JUDGMENT OF THE COURT (First Chamber)

11 January 2007 *

In Case C-279/05,

REFERENCE for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 30 June 2005, received at the Court on 11 July 2005, in the proceedings

Vonk Dairy Products BV

v

Productschap Zuivel,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues, M. Ilešič (Rapporteur) and E. Levits, Judges,

* Language of the case: Dutch.

Advocate General: E. Sharpston,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 29 March 2006,

after considering the observations submitted on behalf of:

— Vonk Dairy Products BV, by J.H. Peek, advocaat,

— the Kingdom of the Netherlands, by H.G. Sevenster and M. de Mol, acting as Agents,

— the Hellenic Republic, by I. Chalkias and S. Papaioannou, acting as Agents,

— the Commission of the European Communities, by C. Cattabriga and M. van Heezik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 16 to 18 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) and the second subparagraph of Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

2 The reference was made in the course of proceedings between Vonk Dairy Products BV and Productschap Zuivel (Dairy Products Board) concerning the withdrawal and recovery, plus an additional 15%, of a differentiated export refund received by the applicant in the main proceedings.

Legal context

Community legislation

Regulation No 3665/87

3 Article 1 of Regulation No 3665/87 provides:

'Without prejudice to derogations provided for in Community rules specific to certain products, this Regulation lays down common detailed rules for the

application of the system of export refunds (hereinafter referred to as refunds) established by or provided for in:

...

— Article 17 of Regulation (EEC) No 804/68 (milk and milk products),

...'

4 Articles 4 to 6 of Regulation No 3665/87 state:

'*Article 4*

1. Without prejudice to the provisions of Articles 5 and 16, the refund shall be paid only upon proof being furnished that the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state.

...

Article 5

1. Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but also ... on its having been imported into a non-member country and, where appropriate, into a specific non-member country within 12 months following the date of acceptance of the export declaration:

(a) where there is serious doubt as to the true destination of the product, ...

...

In the cases referred to in the first subparagraph, the provisions of Articles 17(3) and 18 shall apply.

In addition, the competent authorities of the Member States may require that additional evidence be provided such as to satisfy them that the product has actually been placed on the market in the non-member country of import in the unaltered state.

...

Where there are serious doubts as to the real destination of products, the Commission may request Member States to apply the provisions of paragraph 1.

...

Article 6

If, before leaving the customs territory of the Community, a product for which the customs declaration has been accepted crosses Community territory other than that of the Member State where that declaration was accepted, proof that the product has left the customs territory of the Community shall be furnished by production of the original of the T 5 control copy referred to in Article 1 of Regulation (EEC) No 2823/87.

...'

5 Articles 16 and 17 of Regulation No 3665/87 state:

'*Article 16*

1. Where the rate of refund varies according to destination, payment of the refund shall be dependant upon the additional conditions laid down under Articles 17 and 18.

...

Article 17

1. The product must have been imported in the unaltered state into the non-member country or one of the non-member countries for which the refund is prescribed within 12 months following the date of acceptance of the export declaration.

...

3. A product shall be considered to have been imported when it has been cleared through customs for release for consumption in the non-member country concerned.'

6 Article 18 of Regulation No 3665/87 contains an exhaustive list of all the documentary proof which exporters have to produce in order to establish that the product has been cleared through customs for release for consumption. A copy of the transport document is one of the pieces of evidence required by that provision.

7 Amendments have been made to Article 18 on several occasions during the period to which the facts in the main proceedings relate, but they have no bearing on the outcome of the case in the main proceedings.

8 Article 23 of Regulation No 3665/87 provides:

'1. Where the amount advanced is greater than the amount actually due in respect of the relevant export operation or an equivalent export operation, the exporter shall repay the difference between the two amounts plus 15% of such difference.

...'

Regulation No 2988/95

9 Article 1 of Regulation No 2988/95 provides:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

10 Under Article 3(1) of Regulation No 2988/95:

'1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

...'

National legislation

11 Article 9 of the Law on regulations on the import and export of goods (Wet houdende een regeling op het gebied van de invoer en de uitvoer van goederen) of 5 July 1962 (Stb. 1962, No 295), as amended by the Law of 4 June 1992 (Stb. 1992, No 422) provides:

'1. The competent minister may revoke any authorisation, refund, subsidy or exemption where the information provided in order to obtain it proves to be incorrect or incomplete to the extent that the application would have been subject to a different decision if the true circumstances had been fully known at the time it was examined.

2. Any subsidy or refund granted in implementation of rules adopted by an institution of the European Communities may also be revoked if, as a result of an applicable rule laid down by that institution, that refund may not be claimed.'

