OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 7 June 2006 [1]

1. In this preliminary reference, the Court is asked to interpret provisions governing the recovery of refunds paid to support export outside the Community of milk products, [2] when those products have subsequently been re-exported to a different country of destination. The issue arises because products exported to the United States were then re-exported to Canada. Exports made directly from the Community to Canada would have attracted a lower rate of refund than that payable on exports to the United States.

2. Specifically, the College van beroep voor het bedrijfsleven (Administrative Court for Trade and Industry), Netherlands, asks whether, once the refund in question has become definitive, it may be regarded as having been 'wrongly paid' only in the event of abuse on the part of the exporter or, if not, in what circumstances it may be so regarded. The referring court also seeks guidance on the conditions for establishing whether an 'irregularity' is continuous or repeated within the meaning of the relevant rules.

Relevant Community law

Framework for export refunds on milk and milk products

3. At the time of the transactions in question, general provision for granting variable export refunds for milk and milk products

1 — Original language: English.

2 — Export refunds may be of two kinds: variable (or 'differentiated') and fixed (or 'non-differentiated'). The present case is concerned with variable refunds. The importance of the distinction is discussed briefly below, point 35.

was made in Article 17 of Regulation (EEC) No 804/68, [3] governing the market in such products.

4. Regulation (EEC) No 876/68 [4] contained the implementing rules governing the grant of export refunds for milk and milk products.

5. Article 4 of Regulation No 876/68 provided for refunds to be varied according to the destination of products, where market conditions so required.

6. Article 6 provided:

'1. The refund shall be paid upon proof:

— that the products have been exported from the Community, and

— that the products are of Community origin, ...

2. Where Article 4 applies, the refund shall be paid under the conditions laid down in paragraph 1, provided it is proved that the product has reached the destination for which the refund was fixed.'

Export refund for pecorino cheese

7. It is common ground that, during the material period, export refunds for pecorino cheese were fixed at rates which were systematically higher for exports to the United States than for exports to Canada.

3 — Of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176). With effect from 1 January 2000, Regulation No 804/68 was repealed by Council Regulation (EC) No 1255/1999 of 17 May 1999 of the same name (OJ 1999 L 160, p. 48).

4 — Of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (OJ, English Special Edition 1968(I), p. 234). That Regulation was repealed, with effect from 1 January 1995, by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105).

Detailed rules for export refunds

Applicable at the material time

8. At the material time, Regulation (EEC) No 3665/87 [5] laid down the detailed rules on the application of the system of export refunds in general, including refunds on milk and milk products. Certain of its recitals stressed the importance of ensuring that products whose export was supported by such refunds actually reached the market in the declared non-member country of destination. [6]

9. Article 4(1) provided:

'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.'

10. Article 5 provided:

'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 — save where it has perished in transit as a result of force majeure — 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,

...

However that period may be extended ... .

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

5 — Of the Commission 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). In due course Regulation No 3665/87 was replaced by Commission Regulation (EC) No 800/1999 of the Commission of 15 April 1999 of the same name (OJ 1999 L 102, p. 11), which was applicable from 1 July 1999.

6 — See in particular recitals 4, 13 and 24.

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.

2. ...

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.

...'

11. Articles 16 to 21 of Regulation No 3665/87 set out specific detailed rules applicable to variable export refunds.

12. Article 16 subjected the payment of such refunds to additional conditions laid down in Articles 17 and 18.

13. Article 17(1) stated:

'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. ...'

14. Article 17(3) provided:

'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.'

15. Article 18 provided an exhaustive list of documentary evidence that exporters were obliged to produce to prove that the product had cleared customs for release for consumption. [7] That list included a copy of the transport document.

7 — Amendments to Article 18 were made on several occasions during the relevant period. They are not material to the outcome of these proceedings.

16. Article 19 allowed Member States to exempt the exporter from furnishing the proof required under Article 18 other than the transport document, subject to a ceiling on the refund's value, 'where the transaction concerned offers adequate assurances that the products in question will reach their destination'. [8]

17. Articles 22 and 23 provided in so far as is relevant:

'*Article 22*

1. On application by the exporter, Member States shall advance all or part of the amount of the refund as soon as the export declaration has been accepted, on condition that a security is lodged of which the amount is equal to the amount advanced plus 15%.

Member States may lay down the conditions under which it shall be possible to apply for an advance of part of the refund.

2. The amount advanced shall be calculated taking account of the rate of refund applicable for the declared destination ... [9]

Article 23

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.

...'

Subsequent amendment

18. Shortly after the last export transaction giving rise to the present reference took place, Regulation (EC) No 2945/94 [10] introduced an amendment to Article 11 [11] of

8 — Amendments were made to Article 19 in mid-1993. Again, these are not material to the present case.

