JUDGMENT OF THE COURT (Sixth Chamber)
12 July 1990 *

In Case C-155/89

REFERENCE to the Court under Article 177 of the EEC Treaty by the cour d'appel (Court of Appeal), Paris, for a preliminary ruling in the proceedings pending before that court between

The Belgian State

and

Philipp Brothers SA, a company incorporated under French law whose registered office is in Paris,

on the interpretation and validity of Articles 25 and 31 of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1979, L 317, p. 1),

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, F. A. Schockweiler, G. F. Mancini, T. F. O'Higgins and M. Díez de Velasco, Judges,

Advocate General: J. Mischo
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

the Belgian State, by Benoît Cambier and Luc Cambier, of the Brussels Bar,

* Language of the case: French.

Philipp Brothers SA, by Jean-François Bellis and Jean-Yves Art, of the Brussels Bar, and by François Sage, of the Paris Bar,

the Commission of the European Communities, by Denise Sorasio, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument by the Belgian State, Philipp Brothers SA and the Commission at the hearing on 27 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 3 May 1990,

gives the following

Judgment

1 By interlocutory judgment of 3 February 1989, which was received at the Court on 2 May 1989, the cour d'appel, Paris, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation and validity of Articles 25 and 31 of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1979, L 317, p. 1).

2 Those questions were raised in a dispute between the Belgian State and the French company Philipp Brothers SA concerning the payment of a sum corresponding to the amount of the securities provided by Philipp Brothers to guarantee the exportation of two consignments of common wheat to Norway and Finland which were subsequently released.

3 According to Article 25(1) of Regulation No 2730/79, in the version which was in force at the material time, the amount of the export refund may be advanced in whole or in part by the Member States to the exporter on condition that he provides security equal to the amount advanced plus 15%. Article 25(2) provides that the security is to be forfeited in proportion to the quantities of products in respect of which the proof required by the regulation is not furnished within the prescribed period. However, where such proof cannot be furnished by reason of *force majeure*, the additional 15% is not to be charged.

4 Article 20(3) of the regulation provides that proof of importation in the non-member country for which the refund is prescribed is to be furnished by the production of the relevant customs document or a certified true copy or photocopy thereof or the customs entry certificate. Article 20(4) refers to a number of substitute documents which may be submitted if the documents specified in Article 20(3) cannot be produced or are considered inadequate. Furthermore, Article 20(5) requires the exporter to produce a copy or photocopy of the transport document in all cases.

5 It should also be borne in mind that Article 31(1) of Regulation No 2730/79 lays down a period of six months, except in cases of *force majeure*, for the submission of the relevant documents for payment of the refund. That period was raised to 12 months by Article 1(4) of Commission Regulation (EEC) No 1663/81 of 23 June 1981 amending for the fifth time Regulation No 2730/79, amending for the second time Regulation (EEC) No 798/80 and amending Regulation (EEC) No 52/81 as regards in particular the period for submission of the documents necessary for certain payments to be made (Official Journal 1981, L 166, p. 9).

6 Moreover, Article 31(2) of Regulation No 2730/79 provides that, where it has not been possible to submit the relevant customs document, the customs entry certificate or the substitute documents (hereinafter referred to as 'the customs documents') within the prescribed periods, although the exporter has acted with all due diligence in order to obtain them in time, he may be granted an extension of time for the submission of those documents. That possibility was subsequently extended to delays in the submission of the transport documents by Article 1(14) of Commission Regulation (EEC) No 568/85 of 4 March 1985 amending for the

10th time Regulation No 2730/79 (Official Journal 1985, L 65, p. 5), which entered into force after the material events.

7 In January 1981 Philipp Brothers obtained from the Belgian intervention agency, the Office central des contingents et des licences (hereinafter referred to as 'the OCCL') two licences for the exportation of common wheat to Finland and Norway. On 18 March 1981 Philipp Brothers received from the OCCL advances corresponding to the total amount of the refunds fixed in advance in respect of the two operations, namely BFR 4 351 899 and BFR 8 298 816 respectively. Philipp Brothers provided the requisite securities through a bank.

8 On 24 April 1981 the OCCL released the security relating to the exports to Norway and on 3 February 1982 the security relating to the exports to Finland. The OCCL later contended that the securities had been released on account of an administrative error. Taking the view that Philipp Brothers was under an obligation to furnish proof that the two operations had taken place, the OCCL requested it on 10 August 1981 to produce the documents required under the regulations in question. Since it did not receive a reply, on 27 August 1982 the OCCL demanded the reimbursement of the advances paid, plus 15%.