12 Under Articles 1, 85, 118 and Annex I to the Regulations on the import and export of agricultural products (Regeling in- en uitvoer landbouwgoederen) of 9 March 1981 (Stcrt. 1981, No 50), provisions adopted on the basis of Article 11 of the Law referred to in the preceding paragraph of this judgment, Productschap Zuivel has the power to allocate and revoke the relevant refunds as regards cheese.

The main proceedings and the questions referred for a preliminary ruling

13 From 1988 to 1994, the applicant in the main proceedings exported 300 consignments of Italian 'pecorino' cheese per year to the United States of America, a total of 2 100 consignments.

14 In respect of those exports, it received from the defendant in the main proceedings differentiated refunds granted on the basis of Regulation No 3665/87, which were made definitive following the release of the securities provided when the defendant in the main proceedings received the documents proving that the consignments had been released for free circulation in the United States.

15 The amount of those refunds for the cheese concerned was higher in respect of the exports to the United States than in respect of those to Canada.

16 It is apparent from the documents before the Court that the Algemene Inspectiedienst (General Inspectorate, 'the AID') of the Ministerie van Landbouw, Natuurbeheer en Visserij (Ministry of Agriculture, Nature Management and Fisheries) carried out an initial investigation relating to the exports of cheese at issue in the main proceedings.

17 As that investigation revealed irregularities on the part of the applicant in the main proceedings, the AID requested that the US Customs in New York, USA, initiate an administrative investigation into those exports for the period from 1988 to 1994.

18 That second investigation revealed that, during that period, 75 consignments of cheese (that is to say, some 1.47 million kilograms) were almost immediately re-exported to Canada by Orlando Food Corporation, an intermediary for the applicant in the main proceedings in the United States, in most cases to the National Cheese & Food Company, a company established in Ontario. The same investigation also established that the role of the applicant in the main proceedings was not confined to exporting the consignments of cheese concerned to the United States as it was aware that the cheese was forwarded to Canada and it was also involved in the sale of those consignments in that country. Furthermore, there had been an exchange of correspondence in this connection between the applicant in the main proceedings and the National Cheese & Food Company.

19 Following that second investigation, the Officier van Justitie (Public Prosecutor) in Roermond (Netherlands) initiated a judicial investigation with regard to the applicant in the main proceedings and its officers in respect of falsifications of documents, as the applications for the differentiated refunds were presumed to be false since they referred to the United States as the country of destination for consumption, although some consignments of cheese were sent to Canada where they were marketed. The AID recorded the findings of the initial investigation in an official report of 5 March 1997.

20 By letter of 18 September 1997, the defendant in the main proceedings notified the applicant in the main proceedings that it had received the official report mentioned in the preceding paragraph of this judgment, a copy of which was annexed to the letter.

21 By decision of 18 April 2001, the defendant in the main proceedings revoked its decisions granting refunds as regards the 75 consignments in dispute and demanded the repayment of the sum of NLG 2 795 841.72 corresponding to the difference between the differentiated refunds applicable, on the one hand, to the United States and, on the other hand, to Canada, plus 15%.

22 As the defendant in the main proceedings rejected as unfounded the objection to that decision made by the applicant in the main proceedings, the applicant in the main proceedings brought an appeal before the referring court. In support of that appeal, the applicant in the main proceedings submits that it satisfied all the conditions laid down in Articles 4, 17(3) and 18 of Regulation No 3665/87 for obtaining differentiated refunds in respect of the consignments of cheese concerned and that the subsequent re-exportation of some of those consignments to Canada had no effect on the grant of those refunds. It refers, in that regard, to Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, submitting that the defendant in the main proceedings has not proved the existence, in its head of claim, of an abuse in terms of that judgment. Therefore, the applicant in the main proceedings submits that the refunds at issue in the main proceedings were not wrongly paid to it and became definitive after it furnished evidence of importation and of release for consumption in the United States.

23 The applicant in the main proceedings also submits that the irregularity of which it is accused is neither continuous nor repeated, because most of the consignments which it exported to the United States were not re-exported, and therefore the limitation period was not interrupted. The judicial investigation related to the falsification of documents and not to the revocation of refunds or to the demand for repayment. Furthermore, that investigation was conducted by authorities other than the defendant in the main proceedings, with the result that it could not be regarded as an interruption. The applicant in the main proceedings adds that neither the official report of 5 March 1997 nor the letter of the defendant in the main proceedings of 18 September 1997 specified the acts to which the suspicions related.