9 — Amendments, which are not material to the present case, were likewise made to Article 22 in mid-1993.

10 — Of the Commission of 2 December 1994 amending Regulation (EEC) No 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products, as regards the recovery of amounts unduly paid and sanctions (OJ 1994 L 310, p. 57).

11 — The original text of Article 11 merely read: 'A refund may be withheld if the amount thereof in respect of any one application, which may cover one or more export declarations, does not exceed ECU 25.'

Regulation No 3665/87. The first recital of Regulation No 2945/94 stated that, in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified and provision should be made for the recovery of amounts unduly paid. The fifth recital indicated that past experience and irregularities and notably fraud recorded in this context showed that this measure was necessary and appropriate and that it would act as an adequate deterrent. Regulation No 2945/94 then replaced Article 11 of Regulation No 3665/87 with the following:

'1. Where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:

(a) half the difference between the refund requested and the refund applicable to the actual exportation;

(b) twice the difference between the refund requested and the refund applicable, if the exporter has intentionally supplied false information.

...

3. ... where a refund is unduly paid, the beneficiary shall reimburse the amounts unduly received — which includes any sanction applicable pursuant to the first subparagraph of paragraph 1, — plus the interest calculated on the basis of the time elapsing between payment and reimbursement. However,

— where reimbursement is covered by a security not yet released, seizure of that security in accordance with Article 23(1) or Article 33(1) shall constitute recovery of the amounts due,

— where the security has been released, the beneficiary shall pay the amount of the security which would have been forfeit plus interest calculated from the date of release to the day preceding the date of payment.

...'

19. That amendment came into effect on 1 April 1995.

Financial irregularities

20. Regulation (EEC) No 729/70 [12] dealt in general terms with the financing of the common agricultural policy. Article 1(2) provided that the Guarantee Section of the European Agricultural Guidance and Guarantee Fund ('the EAGGF') was to finance export refunds.

21. Article 8(1) of Regulation No 729/70 imposed a specific obligation on Member States to satisfy themselves that transactions funded by the EAGGF were actually carried out and executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence.

22. Subsequently, Regulation (EC, Euratom) No 2988/95 [13] laid down specific procedural arrangements at Community level for dealing with 'irregularities'.

23. Article 1 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.'

24. Article 3 states:

'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.

12 — Of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218). With effect from 1 January 2000, Regulation No 729/70 was repealed by Council Regulation (EC) No 1258/1999 of 17 May 1999 of the same name (OJ 1999 L 160, p. 103).

13 — Of the Council of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. ...

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty ...

...

3. Member States shall retain the possibility of applying a period that is longer than that provided for in [paragraph 1].'

25. Article 4 states:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to ... repay the amounts ... wrongly received,

...

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result ... in its withdrawal.

4. The measures provided for in this Article shall not be regarded as penalties.'

Factual background and national proceedings

26. Vonk Dairy Products ('Vonk') is a company established in the Netherlands. Between 1988 and 1994 Vonk exported approximately 300 consignments of pecorino cheese to the United States each year.

27. The Algemene Inspectiedienst (general inspection service of the Ministry for Agriculture, Nature and Food Quality; 'the AID') carried out an investigation into Vonk's activities. That investigation concluded that between 1988 and 1994 Vonk had exported 75 consignments [14] of cheese to the United States which had subsequently been exported to Canada.

28. The order for reference sets out extracts from the AID's official report of 5 March 1997 to its ministry. These state inter alia:

'The US Customs in New York, USA, carried out, at the request of the Algemene Inspectiedienst, an investigation into the Orlando Food Corporation ..., New Jersey, one of the customers for the Italian cheese from Vonk Dairy Products BV. ... Following the investigation carried out by the US Customs, the Public Prosecutor in Roermond ... opened an investigation on 5 July 1996 into ... Vonk Dairy Products BV ...

...

The investigation revealed that from 1988 to 1994 Vonk Dairy Products BV exported 75 containers of Italian cheese to the Orlando Food Corporation, USA, and that the same cheese was then passed on to customers in Canada, principal among them being the National Cheese & Food Company ..., Ontario. The 75 containers contained some 1.47 million kg of cheese. Vonk Dairy Products BV applied for export refunds in respect of this quantity, with the United States of America as the destination, and received about HFL 8.1 million [approximately EUR 3 675 000].

The investigation revealed the existence of correspondence between Vonk Dairy Products BV and the National Cheese & Food Company concerning the aforementioned cheese exports.

The investigation revealed that the role of Vonk Dairy Products BV was not confined to exporting Italian cheese to the United States

14 — While the order for reference generally refers to 75 consignments as the quantity that was re-exported between 1988 and 1994, on one occasion (at p. 5) it cites that the United States Customs' investigation found that some 70 consignments were re-exported in that period.

of America, but that it was aware that the cheese was forwarded to Canada and that it was also involved in the marketing of the Italian cheese in Canada.'