9 On 17 September 1982 Philipp Brothers sent to the OCCL a certified true copy of the customs document relating to the Norwegian operation, and a simple copy of the customs document relating to the Finnish operation. On 24 December 1982, copies of the transport documents were sent to the OCCL, with a note to the effect that the originals had been despatched on 19 August 1981. On 22 March 1983 the OCCL again demanded repayment on the ground that the documents had reached it out of time and that, in addition, the copy of the Finnish customs document had not been certified as true. Furthermore, on 15 April 1983 the OCCL refused a request by Philipp Brothers for an extension of time in order to put their documents in order. Since the OCCL had been unable to recover the amounts claimed, the Belgian State instituted proceedings before the tribunal de grande instance (Regional Court), Paris, and then appealed to the cour d'appel (Court of Appeal), Paris.

10 The cour d'appel decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does release of the security provided for in Article 25 of Regulation (EEC) No 2730/79 of 29 November 1979 by the national intervention agency of a Member State which has paid an advance on an export refund have the effect of discharging an exporter from all or part of his obligations, particularly as regards the form of and the time-limit for submitting the proof required in order to qualify for the refund?

(2) Is any error whatsoever on the part of the administration capable of enabling the scope of the decision releasing the security to be called in question?

(3) Must a request for the grant of an extension of time, as provided for in Article 31(2) of the aforesaid regulation, be made before the expiry of the normal time-limit within which the documents must be submitted if entitlement to the refund is not to be lost?

(4) Does Article 31(2) of the aforesaid regulation make the grant of an extension of time for the submission of substitute customs documents conditional on a finding of *force majeure*?

(5) Does Article 31(2) of the regulation apply by analogy to the submission of transport documents in respect of the exported products?

(6) In the event of a negative answer to Question 5, is Article 31(2) of the aforesaid regulation valid in the light of the principle of proportionality inasmuch as that provision discriminates between two categories of proof?

(7) Are Articles 25 and 31 of the aforesaid regulation valid in the light of the principle of proportionality inasmuch as they require an exporter to repay a refund received in advance, plus 15%, where proof of exportation, transport and entry for home use has not been submitted in due time, even though the operation has actually been carried out?'

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant Community legislation and the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Effects of the release of the security (Questions 1 and 2)

12 In its first two questions the national court seeks essentially to ascertain whether the erroneous release by the national intervention agency of the security provided for in Article 25 of Regulation No 2730/79 has the effect of discharging the exporter from his obligations, particularly as regards the form of and the time-limit for submitting the proof required for the refund.

13 It should be borne in mind in that regard that, in its judgment of 5 December 1985 in Case 124/83 *Direktoratet for Markedsordningerne* v *Corman* [1985] ECR 3777, paragraph 44, the Court held that an action against the successful tenderer in a sale of butter held by the intervention agencies for failure to fulfil his obligations is not barred once the security has been released. The Court considered that the Community rules imposed a responsibility on the successful tenderer independently of the security, release of which could not discharge him from his obligations.

14 The principle thus laid down must also be applied where an exporter who has been paid advances on a refund does not furnish proof that the goods in question have actually been imported into the non-member country of destination.

15 In certain circumstances, however, erroneous release of the security may have led the exporter to believe that the matter was settled once and for all, the national intervention agency having taken the view that the goods had been entered for home use in the country of destination. In those circumstances, it is for the national intervention agency, which is called upon to decide whether to grant an extension of time for the production of the requisite documents, to take into consideration any repercussions its error may have had on the exporter's conduct.

16 The answer to the first two questions must therefore be that the erroneous release by the national intervention agency of the security provided for in Article 25 of Commission Regulation No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products does not have the effect of discharging the exporter from his obligations. In its decision on whether to grant an extension of time for the submission of the

documents required under the regulation, the intervention agency must take into consideration the consequences which its error may have had on the exporter's conduct.

The period prescribed for the submission of a request for an extension of time (Question 3)

17 It should be noted that the wording of Article 31(2) of Regulation No 2730/79 authorizes the grant of an extension of time 'where the documents required . . . cannot be submitted within the prescribed periods although the exporter has acted with all due diligence to obtain them within such periods'. The wording of that provision clearly indicates that the grant of an extension of time may be requested even after the period prescribed for the submission of the documents has expired.

18 That interpretation is supported by the consideration that the exporter may not become aware of the impossibility of submitting the requisite documents until the period prescribed for that purpose has nearly expired. In those circumstances, he may be prevented from making his request before the expiry of that period (see, for the same view, the judgment of 30 January 1974 in Case 158/73 *Kampffmeyer* v *Einfuhr- und Vorratsstelle für Getriede und Futtermittel* [1974] ECR 101).