24 Lastly, the applicant in the main proceedings maintains that the defendant in the main proceedings should not have based its decision to increase the amount to be repaid by 15% on Regulation No 3665/87 because the differentiated refund was introduced solely for trade policy reasons.

25 The defendant in the main proceedings considers the action to be unfounded. It submits that it is essential with respect to the payment of differentiated refunds that the goods covered actually reach their market of destination. It deduces from this that the fact that a certain quantity of the cheese concerned was re-exported to Canada implies that the differentiated refunds at issue in the main proceedings must be repaid. Relying on Case C-27/92 *Möllmann-Fleisch* [1993] ECR I-1701, it submits that the import documents amount only to rebuttable evidence as regards the grant of differentiated refunds for the purposes of Regulation No 3665/87. Therefore, it maintains that those refunds were wrongly paid.

26 As regards limitation, the defendant in the main proceedings submits that the decision of 18 April 2001, by which it requested the repayment, took place within the period required by Regulation No 2988/95. That period did not begin until after the last export transaction, which, according to the export declaration, took place on 28 September 1994. The limitation period was then interrupted in July 1997 by the searches carried out at that time as part of the judicial investigation and also on 18 September 1997 by the sending of the official report of 5 March 1997 to the applicant in the main proceedings.

27 In those circumstances, the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Articles 16 to 18 of Regulation (EEC) No 3665/87, as applicable at the material time, be interpreted as meaning that, if variable refunds are definitively

paid after acceptance of the import documents, subsequent evidence that the goods have been re-exported may lead to the conclusion that the refunds have been wrongly paid only in the event of abuse on the part of the exporter?

(2) If question 1 must be answered in the negative, what criteria apply to enable it to be established when the re-exportation of goods necessarily leads to the conclusion that definitively paid variable refunds were wrongly paid?

(3) What criteria apply to enable it to be established whether there has been a continuous or repeated irregularity as referred to in the second subparagraph of Article 3(1) of Regulation (EC, Euratom) No 2988/95? ... [More] particularly [is] a continuous or repeated irregularity ... deemed to have occurred where the irregularity relates to a relatively small proportion of all transactions in a given period and the transactions in which an irregularity has been detected always concern different consignments.'

The questions referred for a preliminary ruling

The first question

28 By its first question, the national court seeks, in essence, to ascertain whether, in proceedings for the withdrawal and recovery of differentiated refunds which have been definitively paid on the basis of Regulation No 3665/87, a finding that those refunds have been wrongly paid means that evidence of abuse on the part of the exporter must be furnished.

29 It is important, to point out, first of all, that the grant of differentiated refunds is subject to all the conditions provided for by Regulation No 3665/97, which are set out in Articles 4 to 6 and in Articles 16 to 18. It is apparent from the case file submitted to the Court that the applicant in the main proceedings satisfied, at a formal level, all the conditions provided for by that regulation, with the result that the refunds at issue were definitively paid to it. In particular, it is apparent from the order for reference that the defendant in the main proceedings did not use the option in the fourth subparagraph of Article 5(1)(a) and Article 18(2) of Regulation No 3665/87 to request, before the refunds at issue were made definitive, additional evidence of such a kind as to establish that the products concerned had actually been placed on the market in the non-member country of import in an unaltered state.

30 It is important to point out that, according to the order for reference, the decision to demand the repayment of those refunds is not based on the defective nature of the import documents furnished by the applicant in the main proceedings, but on the fact that some consignments of cheese were re-exported to another non-member country almost immediately after being imported into the United States.

31 In that regard, it must be borne in mind that the scope of Community regulations must not be extended to cover abuses on the part of a trader (Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21, and *Emsland-Stärke*, paragraph 51).

32 A finding that the differentiated refunds definitively granted for the purposes of Regulation No 3665/87 were wrongly paid thus requires, where a proportion of all the products concerned was almost immediately re-exported to another non-member country, evidence of abuse on the part of the exporter.

33 That evidence involves first, a combination of objective circumstances from which it is apparent that, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved, and, second, a

subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it (Case C-515/03 *Eichsfelder Schlachtbetrieb* [2005] ECR I-7355, paragraph 39 and the case-law cited). The existence of that subjective element can be established, inter alia, by evidence of collusion between the exporter receiving the refunds and the importer of the goods in a non-member country other than the country of importation.

34 It is for the national court to verify whether the factors constituting such an abuse are present in the case before it in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined (*Emsland-Stärke*, paragraph 54 and the case-law cited, and *Eichsfelder Schlachtbetrieb*, paragraph 40).