29. Vonk's premises were subject to searches in July 1997.

30. In September 1997, the Productschap Zuivel (Dairy Products Board) informed Vonk that it had received the AID's official report, and annexed a copy of that report.

31. On the basis of the judicial investigation, the AID completed a (second) report in August 2000. That report established that the cheese in question had been released for free circulation in the United States and import duties had been paid to the US authorities. However, the consignments were then re-exported to Canada a short time after being imported — most within a few days, others within a few weeks. [15]

32. In April 2001 the Productschap revoked the refund granted to Vonk and reclaimed the difference between the refunds applicable for the United States and Canada (some HFL 2.4 million — a little less than EUR 1.1 million), plus 15%. The Productschap therefore reclaimed a total of HFL 2 795 841.72 (approximately EUR 1.3 million) from Vonk in respect of those transactions.

33. Vonk contested that decision in May 2001. By a further decision of 24 January 2002, the Productschap declared Vonk's challenge to be unfounded.

34. Vonk appealed to the College van beroep, which has referred the following questions to the Court for a preliminary ruling under Article 234 EC:

'(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?

15 — Indeed, it appears that initially Vonk claimed and obtained refund of the import duties paid in respect of the re-exports. After 1 January 1989, this practice was discontinued.

(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? The College would particularly like to know whether a continuous or repeated irregularity is 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

Preliminary observations

35. There are important differences, in economic terms, between variable and fixed export refunds. In the absence of effective controls, if transport and other transaction costs are sufficiently low and the differential between two rates of variable refund for two different non-member countries is sufficiently high, an economic operator can make a profit by declaring goods to be for export to country A (high rate of variable XXX refund), exporting them to that destination and then re-exporting them to country B (lower rate of variable refund). The operator makes an additional profit, over and above his normal trading profit, on the sale of the goods. Conversely, the Community has paid more to support the disposal of the product in country B than the amount considered necessary by the Community legislator, as reflected in the (lower) rate of refund fixed for country B. In the case of non-variable refunds, no equivalent economic incentive arises to misuse (indeed, to abuse) the Community export refunds system.

36. The case-law of the Court reflects this economic reality. Thus, in *Eichsfelder Schlachtbetrieb*, [16] the Court stated that, '[t]he system of differentiated export refunds is intended to gain or to maintain access for Community exports to the markets of the non-member countries concerned, the reason for differentiated refunds being the desire to take account of the particular

16 — Case C-515/03 [2005] ECR I-7355.

characteristics of each import market in which the Community wishes to play a part'. [17] On that basis, the Court has also stated that,'... if it sufficed, in order to qualify for payment of the refund at a higher rate, for the goods simply to be unloaded, the *raison d'être* of the system of varying the refund would be disregarded'. [18]

37. Both the recitals to, and the substantive provisions of, Regulation No 3665/87 similarly make it clear that the Community legislator was well aware of the economic potential for misusing the export refunds system. Up to the point at which the refund has been paid in full, the substantive provisions of that regulation are concerned to ensure that the goods are actually marketed in the declared non-member country of destination. Thus, Article 5(1), final sentence, of Regulation No 3665/87 emphasises that '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' (my emphasis). Article 22 (calculation of advance payable) is framed in terms of 'the rate of refund applicable for the declared destination'. Article 23 sets, as the condition precedent for the recovery of an amount advanced by way of export refund, that 'the amount advanced is greater than the amount *actually due in respect of the relevant export operation*' (my emphasis).

38. Payment of a variable refund is therefore conditional upon proof that the product has been released into free circulation in the declared non-member country of destination. [19] Where the primary documents listed in Article 18(1) of Regulation No 3665/87 are unavailable *or are considered inadequate*, Article 18(2) provides an exhaustive list of other documents constituting proof of clearance for release for consumption. It is significant that two of these options [20] specifically include certification that, to the knowledge of the issuing authority, the product in question has not subsequently been loaded for re-export.

39. Furthermore, at the stage when the exporter has obtained an advance (against security) of the refund payable, even proof that customs formalities have been completed provides rebuttable evidence that the objective of variable export refunds has actually been achieved. In *Möllman*, for

17 — Paragraph 26, citing Case 125/75 *Milch- Fett- und Eier-Kontor* [1976] ECR 771, paragraph 5; Case 89/83 *Dimex* [1984] ECR 2815, paragraph 8; and Case C-347/93 *Boterlux* [1994] ECR I-3933, paragraph 18.

18 — *Eichsfelder Schlachtbetrieb*, paragraph 27; *Boterlux*, paragraph 19.

