JUDGMENT OF THE COURT (Sixth Chamber)

30 June 2011 *

In Case C-485/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Germany), made by decision of 27 October 2009, received at the Court on 1 December 2009, in the proceedings

Viamex Agrar Handels GmbH

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Sixth Chamber),

composed of A. Rosas, acting as President of the Sixth Chamber, U. Lõhmus (Rapporteur) and P. Lindh, Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2010,

after considering the observations submitted on behalf of:

— Viamex Agrar Handels GmbH, by K. Landry, Rechtsanwalt,

— the European Commission, by F. Wilman and B. Schima, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point 48(5) of Chapter VII of the Annex to 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 Article 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 The reference has been made in proceedings between Viamex Agrar Handels GmbH ('Viamex') and the Hauptzollamt Hamburg-Jonas (Principal Customs Office, Hamburg-Jonas) concerning refunds in respect of the export of live bovine animals to Egypt.

Legal context

European Union law

3 The second subparagraph of Article 13(9) of Council Regulation (EEC) No 805/68 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, with that concerning 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 that regulation and with Directive 91/628.

6 Article 5(3) of Regulation No 615/98 provides that the export refund is not to be paid for animals which have died during transportation or for animals in respect of which the competent authority considers, in the light of the documents referred to in Article 5(2) of the regulation, the reports on the checks referred to in Article 4 thereof and/or all other elements at its disposal concerning compliance with Article 1 of the regulation, that Directive 91/628 has not been complied with.

7 The ninth recital in the preamble to Directive 91/628 states that 'the rules proposed must ensure more effective protection of animals during transport'.

8 Article 2(2) of Directive 91/628 contains the following definitions:

'(a) "means of transport", those parts of road vehicles, rail vehicles, ships and aircraft used for loading and carrying animals, as well as containers for land, sea or air transport;

(b) "transport", any movement of animals, effected by a means of transport, which involves loading and unloading the animals;

...

(g) "journey", transport from place of departure to place of destination;

(h) "rest period", a continuous period in the course of a journey during which animals are not being moved by a means of transport;

…'

9 Point 48 of Chapter VII of the Annex to Directive 91/628, headed 'Watering and feeding interval, journey times and resting periods', states:

'1. The requirements laid down in this Chapter apply to the movement of the animal species listed in Article 1(1)(a), except in the case of air transport, the requirements for which are laid down in Chapter I(E), points 27 to 29.

2. Journey times for animals belonging to the species referred to in [paragraph] 1 shall not exceed eight hours.

3. The maximum journey time in [paragraph] 2 may be extended where the transporting vehicle meets the following additional requirements:

…

— the transporting vehicle carries appropriate feed for the animal species transported and for the journey time,

…

4. The watering and feeding intervals, journey times and rest periods when using road vehicles which meet the requirements in [paragraph] 3 are defined as follows:

   (a) … calves, lambs, kids and foals … and … piglets …;

   (b) Pigs …;

   (c) Domestic solidungulates …;

   (d) All other animals of the species referred to in [paragraph] 1 must, after 14 hours of travel, be given a rest period of at least one hour sufficient for them in particular to be given liquid and if necessary fed. After this rest period, they may be transported for a further 14 hours.

5. After the journey time laid down, animals must be unloaded, fed and watered and be rested for at least 24 hours.

6. Animals must not be transported by train if the maximum journey time exceeds that laid down in [paragraph] 2. However, the journey times laid down in [paragraph] 4 shall apply where the conditions laid down in [paragraphs] 3 and 4, except for rest periods, are met.

7. (a) Animals must not be transported by sea if the maximum journey time exceeds that laid down in [paragraph] 2, unless the conditions laid down in [paragraphs] 3 and 4, apart from journey times and rest periods, are met.

(b) In the case of transport by sea on a regular and direct link between two geographical points of the Community by means of vehicles loaded on to vessels without unloading of the animals, the latter must be rested for 12 hours after unloading at the port of destination or in its immediate vicinity unless the journey time at sea is such that the voyage can be included in the general scheme of [paragraphs] 2 to 4.

8. In the interests of the animals, the journey times in [paragraphs] 3, 4 and 7(b) may be extended by two hours, taking account in particular of proximity to the place of destination.

…'

National law

10 Paragraph 24 of the Regulation on the protection of animals during transport (Tierschutztransportverordnung) of 25 February 1997 (BGBl. I, p. 348), in force at the material time in the main proceedings, provided as follows with regard to restrictions on transport:

'1. If the place of departure and the place of destination are situated on national territory, journey times to the slaughterhouse for farm animals may not be longer than eight hours. …

2. In cases other than the transportation of farm animals described in subparagraph 1 above, the carrier and the transport manager must ensure that after a journey time of a maximum of eight hours the farm animals are unloaded and that during a rest period of 24 hours they are fed and watered; this must take place at a staging point which has been approved by the competent authority …

…

5. The provisions of subparagraphs 2 and 3, in conjunction with Annex 2 on unloading and rest periods, shall not apply to rail and sea transport [of animals].'