35 The Netherlands Government submits, in that regard, that evidence of abuse in terms of *Emsland-Stärke* on the part of the exporter has to be furnished only in cases where all the formal conditions for the grant of the refunds are satisfied, which is not true of the case in the main proceedings because, as the consignments of cheese which were re-exported to Canada were not released for consumption on the United States market, the condition with respect to release for consumption in the non-member country within the meaning of Article 17(3) of Regulation No 3665/87 has not been satisfied.

36 That argument cannot be accepted. It is apparent, firstly, from paragraph 28 of this judgment that the applicant in the main proceedings satisfied at a formal level all the conditions provided for by Regulation No 3665/87 in respect of the grant of the differentiated refunds at issue in the main proceedings, including those provided for

in Article 17(3) of the regulation, with the result that those refunds were definitively paid to it without the competent authorities of the Member States concerned having deemed it appropriate to require at the outset, on the basis of the fourth subparagraph of Article 5(1)(a) of Regulation No 3665/87, that additional evidence be provided that the product had actually been placed on the market in the non-member country of import in an unaltered state. Secondly, as has been stated in paragraph 32 of this judgment, the Member State concerned in the main proceedings is not justified in requiring the repayment of definitively paid refunds, unless abuse on the part of the exporter is proven.

37 To the same effect as the Netherlands Government, the Greek Government submits that the fact that the condition with respect to release for consumption on the market of the non-member country of importation has not been met in the case in the main proceedings implies that the repayment of the differentiated refunds wrongly paid can be requested on the basis of the provisions of Regulation No 2988/95 without the necessity of establishing abuse on the part of the exporter. That argument cannot be accepted because, as was pointed out in paragraph 32 of this judgment, the repayment of the differentiated refunds which were wrongly paid as regards the transactions at issue in the main proceedings, which date from the period 1988 to 1994, requires evidence of abuse on the part of the exporter. Consequently, there is no irregularity for the purposes of Article 1 of Regulation No 2988/95 that can be taken into account in this connection.

38 In the light of the foregoing, the answer to the first question referred for a preliminary ruling must be that, in proceedings for the withdrawal and recovery of differentiated refunds which have been definitively paid on the basis of Regulation No 3665/87, a finding that those refunds have been wrongly paid must be substantiated by evidence of abuse on the part of the exporter, furnished in accordance with the rules of national law.

The second question

39 Since the first question has been answered in the affirmative, it is unnecessary to answer the second question.

The third question

40 By its third question, the national court seeks, in essence, to ascertain the criteria applicable when assessing, whether an irregularity is to be regarded as continuous or repeated for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95. It does so, in particular, with regard to a situation where the irregularity relates to a relatively small proportion of all the transactions in a given period and always concerns different consignments.

41 As stated, in essence, by Advocate General Sharpston at point 82 of her Opinion, an irregularity is continuous or repeated for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95 where it is committed by a Community operator who derives economic advantages from a body of similar transactions which infringe the same provision of Community law.

42 The fact that, as in the present case, the irregularity relates to a relatively small proportion of all the transactions carried out in a given period and that the transactions in which the irregularity has been detected always concern different consignments is immaterial in this respect. Those factors cannot be decisive for the purposes of establishing the existence of a continuous or repeated irregularity, otherwise operators may seek to avoid the application of the second subparagraph of Article 3(1) of Regulation No 2988/95 by artificially dividing their transactions.

43 It is for the national court to verify, in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined, whether action constituting a continued or repeated irregularity has taken place in the case in the main proceedings.

44 In the light of all the foregoing, the answer to the third question must be that, for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95, an irregularity is continuous or repeated where it is committed by a Community operator who derives economic advantages from a body of similar transactions which infringe the same provision of Community law. The fact that the irregularity relates to a relatively small proportion of all the transactions carried out in a given period and that the transactions in which the irregularity has been detected always concern different consignments is immaterial in this respect.

Costs

45 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 (First Chamber) hereby rules:

1. **In proceedings for the withdrawal and recovery of differentiated export refunds which have been definitively paid on the basis 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, a finding that those refunds have been wrongly paid must be substantiated by evidence of abuse on the part of the exporter, furnished in accordance with the rules of national law.**

2. **For the purposes of the second subparagraph of Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, an irregularity is continuous or repeated where it committed by a Community operator who derives economic advantages from a body of similar transactions which infringe the same provision of Community law. The fact that the irregularity relates to a relatively small proportion of all the transactions carried out in a given period and that the transactions in which the irregularity has been detected always concern different consignments is immaterial in this respect.**

[Signatures]