19 — *Boterlux*, paragraph 30. Indeed, if there is suspicion or proof that abuses have been committed, Member States may also require such proof before the granting of a fixed refund (ibid). Article 17(3) of Regulation No 3665/87 refined the test so as to require the product to have been 'cleared through customs for release *for consumption* in the non-member country concerned' (my emphasis).

20 — Article 18(2)(b) and (c).

example, the Court explained that the proof normally associated with a certificate of release from customs may be set aside if there are reasonable doubts as to actual market entry in the country of destination; and that it is for the national court to decide whether such serious doubts exist. [21]

40. How much changes when the refund is paid in full? At that point, the inward customs formalities for entry into the country of destination have (by definition) been completed. Often (although not invariably), control of the goods has passed from the trader to his customer. In principle, therefore, the interests of legal certainty militate in favour of regarding the grant of the refund as indeed definitive.

41. Against that background, I turn to consider the first two questions referred. Since the second question partly encompasses the first, it seems sensible to rephrase them and deal with them together.

21 — Case C-27/92 [1993] ECR I-1701, paragraphs 13 to 17. Whilst this case, like *Dimex*, cited in footnote 17 above, concerned Regulation (EEC) No 192/75 (the predecessor to Regulation No 3665/87), there seems no reason to believe that the principles derived from those rulings do not apply equally to Regulation No 3665/87.

42. The third question raises the separate issue of what the conditions are for establishing that irregularities are continuous or repeated within the meaning of Article 3(1), second subparagraph, of Regulation No 2988/95; and I shall deal with it last.

The first and second questions

43. By these two questions, the national court essentially asks what criteria determine that a definitively paid variable refund was wrongly paid; and in particular whether there are circumstances other than conduct by the exporter amounting to an abuse that will result in the conclusion that definitive refunds were wrongly paid. It seems helpful to approach these questions by asking first what conditions must be satisfied in order to render a variable refund payable; and then to examine in what circumstances the exporter nevertheless does not retain the benefit of the definitive refund that he has received.

Conditions for payment of refunds and the doctrine of 'abusive practices'

44. Vonk submits that the principle of legal certainty requires that export refunds be

recovered only on the basis of the legislation applicable at the material time. There is no legal basis for reclaiming the definitive payment it has received. Permitting the Productschap to reclaim that payment would breach the principles of the protection of legitimate expectations, due diligence, equal treatment and proportionality.

45. Vonk's argument is essentially as follows. It cleared the cheese through customs and sold it to a United States-based client. The cheese was therefore 'placed on the United States market for consumption'. Vonk did what it undertook to the Community that it would do. Why should it be held to account if the cheese is then sold to another trader in Canada? What happens to the cheese after Vonk sells it to its customer in the United States is irrelevant. [22]

46. The Netherlands takes the view that, in order for an exporter to be entitled to retain an export refund, the products must have been used in some way in the country of destination, by being consumed, significantly modified or processed. Such use is evidence that the products have indeed been released for *consumption*. When there are serious doubts as to market entry and actual marketing of the goods, the exporter must provide evidence to demonstrate that the goods have truly entered the market in the country of destination. [23]

47. The Commission takes the view that it is necessary to show evidence of an abusive practice on the part of the exporter for the refund to be considered as unduly paid and therefore recoverable; and that that is a matter for the national court to determine. The Commission draws attention to certain elements of fact that, it suggests, might lead the national court to conclude that such was indeed the case here.

48. In my view, it follows from Articles 4 and 6 of Regulation No 876/68 that the right to payment of a variable refund is established when there is evidence that the goods: (i) have been exported from the Community; (ii) are of Community origin; and (iii) have reached the destination for which the variable refund was fixed. That, however, merely begs the question of what one means by 'reaching the destination'.

22 — At the hearing, Vonk suggested that since the Community recognised differences in export refunds according to the country of destination it could not reasonably justify asking for reimbursement from an exporter who had complied with all requirements under Community law related to the grant of a variable refund. Further, the Community authorities had been aware of such re-exportation from the United States to Canada for several years and could have introduced additional checks earlier to address that situation.

23 — Greece makes a similar submission.

49. That question is answered by Articles 16 to 18 of Regulation No 3665/87, which introduce the supplementary condition, (iv), that the goods must have been imported into the country of destination within 12 months of acceptance of the export declaration. [24] Products are considered to have been 'imported' when they have been 'cleared through customs for release for consumption in the non-member country concerned'. [25]

50. Those four conditions for establishing whether payment of a variable export refund is due are clearly cumulative.

51. When determining whether the exporter should retain a refund once it has become definitive, is it sufficient that the exporter should be able to demonstrate that he has produced the necessary documentary evidence to show that those conditions have been satisfied?

