(3) of Regulation No 615/98 provides, however, that the export refund is not to be paid for animals which died during transport or for animals for which

the competent authority considers, in the light of the documents referred to in Article 5(2), the reports on the checks referred to in Article 4 of that regulation and/or all other elements at its disposal concerning compliance with Article 1 of the regulation, that Directive 91/628 was not complied with.

9 Article 3(1) of Directive 91/628 provides that the Member States are to ensure that travelling times and rest periods as well as feeding and watering intervals comply with those laid down in Chapter VII of the Annex to the directive.

10 In the case of transport by road of live bovine animals, point 48(4)(d) of Chapter VII of the Annex to Directive 91/628 requires a sufficient rest period of at least one hour to be given after 14 hours of travel. After that rest period, the animals may be transported for a further 14 hours. The maximum transport time is therefore set at 29 hours. However, point 48(8) provides that, in the interests of the animals, the journey time may be extended by two hours, taking account in particular of the proximity of the place of destination.

11 In accordance with point 48(5) of Chapter VII of the Annex to Directive 91/628, the animals must be rested for a period of at least 24 hours after the journey time laid down.

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

12 In the first case in the main proceedings, Viamex submitted a declaration to the Hauptzollamt Kiel covering the export of 35 live bovine animals to Lebanon. By

notice of 1 February 2001, on the basis in particular of Articles 1 and 5(3) of Regulation No 615/98, the Hauptzollamt rejected Viamex's application for an export refund on the ground that examination of the route plan submitted by that company showed that the 24-hour rest period required under point 48(5) of Chapter VII of the Annex to Directive 61/628 had not been complied with. However, Viamex claimed that the failure to comply with that provision was due to the fact that the official veterinarian had instructed it to resume the journey before the 24-hour rest period had been observed. The Hauptzollamt took the view that, notwithstanding that fact, Viamex should have been aware of the rest periods required under Directive 91/628. Moreover, as a result of stops to record the details of an accident and for a heavy goods vehicle roadside check, Viamex failed to observe the maximum period for the second leg of the journey laid down in point 48(4)(d) of Chapter VII of the Annex to Directive 91/628.

13 In the second case in the main proceedings, ZVK submitted a declaration to the Hauptzollamt Bamberg covering the export of 32 live bovine animals to Egypt and applied for an export refund in that respect by way of advance payment, which the Hauptzollamt granted to it. However, by amendment notice of 1 September 2003, the Hauptzollamt decided to seek repayment of that refund, increased by 10%, on the ground in particular that the animals had travelled for more than 14 hours in breach of Directive 91/628. The second leg of the journey had in fact lasted 15 hours and 45 minutes. The fact that the second leg of the journey overran also has the result that ZVK breached the rule in point 48(5) of Chapter VII of the Annex to Directive 91/628, according to which, after a maximum journey time of 29 hours, animals must be unloaded, fed and watered and be rested for at least 24 hours.

14 Since the objections made by Viamex and ZVK to the notices of the Hauptzollamt of 1 February 2001 and 1 September 2003 respectively were not upheld, those companies decided to appeal before the Finanzgericht (Finance Court) Hamburg, which, considering that the outcome of the two cases before it depends on the interpreta-

tion of provisions of Community law, decided to stay proceedings and to refer the following questions, identically formulated in both cases, to the Court of Justice for a preliminary ruling:

'(1) Is Article 1 of Regulation … No 615/98 valid inasmuch as it links the grant of an export refund to compliance with Directive 91/628 …?

(2) If the first question should be answered in the affirmative: Is Article 5(3) of Regulation No 615/98, according to which export refunds are not to be paid for animals for which the competent authority considers, in the light of all elements at its disposal concerning compliance with Article 1 of Regulation No 615/98, that Directive [91/628] was not complied with, compatible with the principle of proportionality?'