19 Furthermore, Article 31 of the regulation expressly makes the grant of an extension of time conditional on the exporter having acted with all due diligence to obtain the customs documents within the periods prescribed by the regulation. It is for the exporter to furnish proof that this condition has been fulfilled.

20 Furthermore, it follows from the scheme of that provision that the exporter is required to substantiate his claims in the fullest possible manner (see also the judgment of 28 May 1974 in Case 3/74 *Einfuhr- und Vorratsstelle für Getriede und Futtermittel* v *Pfützenreuter* [1974] ECR 589) and to give valid reasons for any delay in making the request for the grant of an extension of time.

21 The answer to the third question must therefore be that the grant of an extension of time, as provided for in Article 31(2) of Regulation No 2730/79, may be requested even after the periods prescribed for the submission of the customs

documents have expired provided that the exporter proves that he has acted with all due diligence to obtain them within the prescribed periods and gives valid reasons for any delay in making his request.

The conditions for the grant of an extension of time (Question 4)

22 It is clear from the wording of Article 31(2) that the grant of an extension of time for the submission of the customs documents is conditional not on a finding of *force majeure* but solely on the exporter having acted with all due diligence to obtain those documents.

23 Furthermore, a reading of the first two paragraphs of Article 31 in conjunction with one another excludes any other interpretation. Since paragraph 1 itself provides for the possibility of *force majeure* as an exception to the obligation to submit the relevant documents within six months following the date on which customs formalities were completed, paragraph 2 would have no practical effect if it merely reiterated, specifically with regard to the customs document, the provision in general terms in paragraph 1.

24 The answer to the fourth question must therefore be that Article 31(2) of Regulation No 2730/79 makes the grant of an extension of time conditional not on a finding of *force majeure* but solely on the exporter having acted with all due diligence to obtain the customs documents within the normal time-limits.

The grant of an extension of time for the submission of the transport documents (Questions 5 and 6)

25 In its fifth and sixth questions, the national court seeks essentially to ascertain whether Article 31(2) of Regulation No 2730/79 allows the intervention agency to grant an extension of time not only for the submission of the customs documents, but also for the submission of the transport documents. In the event of a negative answer, the national court also asks whether that provision is valid in the light of the principle of proportionality.

26 It should be pointed out first that the wording of Article 31(2) refers only to the customs documents, so that no possibility of granting an extension of time for the submission of the transport documents is expressly provided for, except in the case of *force majeure* referred to in Article 31(1).

27 It should also be observed that, as the Commission and the Belgian State have rightly pointed out, the distinction thus made between customs documents and transport documents can be explained by the consideration that exporters may encounter difficulties in obtaining the customs documents from the authorities of the non-member country of importation, upon whom they have no means of exerting pressure. However, no such difficulty can exist with regard to the transport documents: in the case of a cif contract, the exporter retains a copy of the transport documents as the party arranging carriage, while in the case of a fob contract he may easily stipulate as part of the contract that the purchaser must furnish a certified true copy of those documents.

28 For its part, Philipp Brothers has argued that, if the only document missing is the transport document, it must follow that the goods have been shipped to the non-member country concerned in order to be entered for home use, proof of which is furnished precisely by the customs document. In that case, it would be contrary to the principle of proportionality for the security to be forfeit because the transport document has not been submitted in due time. If, on the other hand, the exporter has been granted an extension of time for the submission of the customs documents, it would be absurd not to grant such an extension for the transport document since the date of final settlement of the administrative formalities is deferred in any case.

29 According to Philipp Brothers, the Commission itself acknowledged that the possibility of granting an extension of time could not be ruled out in the case of the transport documents when, by Regulation No 568/85, it amended Article 31 of Regulation No 2730/79 accordingly.

30 With regard to that argument, it should be noted that, as the Commission explained in reply to a written question from the Court, the purpose of the amendment made by Regulation No 568/85 was to simplify the processing of

applications by the national intervention agencies. Accordingly, it does not in any way imply that the distinction between the two categories of documents made in the original version of Article 31(2) is contrary to the principle of proportionality.

31 Furthermore, that difference of treatment is based on objective grounds, referred to above (in paragraph 27), which relate to the ease with which the documents in question can be obtained.

32 The answer to the fifth and sixth questions must therefore be that Article 31(2) must be interpreted as not authorizing the grant of an extension of time for the submission of the transport documents. Consideration of the sixth question submitted by the national court has disclosed no factor of such a kind as to affect the validity of that provision.