52. Here, it seems to me that, from both an economic and a legal perspective, a distinction can and should be drawn between two rather different situations. In situation A, the trader has sold on the goods in question to a third party, with whom his dealings are at arm's length, at the point at which the goods are cleared through customs for release for consumption in the non-member country concerned. He plays no further part in the processing, onward sale or disposal of those goods. He cannot therefore reasonably be held responsible for keeping track of them; and he should be allowed to enjoy the benefit of the definitive refund (whether variable or fixed).

53. In situation B, the trader remains involved with what happens to the goods after they are cleared through customs for release for consumption. He participates in any benefit that can be derived from exploiting the system (for example, by re-exporting back to the Community, or by re-exporting the unaltered goods to a different non-member country for whose market they were actually intended). In such circumstances, it would seem strange that he should retain the definitive refund that has, in the meantime, been granted to him.

54. It would be possible to address situation B (continuing involvement by the trader) by permitting a Member State to examine the subsequent chain of events and to apply a different (more elaborate) substantive definition of what customs clearance 'for release for consumption in the non-member country concerned' actually means. Thus, for example, a Member State might have regard to the time-scale, the pattern of dealing, and the presence or absence of any real economic use of the goods in the country of destination

24 — Article 17(1).
25 — Article 17(3).

in determining whether the goods were really 'cleared through customs for release for consumption' in the non-member country in question.

55. That does not seem to me to be a good solution. It would, I think, conflate situation A (the normal trading situation, which does not need addressing) with situation B (which does). It imposes an unnecessarily heavy burden on prudent traders, who do not wish to run the risk of finding that their definitive refunds are later withdrawn, to keep additional records and make additional enquiries. Potentially, it makes the trader's right to a refund dependent on events or commercial conduct outside his control. [26] It is difficult to square with the principle that, normally, legal certainty precludes recovery of refunds which have become definitive.

56. It seems to me that the Court has therefore been right *not* to modify the four cumulative conditions upon whose fulfilment payment of a refund depends, and instead to address this problem by developing a broad, and pragmatic, concept of abusive practice (which I discuss below). It should not alter its approach in the present case.

57. In *Emsland-Stärke* [27] the Court confirmed the general principle that payment of a refund (as opposed to an advance) is definitive. That case concerned fixed export refunds for the export of products based on potato starch to Switzerland. The goods cleared customs and the refunds were duly paid. Subsequently, it was discovered that certain consignments had then been transported back (unaltered) to Germany, and that other consignments had been forwarded (also unaltered) to Italy. Article 9(1), Article 10(1) and Article 20(2) to (6) of Regulation (EEC) No 2730/79 [28] (at issue in that case) imposed four cumulative conditions to be satisfied for payment of a refund that were similar, mutatis mutandis, to those contained in, respectively, Article 4(1), Article 5(1), and Articles 17(3) and 18 of Regulation No 3665/87 in respect of dairy products.

26 — Compare *Eichsfelder Schlachtbetrieb* (cited in footnote 16 above) at paragraph 36, where the Court rejected the argument that reimbursement to a different economic operator of import duties paid by the trader in the non-member country of destination might retroactively remove the legal basis for the export refund.

27 — Case C-110/99 [2000] ECR I-11569.

28 — Of the Commission of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1979 L 317, p. 1).

58. The Court decided that those four cumulative conditions for the grant of the refunds were satisfied. [29] The goods fulfilled the condition in Article 9(1) that they should have left the geographical territory of the Community. The other conditions which Member States were entitled to introduce pursuant to Article 10(1) [30] 'could have been imposed only *prior* to the grant of the refund' (my emphasis). [31]

59. In *Emsland-Stärke*, the Court went on to examine whether nevertheless, exceptionally, there might sometimes be an obligation to repay a definitive refund. It stated unequivocally that 'the scope of Community regulations must in no case be extended to cover abuse [32] on the part of a trader'. [33] The Court continued:

'A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.

It requires, 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. The existence of that subjective element can be established, inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.

It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined.' [34]

60. Subsequently, in *Eichsfelder Schlachtbetrieb*, [35] the Court applied the definition of abuse [36] given in *Emsland-Stärke* in the context of variable refunds. It concluded

29 — See paragraph 46.

30 — Relating to proof that the goods had actually been released into free circulation in the non-member country of destination: compare the last subparagraph of Article 5(1) of Regulation No 3665/87, whose wording is very similar.

31 — Paragraph 48, reiterated — citing *Boterlux* paragraph 30 — at paragraph 49.

32 — The English text of the judgment in *Emsland-Stärke* uses the term 'abuse' for the French 'pratique abusive'.

33 — Paragraph 51, citing Case 125/76 *Cremer* v *BALM* [1977] ECR 1593, paragraph 21 (where the English text has 'abusive practices').