15 By order of the President of the Court of Justice of 17 February 2006, Cases C-37/06 and C-58/06 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred for a preliminary ruling

Question 1

16 By its first question, the Finanzgericht Hamburg asks in essence whether Article 1 of Regulation No 615/98 is valid inasmuch as it makes payment of export refunds for live

animals subject to compliance with Directive 91/628. In particular, the Finanzgericht Hamburg entertains doubts as to whether there is a link between the rules on export refunds, which fall within the common agricultural policy, and Community animal-welfare legislation.

17 Article 1 of Regulation No 615/98 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport provides that, for the application of the second subparagraph of Article 13(9) of Regulation No 805/68, the payment of export refunds for live bovine animals falling within heading 0102 of the Combined Nomenclature is to be subject to compliance with, inter alia, Directive 91/628.

18 As the Advocate General observed at points 28 to 33 of his Opinion, it must be borne in mind, first, that the reference which is made by Article 1 of Regulation No 615/98 to Directive 91/628 and which links the rules on export refunds with the protection of animals during transport is a result of a choice made by the Council of the European Union in Regulation No 805/68, for which the Commission of the European Communities simply laid down the detailed implementing rules in Regulation No 615/98.

19 The purpose of Article 1 of Regulation No 615/98 is to implement Article 13(9) of Regulation No 805/68, according to which the payment of export refunds for live animals is subject to compliance with provisions laid down in Community legislation concerning animal welfare and, in particular, the protection of animals during transport. Article 13(9) was introduced in order to provide a remedy for practice in which account was not always taken of animal welfare during transport.

20 It is apparent from the two recitals in the preamble to Regulation No 2634/97, which led to the insertion of the last subparagraph in Article 13(9) of Regulation No 805/68, that experience acquired in implementing Directive 91/628 had shown that the welfare of live animals was not always respected in animal exports and that it was necessary, for practical reasons, to entrust the Commission with the task of laying down detailed implementing rules for the application of the rules on this matter. The fifth recital in the preamble to Regulation No 615/98 states in this regard that, in cases where it is established on the basis of the physical condition and/or state of health of a certain number of the animals in a consignment that the provisions on the protection of animals during transport have not been complied with, further measures should be taken which will act as an adequate deterrent and which should be applied uniformly.

21 Similar considerations, moreover, led the Community institutions to replace Directive 91/628 by Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 (OJ 2005 L 3, p. 1).

22 It should be noted, secondly, that the protection of animal welfare is a legitimate objective in the public interest, the importance of which was reflected, in particular, in the adoption by the Member States of the Protocol on protection and welfare of animals annexed to the Treaty establishing the European Community (OJ 1997 C 340, p. 110) and the signing by the Community of the European Convention for the protection of animals during international transport (revised) (Council Decision 2004/544/EC of 21 June 2004 on the signing of the European Convention for the protection of animals during international transport (revised), OJ 2004 L 241, p. 21). The importance of that objective is also reflected in Declaration No 24 on the protection of animals annexed to the Final Act of the Treaty on European Union.

23 Moreover, the Court has held on a number of occasions that the interests of the Community include the health and protection of animals (Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 13, and Case 131/86

United Kingdom v *Council* [1988] ECR 905, paragraph 17). In particular, it held that efforts to achieve objectives of the common agricultural policy cannot disregard requirements relating to the public interest such as the protection of the health and life of animals, requirements which the Community institutions must take into account in exercising their powers, in particular in relation to common organisations of the markets.

24 It follows that, by thus linking payment of export refunds for live bovine animals to compliance with Community animal-welfare legislation, the Community legislature seeks to uphold public-interest requirements and the pursuit of that objective cannot, of itself, lead to a finding that Article 1 of Regulation No 615/98 is invalid. The link thus made also has the advantage of ensuring that the Community budget does not finance exports made in breach of Community provisions on animal welfare.

25 However, the Finanzgericht Hamburg observes, in essence, that Regulation No 615/98 and Directive 91/628 pursue different objectives and that a regulation cannot thus refer in global terms to a directive which is, moreover, 'regrettably vague'.

