if the dispatch or export formalities have not been completed. The completion of formalities at the office of departure plays a vital role in the system for granting export refunds and cannot be replaced by checks carried out at the office of destination or any office in another Member State. Failure to complete those formalities may not be regarded as a mere procedural flaw.

REPORT FOR THE HEARING
delivered in Case 321/86 *

I — Facts and procedure

1. *Legal background*

Article 10 of Commission Regulation (EEC) No 223/77 provides that proof that the conditions prescribed by a Community measure as to the use and/or destination of goods imported into, exported from, or moving within the Community have been complied with is to be furnished by the production of Control Copy T No 5.

Under Article 12 of that regulation, when the Community transit procedure is used the Control Copy T No 5 is to be issued by the office of departure.

Article 13b of the regulation, inserted by Commission Regulation (EEC) No 1209/85 of 3 May 1985 amending for the 13th time Regulation (EEC) No 223/77 and for the third time Regulation (EEC) No 1664/81 (Official Journal 1985, L 124, p. 19), is worded as follows:

'(1) Control Copy T No 5 may be issued retroactively on condition that:

the person concerned is not responsible for the failure to apply for or to issue this document when the goods were dispatched,

the person concerned furnishes proof that the Control Copy T No 5 relates to the goods in respect of which the dispatch or export formalities were completed,

the person concerned produces the documents required for the issue of the Control Copy T No 5,

it is established to the satisfaction of the competent customs authorities that the retroactive issue of Control Copy T No 5 cannot give rise to the securing

* Language of the Case: German.

of financial benefits which would not be due considering the transit procedure which may have been used, the customs status of the goods and their use and/or destination.'

According to the second recital in the preamble to Regulation No 1209/85, Article 13 b is intended to amend the provisions concerned in the light of the case-law of the Court of Justice.

In its judgment in Case 302/81 (*Eggers* v *Hauptzollamt Kassel* [1982] ECR 3443), the Court considered that Article 11 (5) of Commission Regulation No 1380/75 of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1975, L 139, p. 37), as amended by Regulation No 1498/76 of 25 June 1976 (Official Journal 1976, L 167, p. 28), must be regarded as embodying and recognizing a general principle whereby procedural flaws which are beyond the control of the person to whom compensatory amounts should normally be granted must not have effects which are unfavourable to him. Consequently the Court held that the Member States are both entitled and required to issue retroactively Control Copy T No 5 provided for by Article 10 of Regulation No 223/77 in order to enable proof to be furnished pursuant to Article 11 (2) of Regulation No 1380/75 concerning the payment by the exporting Member State of compensatory amounts which should be granted by the importing Member State where the failure to apply for or to issue the document when the goods were consigned was beyond the control of the person concerned and that person is able to produce the supporting documents required for the issue of the control copy.

2. *Background to the main proceedings*

In June 1979 Töpfer & Co. directed a transport undertaking to deliver a consignment of white sugar intended for export from Germany to Norway and to complete the customs formalities. The driver of the lorry carrying the goods was given a T No 5 form which had been completed by Töpfer. When the lorry left Germany that form was to be signed and stamped by the Hauptzollamt (Principal Customs Office) Hildesheim, thus becoming a 'Control Copy T No 5'. However, the lorry did not stop at the Hildesheim customs office and the driver presented the consignment for export on 10 June 1979 at the Danish customs office in Frederikshavn. The sugar was imported into Norway on 20 June 1979. Form T No 5, stamped and signed by the Danish office, was sent to the Hamburg-Jonas customs office, where it was registered on 14 June 1979.

In order to obtain an export refund as provided for in the Community rules on sugar (Regulation (EEC) No 192/75 of the Commission of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products, Official Journal 1975, L 25, p. 1), Töpfer needed a control copy issued by the German customs office. The company therefore requested the Hauptzollamt Hildesheim to issue it retroactively, on the basis of the information certified by the Danish office, but the Hauptzollamt refused that request. The action contesting that decision brought by Töpfer before the Finanzgericht (Finance Court) Hamburg was dismissed. The Finanzgericht stated that a control copy could only be issued retroactively if all customs export formalities had

been completed, which was precisely what had not occurred. Töpfer appealed against that decision to the Bundesfinanzhof (Federal Finance Court), relying on the principles set out in the *Eggers* judgment (cited above).

3. *Questions referred to the Court for a preliminary ruling*

By an order of 25 November 1986 the Bundesfinanzhof decided to stay the proceedings and refer the following two questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) In connection with the dispatch of goods for which export refunds are available on exportation, is the Community law in force in June 1979 and in particular Articles 10 and 12 of Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (Official Journal 1977, L 38, p. 20) to be interpreted to the effect that the retroactive issue of Control Copy T No 5 is dependent upon completion of the dispatch or export formalities?

(2) If the first question is answered in the affirmative: may the customs office of departure where the transit formalities (dispatch formalities) required by customs law to be completed issue Control Copy T No 5 retroactively only if those formalities were completed at that office, or is it sufficient if the export formalities were completed at another customs office — even an office in another Member State?'

In its order referring those questions to the Court, the Bundesfinanzhof asks whether it should follow Article 13 b (1) of Regulation No 223/77 rather than the judgment in *Eggers*. First, that judgment concerned the grant of monetary compensatory amounts and not, as does this case, export refunds. Secondly, the decision was arrived at on the basis that export formalities had already been completed before the control copy was issued by the German customs office, whereas it is not clear that such a finding can be made in this case.

Finally, the Bundesfinanzhof asks whether the authorities normally competent, that is to say the authorities where the customs formalities should have been completed and the control copy obtained, are also competent to issue the control copy retroactively if the customs formalities have been completed at the offices of the customs authorities of another Member State.