34 — *Emsland-Stärke*, paragraphs 52 to 54. As to the evidential rules, see further the cases cited in paragraph 54.

35 — Cited in footnote 16 above; see paragraph 39 of the judgment.

36 — In *Eichsfelder Schlachtbetrieb*, the wording of the English text reverts to 'abusive practices'.

that reimbursement of a (variable) refund may be required, despite fulfilment of the conditions for obtaining a refund, if the national court considers that evidence of an abusive practice on the part of the exporter has been produced, in accordance with the rules of national law. [37]

61. It is clear from that case-law that the assessment of whether such an abusive practice has occurred involves looking at the surrounding circumstances and evidence as a whole. Only on the basis of that comprehensive analysis can national courts establish whether there has been an abusive practice; and Member States fulfil their obligations under Article 8(1) of Regulation No 729/70 and/or Article 10 EC. [38]

62. The difficulty that appears to have led the national court to refer the first and second questions is essentially the following. In its order for reference, [39] the referring court says: 'The College finds that the order, upheld in the contested decision, demanding repayment of the refunds was not based upon the defectiveness of the import documents produced by the appellant or on abuse on the part of the appellant, but solely on the fact that the consignments of cheese in question were re-exported to Canada almost immediately after being exported into the USA.'

63. The Productschap's decision of 24 January 2002 [40] (which is to be found on the file lodged by the national court with the Court's Registry) is, at least to some extent, ambiguous. For example, it records that, 'Vonk had immers zelf twijfels over de werkelijke bestemming van de door haar uitgevoerde kaas'. [41] On the other hand, one finds the statement, 'Het bestreden besluit is bovendien niet gebaseerd op enig gebrek betreffende deze documenten zelf, maar op de feitelijke weg die de onderhavige zendingen hebben afgelegd'. [42]

64. As the Commission rightly observes, it is for the national court to assess whether an abusive practice has occurred. The assessment is to be made in accordance with the rules of evidence of national law, provided

37 — *Eichsfelder Schlachtbetrieb*, paragraphs 41 to 42.

38 — Case C-2/93 *Exportslachterijen van Oordegem* [1994] ECR I-2283, paragraph 17.

39 — At paragraph 3.6.

40 — See point 33 above

41 — 'Indeed, Vonk itself doubted the true destination of the cheese it exported' (my translation) (p. 7 of the decision).

42 — 'Moreover, the contested decision is not based on any shortcomings relating to the documents themselves, but on the actual route taken by the consignments under consideration' (my translation) (p. 8 of the decision).

that the effectiveness of Community law is not undermined.[43] It is clear from the definition of an abusive practice given by the Court that the assessment of whether particular conduct, properly understood, amounts to an abusive practice involves looking at the surrounding circumstances and evidence as a whole. Whether and to what extent that assessment is done by the competent authority for examining refund payments (the Productschap) or by the national court reviewing the legality of the competent authority's decision, or by both in turn, is a matter for the legal system of the Member State concerned.

Member States' obligation to recover sums unduly paid

65. The Netherlands makes the further submission that variable refunds paid in violation of Community law may be reclaimed even when the exporter has not acted abusively. It bases its argument on Article 10 EC and Article 8(1) of Regulation No 729/70. In its view, Member States are obliged to reclaim sums that were unduly paid, even where the exporter has not committed any error. The method of recovery is a matter of national law. The present case concerns simply failure to satisfy the conditions for payment of the refund.

66. That submission runs counter to the principle clearly enunciated in *Emsland-Stärke*[44] that, provided the requisite four cumulative conditions are satisfied, payment of the refund becomes due. In this context, it is necessary briefly to consider two decisions cited by the Netherlands, *Deutsche Milchkontor*[45] and *Steff-Houlberg*,[46] and the Court's earlier judgment in *BayWa.*[47] Those cases are authority for the propositions that (i) 'Member States must take the measures necessary to prevent and deal with irregularities affecting the operations of [the EAGGF] and to recover sums lost as a result of irregularities or negligence'[48] and (ii) 'national authorities responsible for operating Community machinery for agricultural intervention ... may not ... exercise a discretion as to the expediency of demanding repayment of Community funds unduly or irregularly granted'.[49] However, all three cases were concerned with situations in

43 — *Eichsfelder Schlachtbetrieb*, paragraph 40.

44 — See points 57 and 58 above.

45 — Joined Cases 205/82 to 215/82 [1983] ECR 2633.

46 — Case C-366/95 [1998] ECR I-2661.

47 — Joined Cases 146/81, 192/81 and 193/81 [1982] ECR 1503.

48 — *Deutsche Milchkontor*, paragraph 18; *Steff-Houlberg*, paragraph 14; cf. also *BayWa*, paragraph 30.