The validity of Articles 25 and 31 of Regulation No 2730/79 in the light of the principle of proportionality (Question 7)

33 It is apparent from the order for reference that, according to the national court, it may seem contrary to the principle of proportionality to make failure to submit, within a mandatory time-limit, the proof required under the regulation that the operation has actually been carried out subject to the penalty of the loss of the amount of the refund paid in advance, plus 15%. The fundamental obligation to be guaranteed by the security is the actual exportation of the goods in question, and not the submission of the relevant documents.

34 It should be borne in mind in that regard that, as the Court has consistently held (see, most recently, the judgment of 27 June 1990 in Case C-118/89 *Lingenfelser* v *Federal Republic of Germany* [1990] ECR I-2637), in order to establish whether a provision of Community law complies with the principle of proportionality, it is necessary to ascertain whether the means which that provision applies to achieve its aim correspond to the importance of that aim and whether they are necessary in order to achieve it.

35 In this case, the aim pursued by the system of advance payment of refunds and by the security connected therewith is set out in the 19th recital in the preamble to the

regulation, according to which 'to enable exporters to finance their transactions more easily, Member States should be authorized to advance all or part of the amount of the refund as soon as customs export formalities are completed, subject to the provision of security to guarantee repayment of the amount advanced if it should later be found that the refund ought not to be paid'.

36 Furthermore, the purpose of fixing a mandatory time-limit for the submission of the customs documents and the transport documents is set out in the 23rd recital in the preamble to Regulation No 2730/79, according to which 'in the interests of sound administration applications for payment of the refund, accompanied by all relevant documents, should be required to be made within a reasonable period'.

37 It should be pointed out, moreover, that the amount of the security provided for by Article 25(1) of Regulation No 2730/79 is 15% more than the amount of the advance received by the exporter because of the concern to prevent the exporter from enjoying an unjustified financial advantage during the period between the payment of the advance and possible forfeiture of the security in the event of the goods not being exported.

38 In the light of those circumstances, the conclusion must be drawn that the setting of a mandatory time-limit for the submission of the requisite documents as proof of exportation is a measure which is necessary to prevent the exporter from enjoying an undue advantage.

39 The fixing of the length of that period at six months is not unreasonable, bearing in mind that it is in the interest of traders themselves to obtain release of the security as soon as possible, that the intervention agencies cannot keep open indefinitely files relating to operations in respect of which a Member State has paid refunds in advance, that the grant of an extension of time is permissible for the submission of the customs documents which may not be easy to obtain from the authorities of non-member countries, and that an exception is provided for in cases of *force majeure*.

40 It follows that if the documents required under the regulation are not submitted within six months, the penalty prescribed, namely loss of the security or payment of a corresponding amount where the security has been released, is not disproportionate to the objectives of the rules in question or to the requirements relating to the processing of documents concerning refunds paid in advance.

41 The answer to be given to the national court must therefore be that consideration of the seventh question has disclosed no factor of such a kind as to affect the validity of Articles 25 and 31 of Regulation No 2730/79.

Costs

42 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings 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,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the cour d'appel, Paris, by interlocutory judgment of 3 February 1989, hereby rules:

(1) The erroneous release by the national intervention agency of the security provided for in Article 25 of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products does not have the effect of discharging the exporter from his obligations. In its decision on whether to grant an extension of time for the submission of the documents required under the regulation, the intervention agency must take into consideration the consequences which its error may have had on the exporter's conduct.

(2) The grant of an extension of time, as provided for in Article 31(2) of Regulation No 2730/79, may be requested even after the periods prescribed for the submission of the customs documents have expired provided that the exporter proves that he has acted with all due diligence to obtain them within the prescribed periods and gives valid reasons for any delay in making his request.

(3) Article 31(2) of Regulation No 2730/79 makes the grant of an extension of time conditional not on a finding of *force majeure* but solely on the exporter having acted with all due diligence to obtain the customs documents within the normal time-limits.

(4) Article 31(2) must be interpreted as not authorizing the grant of an extension of time for the submission of the transport documents. Consideration of the sixth question submitted by the national court has disclosed no factor of such a kind as to affect the validity of that provision.

(5) Consideration of the seventh question has disclosed no factor of such a kind as to affect the validity of Articles 25 and 31 of Regulation No 2730/79.

Kakouris Schockweiler

Mancini O'Higgins Díez de Velasco

Delivered in open court in Luxembourg on 12 July 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber