JUDGMENT OF THE COURT (Fifth Chamber)

27 October 2011 *

In Case C-402/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 26 May 2010, received at the Court on 6 August 2010, in the proceedings

Groupe Limagrain Holding

v

Établissement national des produits de l'agriculture et de la mer,

THE COURT (Fifth Chamber),

composed of A. Borg Barthet, acting as President of the Fifth Chamber, J.-J. Kasel and M. Berger (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 11 May 2011,

after considering the observations submitted on behalf of:

— Groupe Limagrain Holding, by A. Monod and V. Maignan-Artiga, avocats,

— Établissement national des produits de l'agriculture et de la mer, by F. Blancpain, avocat,

— the French Government, by G. de Bergues and B. Cabouat, acting as Agents,

— the European Commission, by B. Burggraaf and D. Triantafyllou, 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 the provisions 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 (OJ 1987 L 351, p. 1), as amended by, inter alia, Commission Regulation (EEC) No 1708/93 of 30 June 1993 (OJ 1993 L 159, p. 77) ('Regulation No 3665/87'), read in conjunction with those of Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5).

2 The reference has been made in the course of proceedings between the company Groupe Limagrain Holding ('Limagrain'), successor in law to the company Maïs Céréales Technologie ('MCT'), and Office national interprofessionnel des céréales ('ONIC'), now Établissement national des produits de l'agriculture et de la mer, concerning reimbursement of an export refund received in advance by MCT.

Legal context

Regulation No 565/80

3 Regulation No 565/80 introduces for certain agricultural products, including those covered by Council Regulation (EEC) No 2727/75 of 29 October 1975 on the common organisation of the market in cereals (OJ 1975 L 281, p. 1), repealed and replaced by Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals (OJ 1992 L 181, p. 21), a system of advance financing of refunds for exports to non-member countries.

4 Article 4(1) of Regulation No 565/80 provides:

'An amount equal to the export refund shall, at the request of the party concerned, be paid as soon as the basic products are placed under customs control ensuring that the processed products or the goods will be exported within a set time-limit.'

5 Under Article 6 of that regulation:

'The benefit of the arrangements provided for in this Regulation shall be subject to the lodgment of a security guaranteeing reimbursement of an amount equal to the amount paid, plus an additional amount.

Without prejudice to cases of *force majeure*, this security shall be forfeited in whole or in part:

— where reimbursement has not been made when export has not taken place within the period referred to in [Article] 4(1) …,

or

— if there proves to be no right to the export refund, or if there was a right to a smaller refund.'

Regulation No 3665/87

6 Chapter 3, comprising Articles 24 to 33, of Title 2 of Regulation No 3665/87 describes the methods for application of Regulation No 565/80 and the formalities to be completed or the conditions to be met in order to benefit from advance payment of a refund in the case where goods are processed or stored prior to exportation.

7 The first subparagraph of Article 25(1) of that regulation provides:

'Where the exporter states his intention to export the products or goods after processing or storage, and to qualify for a refund, in accordance with the provisions of Articles 4 or 5 of Regulation (EEC) No 565/80, admission under those provisions shall be subject to the lodging with the customs authorities of a declaration, hereinafter referred to as the "payment declaration".'

8 Article 26(1) of that regulation provides:

'At the time of acceptance of the payment declaration, the products or goods shall be placed under customs control until they leave the customs territory of the Community or until they have reached their destination.'

9 Under the first subparagraph of Article 27(5) of Regulation No 3665/87:

'The period during which basic products may remain under customs control with a view to their being processed shall be six months from the date of acceptance of the payment declaration.'

10 Article 29(1) and (2) of that regulation provides:

'1. The amount to be paid in advance of export shall be paid by the Member State in which the payment declaration was accepted.

2. The amount shall be paid only on written application by the exporter. …'

11 Article 31(1) of Regulation No 3665/87 provides:

'A security equal to the amount calculated in accordance with Article 29(3) plus any positive monetary compensatory amount, plus 20 % of those amounts, shall be lodged prior to acceptance of the payment declaration. …'

12 Article 33(1) of that regulation reads as follows:

'Where proof of entitlement to a refund is provided in respect of products or goods eligible under this chapter, the advance and the sum payable shall be set off against each other. Where the sum due on the quantity exported is higher than that paid in advance, the difference shall be paid to the person concerned.