49 — *BayWa*, paragraph 30; *Deutsche Milchkontor*, paragraph 22; *Steff-Houlberg*, paragraph 14.

which the relevant Community rules had *not* been complied with, so that there had indeed been 'irregularities' and 'undue payments'. In the present case, in contrast, the formal rules *have* been complied with; but the products have subsequently been re-exported to a different non-member country (Canada) from that for which the variable refund was granted (the United States).

Effect (if any) of Regulation No 2988/95

67. Greece likewise submits that variable refunds may be reclaimed even where the exporter has not acted abusively. Under Articles 1(2) and 4(1) of Regulation No 2988/95, unduly paid sums may be recovered when the economic operator's activities contain an irregularity. It is not necessary to consider whether there is a connection between the irregularity and the subjective conduct of the operator.

68. In my view, it is not appropriate to establish whether the *substantive* conditions applicable at the time to variable refunds (contained in Regulation No 3665/87) are, or are not, fulfilled by reference to the terms of a subsequent *procedural* regulation (Regulation No 2988/95). In any event, the scope of the definition in Article 1(2) of Regulation No 2988/95 (and of the consequential obligation in Article 4(1) thereof) can only be ascertained by reference to the substantive rules in force at the material time.

69. During the period when the exports in question took place, Article 11 of Regulation No 3665/87 had *not* been amended by Regulation No 2945/94 so as to include the possibility of recovering sums overpaid by way of refund on the basis of incorrect information. At the material time, therefore, only conduct by an operator displaying the combination of objective and subjective features that together constitute an abusive practice, as defined by the Court, gave rise to an irregularity within the meaning of Article 1(2) of Regulation No 2988/95 and a corresponding obligation to repay a definitive refund.

Alleged breach of fundamental principles

70. The arguments advanced by Vonk that reclaiming variable refunds after payment has become definitive breaches the principles of legal certainty, legitimate expectations, due diligence, equal treatment and proportionality can be disposed of shortly. As the Court also made clear in *Emsland-Stärke*, the obligation to repay refunds received in the

event that the two constituent elements of an abuse are established does not breach the principle of lawfulness. The obligation to repay is not a penalty [50] for which a clear and unambiguous legal basis would be necessary, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the Community rules were created artificially, thereby rendering the refunds granted undue payments and thus justifying the obligation to repay them. [51]

71. I am therefore of the view that before Regulation No 2945/94 came into force, and therefore in these proceedings, a finding that the exporter had engaged in an abusive practice was the sole basis on which a definitively paid refund could be considered as wrongly paid.

72. By way of answer to the first and second questions referred, I therefore conclude that, in accordance with Articles 4 and 6 of Regulation No 876/68 and Articles 16 to 18 of Regulation No 3665/87, the definitive right to payment of a variable refund is established upon production of proof that the goods in question:

— are of Community origin,

— have been exported from the Community,

— have reached the destination for which the variable refund was fixed, and

— have been imported into the non-member country of destination within 12 months of acceptance of the export declaration, by being cleared through customs for release for consumption in the country concerned.

However, in order to retain the benefit of the definitive grant of a variable refund, the exporter must not have engaged in conduct that is properly to be characterised as an abusive practice.

50 — Cf. Article 4(4) of Regulation No 2988/95.

51 — Paragraph 56.

A finding of an abusive practice requires, first, a combination of objective circumstances in which, 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.

It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined.

At the material time, a finding that the exporter had engaged in an abusive practice was the sole basis on which a definitively paid refund could be considered as wrongly paid.

The third question

73. The referring court's third question is concerned with the meaning of the term 'continuous or repeated irregularities' in Article 3(1), subparagraph 2, of Regulation No 2988/95. More particularly, it wonders whether (i) irregularities are to be deemed to be 'continuous' or 'repeated' if they concern a relatively small proportion of the total number of transactions during a defined period, and (ii) the transactions in relation to which irregularities have been identified concern different quantities.

74. Vonk disputes the applicability of Regulation No 2988/95 in the present case. The Netherlands also wonders whether the regulation applies retroactively, given that the last irregularity was committed in 1994 and that Regulation No 2988/95 entered into force only on 26 December 1995. None the less, both parties consider how Regulation No 2988/95 might be applied.

75. Vonk submits that the relevant criteria defining continuous or repeated irregularities are set out in *José Martí Peix.* [52] There

52 — Case C-226/03 P [2004] ECR I-11421. In paragraphs 16 and 17 the Court stated: '[U]nder Article 1(2) of Regulation No 2988/95 an irregularity presupposes a breach of a provision of Community law resulting from an "act or omission" by an economic operator. Where the omission occasioning the breach of the provision of Community law persists, the irregularity is "continuous" for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95.'

must be one or several acts concerning the same supply or the same application for a refund.