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

11 On 12 October 2000, Viamex made a declaration to the Hauptzollamt Itzehoe concerning the export of 20 live bovine animals to Egypt and, on 26 October 2000, applied to the Hauptzollamt Hamburg-Jonas ('the Hauptzollamt') for the grant of an export refund. The animals were transported by rail from Husum (Germany) to Rasa (Croatia) and were then loaded on to a ship.

12 It is apparent from the order for reference that, according to the route plan, the animals were transhipped in Husum on 12 October 2000 between 11.30 and 18.00. The train left Husum at about 20.10. After a stop on 13 October 2000 in Jesenice (Slovenia), where the animals were fed and watered between 21.00 and 22.30, the train carrying the animals arrived in Rasa on 14 October 2000 at about 5.30.

13 By decision of 9 August 2005, the Hauptzollamt, after examining the route plan concerned, turned down the application for a refund on the ground that the duration of the rail journey had been 33 hours and 20 minutes and had thus exceeded the maximum journey time of 28 hours permitted under point 48 of Chapter VII of the Annex to Directive 91/628.

14 In its objection to that decision, Viamex claimed inter alia that since the journey time by rail had complied with the national provisions it was a breach of good faith to refuse to grant Viamex the export refund.

15 By decision of 24 May 2006, the Hauptzollamt dismissed that objection on the ground that, when checking journeys by rail, the European Commission established that the average journey time from Husum to Rasa was 36 hours and 35 minutes, whilst according to the timetables for the transportation of animals submitted to the veterinary authorities by the Cargo Department of German Railways the timing for the journey at issue in the main proceedings was 34 hours and 41 minutes. It would appear, therefore, that not only had the journey exceeded the maximum journey time laid down in Directive 91/628 but also the rest period of 24 hours required by that directive once the maximum journey time had been reached had not been complied with either.

16 In its action brought on 26 June 2006, Viamex claimed again that, according to the national provisions transposing Directive 91/628 into German law, the provisions relating to rest periods and journey times do not apply to transport by rail.

17 The Finanzgericht Hamburg (Finance Court, Hamburg) has held that the outcome of the case in the main proceedings depends on whether Viamex infringed the rules laid

down in point 48(5) of Chapter VII of the Annex to Directive 91/628, which states that, after the journey time laid down, animals must be unloaded, fed and watered and be rested for at least 24 hours. That court questions whether it is possible to infer from the context of that provision that it applies only to transport by road.

18 Moreover, the national court seeks to ascertain whether, in situations such as that in the main proceedings, it is under an obligation to examine whether the competent national authority has applied Article 5(3) of Regulation No 615/98 in a manner consistent with the principle of proportionality. In that regard, it considers that it is apparent from the case-law of the Court that certain breaches, in particular those which have not resulted in the death of animals, do not automatically lead to loss of entitlement to an export refund, so the competent authority must decide whether the refund should be retained, reduced or forfeited in order to comply with that principle.

19 It was in those circumstances that the Finanzgericht Hamburg decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does point 48(5) of Chapter VII of the Annex to Directive 91/628 … apply to rail transport?

(2) In situations in which the breach of Directive 91/628 has not resulted in the death of the animals, are courts generally under an obligation to examine whether the competent authority of the Member State applied Article 5(3) of [Regulation No 615/98] in a manner consistent with the principle of proportionality?'

Consideration of the questions referred

The first question

20 By its first question the national court asks the Court, in essence, whether point 48(5) of Chapter VII of the Annex to Directive 91/628 applies to rail transport.

21 Viamex adopts a systematic interpretation of that chapter and claims that point 48(5) thereof does not apply to rail transport. In its view, according to that way of interpreting the chapter, paragraphs 2 to 5 of point 48 refer to transport by road, paragraphs 6 and 7 to transport by rail and sea, respectively, and paragraphs 8 and 9 to any means of transport.

22 It should be stated in that regard that point 48(5) of Chapter VII of the Annex to Directive 91/628 provides in general terms that, after the journey time laid down, animals must be unloaded, fed and watered and be rested for at least 24 hours.

23 There is nothing in that paragraph 5 or in any other provision of Directive 91/628 to imply that the European Union legislature sought to restrict the scope of that paragraph solely to road transport.

24 It is apparent from the wording of the various paragraphs of point 48 of Chapter VII of the Annex to Directive 91/628 that those paragraphs where the scope is limited to one particular means of transport contain an express reference to that effect. Thus, it is clear from the wording of paragraphs 4, 6 and 7 of point 48 that they apply to road, rail and sea transport, respectively. Since point 48(5) contains no such express reference it must be considered to apply to all means of transport.

25 In those circumstances, it must be held that point 48(5) of Chapter VII of the Annex to the directive applies also to rail transport.

26 First, that interpretation is confirmed by the scheme of the provisions of Directive 91/628. It follows from the definitions of the terms 'transport' and 'rest period' given in Article 2(2) of that directive that periods between the time when animals are loaded on to and unloaded from a means of transport are all necessarily periods of either 'transport' or 'rest'. However, since it is not disputed that the rules on maximum journey time, laid down in paragraphs 2 and 3 of point 48 of Chapter VII of the Annex to Directive 91/628, apply inter alia to rail transport, it must be held that the rules relating to the rest period after a period of transport also apply to that means of transport.