Where the sum due on the quantity exported is lower than that paid in advance, and in particular where paragraph 2 applies, the competent authority shall initiate without delay the procedure provided for in Article 29 of Regulation (EEC) No 2220/85 with a view to repayment by the operator of the difference between those two sums, increased by 20 %.'

Regulation (EEC) No 3719/88

13 Article 43(1) of Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1988 L 331, p. 1) provides:

'Where basic products have been placed under the arrangement provided for in Article 4 of Regulation (EEC) No 565/80 … and an export licence or advance fixing certificate has been used, and where the party concerned wholly or partly:

— withdraws from customs control the basic products, whether in that form or as processed products, or the products or goods, or

— does not comply with the total time-limit calculated on the basis of Articles 27(5) and 28(5) of Regulation (EEC) No 3665/87 or in other legal provisions,

the obligation to export shall not have been complied with for the quantity concerned.'

Regulation (EEC) No 2913/92

14 Pursuant to the first paragraph of Article 105 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Community Customs Code'):

'The person designated by the customs authorities shall keep stock records of all the goods placed under the customs warehousing procedure in a form approved by those authorities. Stock records are not necessary where a public warehouse is operated by the customs authorities.'

Regulation (EEC) No 2454/93

15 In the version in force at the time material to the main proceedings, Article 504(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the

Community Customs Code (OJ 1993 L 253, p. 1; 'the Regulation implementing the Community Customs Code') provided:

'Without prejudice to paragraphs 2 and 3, customs warehouses in which goods are stored under the customs warehousing procedure shall be classified as follows:

…

— type C: private warehouse conforming to the second indent of the second paragraph of Article 99 of the Code where the warehouse keeper is the same person as the depositor but is not necessarily the owner of the goods,

…'

16 Article 517(1) of that regulation provided:

'In type A, type C, type D and type E warehouses, the customs authorities shall designate the warehouse keeper as the person required to keep the stock records referred to in Article 105 of the [Community Customs] Code.

The stock records shall be made available to the supervising office to enable it to carry out any checks.'

17 Article 520 of that regulation stated:

‘1. The stock records referred to in Article 105 of the [Community Customs] Code shall contain all the particulars necessary for the proper application and supervision of the procedure.

They shall include:

(a) the information contained in boxes 1, 31, 37 and 38 of the declaration of entry for the procedure;

(b) reference particulars of the declarations by means of which the goods are assigned to a customs-approved treatment or use discharging the customs warehousing procedure;

(c) the date and reference particulars of other customs documents and all other documents relating to entry and discharge;

(d) information enabling the goods to be monitored, including their location and particulars of any transfer of goods between customs warehouses without termination of the arrangements;

(e) information concerning the common storage of goods referred to in Article 524;

(f) any other details which may be needed to identify the goods;

(g) information concerning the usual forms of handling to which the goods are subject;

(h) information concerning the temporary removal of goods from the premises of the customs warehouse.

…

3. The stock records shall at all times show the current stock of goods which are still under the customs warehousing procedure. At the times laid down by the customs authorities, the warehouse keeper shall lodge at the supervising office a list of the said stock.

…'

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

18 MCT specialised in the conservation of cereals, particularly maize in granular form, and in the processing of that maize into corn meal for purposes of exportation.

19 On 30 September 1994 MCT signed a declaration recording the placing in a customs warehouse, pursuant to Article 4(1) of Regulation No 565/80, of a quantity of maize pending its exportation in the form of corn meal.

20 The warehouse in which the stock was placed was a Type C private warehouse within the meaning of Article 504 of the Regulation implementing the Community Customs Code.

21 That declaration led to the payment by ONIC of an advance refund of FRF 2 523 414.07.

22 During 1996, the customs services carried out a records check which disclosed the absence, during the warehousing period, of stock records relating to the goods placed under the customs warehousing procedure, as laid down in Article 105 of the Community Customs Code.

23 By letter of 17 November 1998, ONIC requested MCT to repay the sum of FRF 3 028 096.88, corresponding to the amount of the advance refund received by that company, together with the addition of a penalty equivalent to 20 % of that amount, pursuant to Article 33 of Regulation No 3665/87.

24 MCT sought annulment of the recovery notice issued by ONIC.

25 By decision of 7 October 2004, the Tribunal administratif de Clermont-Ferrand (Administrative Court, Clermont-Ferrand) dismissed that application. By judgment of 21 June 2007, the Cour d'appel de Lyon (Court of Appeal, Lyon) upheld that decision.