76. The Netherlands notes that the purpose of Article 3 of Regulation No 2988/95 is to allow sufficient time to reclaim unduly paid sums, thereby protecting the Community's financial interests. Continuous or repeated irregularities must be analogous acts infringing the same law. The Netherlands bases that view on inter alia *Montecatini* [53] in which the Court stated:

'... although the concept of a continuous infringement has different meanings in the legal orders of the Member States, in any event it comprises a pattern of unlawful conduct implementing a single infringement, united by a common subjective element'.

77. The fact that the different consignments must be considered individually cannot preclude categorising them as continuous or repeated irregularities within the meaning of Article 3(1) of Regulation No 2988/95.

78. The Commission also cites the definition of continuous or repeated irregularities given by the Court in *José Martí Peix*, and also the earlier interpretation given by the Court of First Instance in those proceedings and endorsed on appeal, namely that irregularities are 'continuous' within the meaning of Article 3(1) where they are identical in substance. [54] Whilst the decision is one for the national court, the Commission considers on the basis of the material contained in the order for reference that there was repetition of an identical irregularity.

79. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force. [55] Article 3(1) of Regulation No 2988/95 therefore applies to all proceedings pending on 26 December 1995, when Regulation No 2988/95 entered into force. It is not possible to verify from the order for reference whether the proceedings against Vonk were 'pending' on 26 December 1995, or had not yet been commenced at that date. In either event, however, Article 3(1) of Regulation No 2988/95 would apply.

53 — Case C-235/92 P [1999] ECR I-4539, paragraph 195.

54 — See paragraph 81 of the judgment of the Court of First Instance, cited in paragraph 7 of the judgment of the Court of Justice.

55 — See Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31 and the case-law cited there.

80. I agree with the Commission that the actual decision as to whether there have, or have not, been continuous or repeated irregularities in the present case is a matter for the national court. However, the Court may provide guidance as to the legal meaning of those terms.

81. As the Commission has pointed out, the present case is concerned with separate export transactions involving the same type of product (pecorino cheese) to the same declared destination (the United States) and the same ultimate destination (Canada). Vonk made separate declarations claiming refund, but the pattern of what happened to the goods (imported into the United States, held there, exported shortly thereafter in an unaltered state to Canada) is identical.

82. Essentially, I agree with the Netherlands' analysis. In order for irregularities to be considered as continuous or repeated under Article 3(1) they must be similar in the following respects. They must show a similar pattern of acts infringing the same Community rule. They must also enable the same economic operator to benefit from the same economic advantage as a result of the application of Community rules.

83. Finally, I agree with the Commission, Greece and the Netherlands that, for the purpose of establishing whether there have been continuous or repeated irregularities, it is immaterial what proportion of the transactions in a defined period is tainted by the irregularities, and whether the irregularities are interspersed with regular transactions.

84. I therefore conclude that irregularities are to be considered as continuous and repeated within the meaning of Article 3(1) of Regulation No 2988/95 if they show a similar pattern of acts infringing the same Community rule. They must also enable the same economic operator to benefit from the same economic advantage as a result of the application of Community rules. In that context, it is immaterial what proportion of the transactions in a defined period is tainted by the irregularities concerned, and whether the irregularities are interspersed with regular transactions.

Conclusion

85. I therefore propose that the questions referred by the College van beroep voor het bedrijfsleven, Netherlands, should be answered as follows:

Questions 1 and 2

In accordance with Articles 4 and 6 of Council Regulation (EEC) No 876/68 of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds and Articles 16 to 18 of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common rules for the application of the system of export refunds on agricultural products, the definitive right to payment of a variable refund is established upon production of proof that the goods in question:

— are of Community origin,

— have been exported from the Community,

— have reached the destination for which the variable refund was fixed, and

— have been imported into the non-member country of destination within 12 months of acceptance of the export declaration, by being cleared through customs for release for consumption in the country concerned.

However, in order to retain the benefit of the definitive grant of a variable refund, the exporter must not have engaged in conduct that is properly to be characterised as an abusive practice.

A finding of an abusive practice requires, first, a combination of objective circumstances in which, 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.

It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined.

At the material time, a finding that the exporter had engaged in an abusive practice was the sole basis on which a definitively paid refund could be considered as wrongly paid.

Question 3

Irregularities are to be considered as continuous and repeated within the meaning 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 if they show a similar pattern of acts infringing the same Community rule. They must also enable the same economic operator to benefit from the same economic advantage as a result of the application of Community rules. In that context, it is immaterial what proportion of the transactions in a defined period is tainted by the irregularities concerned, and whether the irregularities are interspersed with regular transactions.