26 It must be emphasised in this regard that the simple fact that payment of export refunds for live bovine animals is subject under Regulation No 615/98 to compliance with a number of conditions laid down in legislation pursuing objectives which are specific to that legislation cannot of itself be regarded as a ground of invalidity in relation to that regulation since, as was stated at paragraphs 22 to 24 above, objectives thus pursued are not only perfectly legitimate but also constitute obligations to which, under Community law, all the Member States and institutions are continuously and permanently subject in the formulation and implementation of the common agricultural policy.

27 It is true that, according to settled case-law, a directive cannot of itself impose obligations on an individual (see, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlucsoni and Others* [2005] ECR I-3565, paragraph 73; and Case C-80/06 *Carp* [2007] ECR I-4473, paragraph 20).

28 However, it cannot be precluded, in principle, that the provisions of a directive may be applicable by means of an express reference in a regulation to its provisions, provided that general principles of law and, in particular, the principle of legal certainty, are observed.

29 Moreover, the purpose of the general reference made by Regulation No 615/98 to Directive 91/628 is to ensure, for the purposes of the implementation of Article 13(9) of Regulation No 805/68, compliance with the relevant provisions of that directive on the welfare of live animals and, in particular, the protection of animals during transport. That reference, which lays down the conditions for the grant of refunds, cannot therefore be interpreted as covering all the provisions in Directive 91/628 and, in particular, those provisions which have no connection with the principle objective pursued by that directive.

30 Consequently, it cannot properly be held, as was submitted by the applicant in the main proceedings in Case C-58/06, that that reference is contrary to the principle of legal certainty in so far as it covers all the provisions of Directive 91/628.

31 It is apparent from the foregoing arguments that consideration of the first question has disclosed nothing capable of casting doubt on the validity of Article 1 of Regulation No 615/98.

Question 2

32 By its second question, the Finanzgericht Hamburg asks, in essence, whether Article 5(3) of Regulation No 615/98 is compatible with the principle of proportionality inasmuch as, according to the wording of that provision, any infringement of a provision of Directive 91/628 is automatically, and irrespective of whether animal welfare is in fact adversely affected, penalised by the total forfeiture of the export refund.

33 First of all, the principle of proportionality, which is a general principle of Community law and has been affirmed on numerous occasions in the case-law of the Court of Justice, in particular with regard to common agricultural policy (see, inter alia, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81, and Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, paragraph 97), must be observed as such both by the Community legislature and by the national legislatures and courts which apply Community law. That principle must also be observed by the competent national authorities in the application of Regulation No 615/98.

34 Next, it should be borne in mind that, while being bound by the principle of proportionality, the Community legislature enjoys a wide discretionary power in matters concerning the common agricultural policy, corresponding to the political responsibilities given to it by Articles 34 EC to 37 EC. Consequently, judicial review must

be limited to verifying that the measure in question is not vitiated by any manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of its discretionary power (see, to that effect, *Jippes and Others*, paragraph 80).

35 The principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and *Jippes and Others*, paragraph 81).

36 Finally, as regards judicial review of compliance with that principle, bearing in mind the wide discretionary power enjoyed by the Community legislature in matters concerning the common agricultural policy, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue (see *Fedesa and Others*, paragraph 14, and *Jippes and Others*, paragraph 82). Thus, the criterion to be applied is not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate (*Jippes and Others*, paragraph 83).

37 In the present case, bearing in mind the wording of Articles 1 and 5(3) of Regulation No 615/98 and the purpose of that regulation, compliance with Directive 91/628 constitutes a prerequisite for payment of export refunds. Article 5(3) of Regulation No 615/98 establishes that the consequence of failing to comply with the provisions of that directive is forfeiture of the right to the refund, leading to non-payment. It is

therefore necessary to determine whether the conditions for granting export refunds laid down in Article 5(3) of Regulation No 615/98 are in conformity with the principle of proportionality.