26 Limagrain, the successor in law to MCT, appealed to the Conseil d'État (Council of State).

27 In those circumstances, the Conseil d'État, having doubts as to the interpretation of Article 4(1) of Regulation No 565/80 and Article 105 of the Community Customs Code, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the failure, in disregard of the obligations imposed on the warehouse keeper under the Community customs legislation, to keep stock records of products or goods placed under the customs warehousing procedure sufficient to deprive the exporter who has placed his products or his goods in that warehouse of entitlement to the advance payment provided for by the [combined] provisions of [Regulations No 3665/87 and No 565/80]?

2. If the answer to the first question is in the affirmative, what conclusions should be drawn as regards the sums paid to the recipient?

In particular:

(a) in the event that it is proved that the goods have actually been exported, can the exporter be regarded as having obtained the amount of the refunds relating to those exports, wholly or in part; if in part, is it appropriate to adopt the rates of refunds as pre-established under the regulations relating to advance payment of export refunds or the rates applicable on the date of actual exportation, whether higher or lower than the pre-established rate?

(b) in the event that there is an obligation to repay all or part of the sums received, is it appropriate, pursuant to Article 33 of … Regulation … No 3665/87 …, to add, to the amount to be repaid as unduly received, the penalty provided for by that article, although the responsibility for keeping stock records rests with the warehouse keeper, where, as in the present case, the customs warehouse is a type C private warehouse maintained by the exporter of the agricultural goods himself?'

Consideration of the questions referred

The first question

28 By its first question, the national court asks, in essence, whether the provisions of European Union law relating to the advance financing of export refunds must be interpreted as meaning that the failure, in disregard of the obligations under the European Union customs legislation, to keep stock records of products placed under the customs warehousing procedure is sufficient to deprive the exporter of entitlement to the advance payment of an export refund in respect of those products.

29 In order to answer that question, it is necessary to recall the characteristics, relevant to the main proceedings, of the system of advance payments of export refunds.

30 Article 4(1) of Regulation No 565/80 provides that an amount equal to the export refund is, at the request of the party concerned, to be paid as soon as the basic products are placed under customs control, thereby ensuring that the processed products

or the goods will be exported within a set time-limit. Under Article 25 of Regulation No 3665/87, the right to benefit from that system of advance financing of export refunds is subject to the lodging with the customs authorities, and acceptance by them, of a payment declaration. In accordance with Articles 26 and 27 of that regulation, basic products must be placed under customs control with effect from the date of acceptance of the payment declaration until they are exported, which must, in principle, take place within six months.

31 It follows from those combined provisions that the smooth functioning of the system of advance financing of export refunds relies on the supervision mechanism constituted by the system of customs supervision. The application of that system must allow the competent national authorities to verify and ensure at any time, using a procedure uniform in all Member States, that the substantive conditions necessary for the grant of the refund applied for, as defined in the applicable provisions of European Union law, are met (see, to that effect, Case 121/87 *Bayernwald Früchteverwertung* [1988] ECR 6273, paragraph 18).

32 Compliance with the obligations connected with the system of customs supervision thus constitutes a condition governing entitlement to benefit from advance payment of an export refund under the provisions of Regulation No 565/80.

33 The essential obligations connected with that system include, pursuant to Article 105 of the Community Customs Code, the obligation to keep stock records of goods placed under the customs warehousing procedure, unless the warehouse concerned is a public warehouse operated by the customs authorities. That exception is not relevant to the main proceedings, as the basic products were placed in a type C private warehouse.

34 Under the first subparagraph of Article 520(1) of the Regulation implementing the Community Customs Code, the stock records must contain all the particulars necessary for the proper application of the customs supervision procedure.

35 In the version applicable at the time material to the main proceedings, the second subparagraph of Article 520(1) of that regulation listed the information to be included in the stock records. The use of the expression 'shall include' with respect to that information shows that the legislature regarded that list as constituting an indispensable minimum.

36 Furthermore, Article 520(3) states that 'the stock records shall at all times show the current stock of goods which are still under the customs warehousing procedure'.