4. *Procedure*

The order of the national court was received at the Court Registry on 19 December 1986. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by Töpfer & Co., the plaintiff in the main proceedings, represented by K. Landry, Rechtsanwalt, Hamburg, by the Hauptzollamt Hildesheim, the defendant in the main proceedings, represented by its Director, and by the Commission of the European Communities, represented by J. Sack, a member of its Legal Department, acting as Agent.

By a decision of 17 June 1987 pursuant to Article 95 (1) and (2) of the Rules of

Procedure, the Court assigned the case to the Fourth Chamber.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

As regards the first question, Töpfer & Co., the plaintiff, observes that the *Eggers* case concerned exports effected in 1979, as does the present case. In *Eggers*, too, customs formalities had not been completed in the Federal Republic of Germany. That finding leads the plaintiff to conclude that the question is in fact seeking to establish whether Regulation No 1209/85 may be applied retroactively. On that point, the plaintiff asserts that according to the case-law of the Court the principle of legal certainty precludes the retroactive application of a regulation. The plaintiff adds that neither the wording nor the purpose of Regulation No 1209/85 indicate that it should govern events which occurred before its adoption.

Furthermore, the version of Regulation No 223/77 applicable in 1979 cannot be interpreted in the same way as the amended version. It would therefore seem preferable to adhere to the unamended regulation as interpreted by the Court. In the *Eggers* case the Court set out two conditions for entitlement to the retroactive issue of the control copy; they did not include the requirement that the person concerned must prove that he has completed export or dispatch formalities, as Regulation No 223/77 has required since 1 July 1985.

The plaintiff acknowledges that the person concerned must produce the necessary supporting documents, but in order to establish which documents are required for the retroactive issue of the control copy the purpose of retroactive issue must be considered. According to Regulation No 192/75 laying down detailed rules for the application of export refunds in respect of agricultural products, the control copy is simply documentary evidence that the goods being exported have left the geographical territory of the Community. Under Article 4 (1) of that regulation payment of the export refund is conditional solely on the provision of such proof. The reply to the first question should therefore be in the negative.

With regard to the second question, Töpfer observes that pursuant to Article 12 (1) of Regulation No 223/77, the office of departure is responsible for the issue of control copies. However, that same article provides that the control as to the use and/or destination provided for or prescribed is the task of the appropriate customs office of the Member State of destination. In the case of export outside the territory of the Community that is the office at the point of exit from Community territory. Article 12 therefore presupposes that in the case of export for which a refund is payable the customs office of departure and that at the point of exit are situated in different Member States. It follows that the retroactive issue of a control copy by the customs office of departure does not depend on completion there of the dispatch formalities.

The Hauptzollamt Hildesheim, the defendant, submits observations only on the second question. It considers that the control copy may be issued retroactively only by the office of departure in the Member State in which the transit formalities for export to a third country were completed. If those formalities could also be completed at a customs office of another Member State it would be impossible to prevent multiple applications for export refunds.

The Commission explains first of all that in the area of export refunds attempts are frequently made to commit irregularities at the expense of the EAGGF. Consequently, very strict checks concerning the condition and nature of the goods are necessary. Normally an export declaration has a purely statistical function and it is not necessary to undertake a detailed check of the goods exported. However, when entitlement to a refund is claimed, customs examination ought to be carried out in full knowledge that the exporter intends to apply for a refund. According to the German legislation it is on presentation of the control copy to the customs office of departure that the person making the declaration expresses his intention to proceed to export the goods in question.

As regards the first question, the Commission believes that completion of dispatch or export formalities constitutes the minimum requirement for the issue of a control copy, without which it would not be possible to obtain proof that the goods had been exported. The completion of dispatch or export formalities without expressing an intention to apply for a refund does not suffice for the retroactive grant of a control copy, because in such circumstances customs examination will not have been sufficiently strict. The Commission does not, however, exclude the possibility that the intention to claim an export refund may be expressed sufficiently clearly other than by submitting Form T No 5; in such a situation the retroactive issue of the control copy could be envisaged, provided that the failure to issue it was beyond the control of the person concerned and the competent customs authorities were certain that the export operation was quite in order.

Consequently, the Commission suggests that the reply to the first question should be that:

'The simple completion of dispatch and export formalities on the exportation of a product to a third country does not, where the intention to apply for an export is not expressed sufficiently clearly to the customs authorities at the time, give rise to entitlement to the retroactive issue of Control Copy T No 5, with which payment of such an export refund may be sought. However, if the intention to apply for an export refund has been expressed sufficiently clearly to the competent customs authorities other than by submission of a control copy, those authorities are both entitled and required to issue a control copy retroactively where the failure to issue it was beyond the control of the exporter and the customs authorities are certain that the export operation is quite in order.'

As regards the second question, the Commission distinguishes two situations. In so far as that question refers to the completion of different operations within a Member State, it is immaterial in which customs office the formalities were completed. However, when export formalities have been completed in a different Member State, Article 13 of Regulation No 192/75 is applicable. It provides that the refund is to be paid by the authorities of the Member State in which the export formalities were completed. Thus that Member State is responsible for the ultimate control of the payment of the refund. Retroactive issue of the control copy in another Member State would allow certain control mechanisms provided for by the common agricultural rules to be circumvented.

In the Commission's view, the reply to the second question should therefore be as follows:

'Where export formalities have been completed in the same Member State in a customs office other than that in whose jurisdiction the dispatch of the goods is initiated, the reply to the first question is equally applicable. However, if export formalities are completed in a different Member State, Control Copy T No 5 cannot be issued retroactively if that would lead to non-compliance with certain control provisions of the common agricultural rules, in particular Article 13 of Regulation (EEC) No 192/75.'

T. Koopmans
Judge-Rapporteur