38 It should be noted in that regard that the competent authorities of the Member States can determine the amount of export refunds only in the two clearly distinct situations set out in Article 5(3) of Regulation No 615/98. In the first situation, where the death of animals is attributable to failure to comply with Directive 91/628, the Community legislature does not confer any discretion upon the competent authorities, since it expressly provides that the refund is not to be paid. On the other hand, in the second situation, where those authorities consider that Directive 91/628 has not been complied with, but that failure has not resulted in the death of animals, the Community legislature confers a certain degree of discretion upon the competent authorities to determine whether it is appropriate, as a result of non-compliance with a provision of that directive, for the export refund to be forfeited, reduced or retained.

39 However, such discretion is not unlimited, since it is circumscribed by Article 5 of Regulation No 615/98. It is only in the light of the documents referred to in Article 5(2), the reports on the checks referred to in Article 4 of that regulation and/or all other elements at its disposal concerning compliance with Article 1 of the regulation that the competent authority may conclude that Directive 91/628 has not been complied with.

40 The documents referred to in Article 5 of Regulation No 615/98 and the reports referred to in Article 4 of that regulation all relate to the physical condition and/or the health of animals during transport. The competent authority can therefore conclude that Directive 91/628 has not been complied with only on the basis of documents relating to the health of the animals which must be provided by the exporter,

such as the control copy T 5, which makes it possible to verify, inter alia, whether the animals were fit to travel and whether the means of transport complied with the provisions of that directive.

41 That interpretation cannot be affected by the wording of Article 5(3) of Regulation No 615/98, according to which the competent authority may also conclude that Directive 91/628 has not been complied with in the light of all other elements at its disposal. In fact, that wording must also be interpreted as referring to elements which have some bearing on the welfare of the animals.

42 In those circumstances, Article 5(3) of Regulation No 615/98 must be interpreted as meaning that non-compliance with Directive 91/628 which may result in a reduction in or forfeiture of export refunds relates to the provisions of that directive which have an impact on the welfare of animals, that is to say, their physical condition and/or their health, and does not relate the provisions of that directive which, in principle, have no such impact.

43 The conditions laid down in Article 5(3) of Regulation No 615/98 are therefore consonant with the principle of proportionality.

44 It is for the competent authority to assess whether a failure to comply with a provision of Directive 91/628 has had an impact on animal welfare, whether such a failure can, where appropriate, be remedied and whether it must result in the export refund being forfeited, reduced or retained. It is also for that authority to decide whether the export refund must be reduced on a pro rata basis according to the number of

animals which may, in its view, have suffered as a result of non-compliance with Directive 91/628 or whether that refund should not be paid since the failure to comply with a provision of that directive has had an impact on the welfare of all the animals.

45 In the light of all the foregoing considerations, it must be concluded that the examination of the conditions for granting export refunds has disclosed nothing which would make it possible for Article 5(3) of Regulation No 615/98 to be regarded as manifestly inappropriate in terms of the objective pursued, namely that of ensuring the protection of live animals during transport under the rules on export refunds.

46 It follows that consideration of the second question has disclosed nothing capable of casting doubt on the validity of Article 5(3) of Regulation No 615/98 in the light of the principle of proportionality. It is for the Finanzgericht Hamburg to assess whether the competent authorities have applied the relevant provisions of Regulation No 615/98 in a manner that is consonant with that principle.

Costs

47 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 (Third Chamber) hereby rules:

1. **Consideration of the first question has disclosed nothing capable of casting doubt on the validity of Article 1 of Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport.**

2. **Consideration of the second question has disclosed nothing capable of casting doubt on the validity of Article 5(3) of Regulation No 615/98 in the light of the principle of proportionality. It is for the Finanzgericht Hamburg to assess whether the competent authorities have applied the relevant provisions of Regulation No 615/98 in a manner that is consonant with that principle.**

[Signatures]