37 It follows that, where the minimum indispensable information required by Article 520 et seq. of the Regulation implementing the Community Customs Code is lacking, the obligation to keep stock records cannot be regarded as fulfilled (see, to that effect, *Bayernwald Früchteverwertung*, paragraph 19). The result is a failure to fulfil an obligation essential to the customs supervision procedure. Consequently, one of the conditions governing entitlement to advance payment of an export refund under the provisions of Regulation No 565/80 will not have been met.

38 Nevertheless, account must be taken of the purpose of stock records, which is to make possible verification of the nature and exact quantities of goods in respect of which a refund is due. Accordingly, where there is doubt as to the accuracy of certain entries in the stock records, it may be possible to examine other additional documents in order to remove that doubt (see, to that effect, *Bayernwald Früchteverwertung*,

paragraph 19). Thus, any remaining doubts as to the accuracy of certain entries in the stock records or relating to discrepancies or minor omissions in those records may be resolved by reference to other additional documents (see, to that effect, *Bayernwald Früchteverwertung*, paragraph 20).

39 The answer to the first question is therefore that the provisions of European Union law on the advance financing of export refunds must be interpreted as meaning that the maintenance, in accordance with the European Union customs legislation, of stock records in respect of products placed under the customs warehousing procedure constitutes a condition of advance payment of an export refund with regard to those products. However, any remaining doubts as to the accuracy of certain entries or as to discrepancies in those stock records may be resolved by reference to other additional documents, on condition that those documents are deemed by the competent national authorities to be satisfactory.

The second question

40 By its second question, the national court, referring to a situation in which there has been a failure to comply with the obligation to maintain, in accordance with European Union customs legislation, stock records in respect of products placed under the customs warehousing procedure, wishes to know what the consequences of that omission must be, having regard to the sums which the exporter has received by way of advance payment of an export refund.

41 This question consists of two parts.

42 Firstly, the national court asks, in essence, whether, in the event that it is proved that the goods covered by the advance payment declaration have in fact been exported, the exporter can nevertheless be regarded as having properly obtained the amount of the refund relating to those exports, and, if so, on the basis of what rate the amount of that refund is to be calculated.

43 First of all, it must be pointed out that, as is apparent from paragraphs 30 to 32 of the present judgment, entitlement to benefit from the right to advance payment of an export refund is subject to, inter alia, proof that the products in respect of which a payment declaration has been submitted were placed, and remained, under the customs warehousing procedure until they were exported. Proof of compliance with the obligations under the customs warehousing procedure must be provided by the exporter and must be submitted in accordance with the provisions of the European Union customs legislation, as interpreted in paragraphs 37 to 39 of this judgment.

44 The placing of those products under the customs warehousing procedure is intended to guarantee that the products referred to in the payment declaration and the goods actually exported are identical. Where the products are not correctly placed under the customs warehousing procedure, proof that the products covered by the advance payment declaration have actually been exported cannot be satisfactorily provided. The most that can be established is that products similar in quantity and type have been exported.

45 Where the customs warehousing scheme has not been duly complied with, sanctions are applied, in particular under Article 43 of Regulation No 3719/88 (see Case C-217/98 *LFZ Nordfleisch* [2000] ECR I-1619, paragraph 42). Under Article 43(1) of that regulation, where products have been placed under the arrangement provided for in Article 4 of Regulation No 565/80, and the exporter wholly or partly withdraws

those products from customs control, the obligation to export will not have been complied with for the quantity concerned, which implies the loss, for that quantity, of any right to a refund.

46 It is appropriate to liken to a withdrawal from customs control the situation referred to by the national court, that is to say, where there has been a failure to comply with the obligation to maintain, in accordance with the European Union customs legislation, stock records in respect of products placed under that control. Both those situations have the result of depriving the customs authorities of their ability to check the route taken by the products concerned and, consequently, to ensure that there was compliance with the conditions governing the system of advance payment of export refunds.

47 Accordingly, the answer to the first part of the second question is that, to the extent to which, and on condition that, there has been a failure to comply with the obligation to maintain, in accordance with the European Union customs legislation, stock records in respect of products placed under the customs warehousing procedure pursuant to Article 4 of Regulation No 565/80, proof that products similar in quantity and type to those referred to in the advance payment declaration have been exported is not sufficient for the exporter to be regarded as having properly obtained the amount of the export refund relating to those products.