27 Secondly, that interpretation is supported by the objective of Directive 91/628, which, according to the ninth recital in the preamble, is to ensure more effective protection of animals during transport.

28 In the light of the above considerations, the answer to the first question must be that point 48(5) of Chapter VII of the Annex to Directive 91/628 applies inter alia to rail transport.

The second question

29 By its second question the national court asks in essence whether, in situations in which the breach of Directive 91/628 has not resulted in the death of the animals being transported, the competent authorities and courts of the Member States, when carrying out their checks or review, are required to apply Article 5(3) of Regulation No 615/98 in a manner consistent with the principle of proportionality.

30 As a preliminary point, it should be noted that the Court held in paragraph 38 of Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handels and ZVK* [2008] ECR I-69, in proceedings between the same parties, 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 European Union legislature does not confer any discretion upon the competent authority, since it expressly provides that the refund is not to be paid. On the other hand, in the second situation, where that authority considers that that directive has not been complied with, but that failure has not resulted in the death of animals, the European Union legislature confers a certain degree of discretion upon the competent authority 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.

31 With regard to that second situation, the Court has held that 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 (see, to that effect, *Viamex Agrar Handels and ZVK*, paragraph 44, and Case C-96/06 *Viamex Agrar Handels* [2008] ECR I-1413, paragraph 51).

32 In that regard, the Court has held that non-compliance with Directive 91/628 which may result in a reduction in or forfeiture of export refunds relates only 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 to the provisions of that directive which, in principle, have no such impact (*Viamex Agrar Handels and ZVK*, paragraph 42).

33 The Court has also held that it is for the competent authority to assess whether a failure to comply with a provision of Directive 91/628 can be remedied and whether such failure 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 inevitably had an impact on the welfare of all the animals (see, to that effect, *Viamex Agrar Handels and ZVK*, paragraph 44, and *Viamex Agrar Handels*, paragraph 51).

34 Viamex considers that it is clear from the case-law cited above that the effect of the application of the principle of proportionality is that the competent authorities and courts of the Member States must introduce a system of graded penalties making the grant of export refunds conditional upon no actual harm being done to the welfare of the animals during transport.

35 That line of argument cannot be accepted.

36 The Court held in paragraph 47 of *Viamex Agrar Handels* that the wording of Article 5(3) of Regulation No 615/98 clearly shows that the European Union legislature made the payment of export refunds conditional upon compliance with Directive 91/628, regardless of any proof of actual and specific injury suffered by the animals during their transportation.

37 In this respect, the welfare of the animals is liable to be endangered and can no longer be guaranteed once the provisions of Directive 91/628 concerning their health are no longer complied with. Also, in practice, it is not always possible for the competent authority to ascertain that the animals have actually suffered, or been injured, as a result of non-compliance with those provisions (see, to that effect, *Viamex Agrar Handels*, paragraphs 48 and 49).

38 It follows from the case-law cited in paragraphs 32 and 33 and in paragraphs 36 and 37 above that examination by the competent authority should, in the first place, ascertain whether the provision of Directive 91/628 which has not been complied with concerns the welfare of the animals. If that is the case, it is necessary, in the second place, to determine whether such non-compliance concerned the welfare of all the animals being transported or only a limited number of those for which an export refund has been applied for. In the third place, the competent authority should check whether the non-compliance established can be remedied. It is on the basis of that evidence that that authority will decide whether non-compliance with a provision of Directive 91/628 must result in the export refund being forfeited, reduced or retained.

39 In the event that that authority reaches the conclusion that the breach of the provisions of Directive 91/628 does concern the welfare of all the animals being transported, it is required to refuse the export refund without the need for evidence that the animals suffered actual and specific injury whilst being transported.

40 However, if the breach of the provisions of Directive 91/628 has had an impact on only some of the animals, the competent authority must decide whether the export refund must be reduced on a pro rata basis according to the number of animals which may have been affected by that breach. In any event, the refund is not granted for animals in respect of which the provisions of Directive 91/628 have not been complied with.

41 The answer to the second question must therefore be that, in situations in which the breach of Directive 91/628 has not resulted in the death of the animals being transported, the competent authorities and courts of the Member States, when carrying out their checks or review, are required to apply Article 5(3) of Regulation No 615/98 in a manner consistent with the principle of proportionality, by refusing to pay the export refund for animals in respect of which the provisions of that directive concerning their welfare have not been complied with.

Costs

42 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 (Sixth Chamber) hereby rules:

1. **Point 48(5) of Chapter VII of the Annex to 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, as amended by Council Directive 95/29/EC of 29 June 1995, applies inter alia to rail transport.**

2. **In situations in which the breach of Directive 91/628, as amended by Directive 95/29, has not resulted in the death of the animals being transported, the competent authorities and courts of the Member States, when carrying out their checks or review, are required to apply Article 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 in a manner consistent with the principle of proportionality, by refusing to pay the export refund for animals in respect of which the provisions of that directive concerning their welfare have not been complied with.

[Signatures]