48 Secondly, the national court asks, in essence, whether, in the case where, because of a failure to fulfil the obligation to maintain stock records for products placed under the customs warehousing procedure, the exporter is required to repay all or part of the sums received as advance payment of an export refund, the increase of 20 % provided for in the second subparagraph of Article 33(1) of Regulation No 3665/87 should be applied to the amount to be repaid.

49 First of all, it must be borne in mind that, in accordance with the second subparagraph of Article 33(1) of Regulation No 3665/87, where it appears that the amount due as an export refund is lower than that paid in advance, the competent national authority must initiate, without delay, the procedure designed to secure repayment by the trader of the difference between those two sums, increased by 20%.

50 That provision does not, admittedly, expressly identify the person liable, where appropriate, to pay the surcharge of 20%. None the less, as the European Commission has observed, the exporter alone is in contact with the competent authorities. He is the person who, initially, must submit, under Article 25 of Regulation No 3665/87, a payment declaration and who, before that application is accepted by the competent authorities, must, in accordance with Article 31 of that regulation, lodge a security equal to the amount of the refund as calculated at that date, increased by 20%. It is also the exporter who must then submit, under Article 29 of that regulation, a request in writing which alone enables the competent authorities to make advance payment to him of the export refund. That additional formality gives the exporter the opportunity, inter alia, where the destination of the products has been changed, to renounce that payment totally and to recover, in that case, the whole of the security provided (see *LFZ Nordfleisch*, paragraphs 36 and 40).

51 Furthermore, it is apparent from the 40th recital in the preamble to Regulation No 3665/87 that the 20% supplement was laid down in order to prevent the exporter concerned obtaining undue benefit. As the Court has held, traders would, under the arrangements for advance payment, obtain undue interest-free credit if it subsequently emerged that the refund should not have been granted (Case 288/85 *Plange Kraftfutterwerke* [1987] ECR 611, paragraph 14).

52 It follows that it is the exporter who must bear the consequences of non-compliance with the obligations under the system of advance financing of export refunds.

53 Irrespective of the liability of the person designated by the competent authorities to keep stock records for products placed in a customs warehouse, the exporter must therefore bear the consequences of non-compliance with that obligation. In that regard, it must be noted that the exporter is fully at liberty to select his trading partners and it is up to him to take the appropriate precautions, either by including the necessary clauses in the contracts which he concludes with them or by taking out appropriate insurance (Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 80).

54 Furthermore and in any event, in the main proceedings, where the products were stored in a type C private warehouse, the obligation to maintain stock records devolved, in accordance with Article 517(1) of the Regulation implementing the Community Customs Code, on the warehouse keeper, who, under Article 504(1) of that regulation, was regarded as being the same person as the depositor and, therefore, the exporter.

55 The answer to the second part of the second question referred is therefore that, in the case where, by reason of a failure to comply with the obligation to maintain stock records in respect of products placed in a customs warehouse, the exporter must repay all or part of the sums received as advance payment of an export refund, the surcharge of 20 % provided for in the second subparagraph of Article 33(1) of Regulation No 3665/87 is to be applied to the amount unduly received and to be repaid.

Costs

56 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 (Fifth Chamber) hereby rules:

1. **The provisions of European Union law on the advance financing of export refunds must be interpreted as meaning that the maintenance, in accordance with the European Union customs legislation, of stock records in respect of products placed under the customs warehousing procedure constitutes a condition of advance payment of an export refund with regard to those products. However, any remaining doubts as to the accuracy of certain entries or as to discrepancies in those stock records may be resolved by reference to other additional documents, on condition that those documents are deemed by the competent national authorities to be satisfactory.**

2. **The provisions of European Union law on the advance financing of export refunds must be interpreted as meaning that:**

   — **to the extent to which, and on condition that, there has been a failure to comply with the obligation to maintain, in accordance with the European Union customs legislation, stock records in respect of products placed under the customs warehousing procedure, proof that products similar in quantity and type to those referred to in the advance payment declaration have been exported is not sufficient for the exporter to be regarded**

as having properly obtained the amount of the export refund relating to those products;

— **in the case where, by reason of a failure to comply with the obligation to maintain stock records in respect of products placed in a customs warehouse, the exporter must repay all or part of the sums received as advance payment of an export refund, the surcharge of 20 % provided for in the second subparagraph of Article 33(1) 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, as amended by, inter alia, Commission Regulation (EEC) No 1708/93 of 30 June 1993, is to be applied to the amount unduly received and to be repaid.**

[Signatures]