OPINION OF ADVOCATE GENERAL ALBER

delivered on 16 May 2000 *

1. This reference for a preliminary ruling was submitted by the Bundesfinanzhof (Federal Finance Court), Germany, and covers two questions regarding the interpretation of Article 10(1) in conjunction with Article 20(2), (3), (4), (5) and (6) of Regulation (EEC) No 2730/79 [1] laying down common detailed rules for the application of the system of export refunds on agricultural products.

2. The parties to the main proceedings are Emsland-Stärke GmbH (hereinafter: 'the plaintiff') and the Hauptzollamt Hamburg-Jonas (hereinafter: 'the HZA'), and the dispute concerns the claim by the plaintiff for payment of export refunds in respect of the export of starch products to Switzerland between April and June 1987. The export refunds granted were reclaimed because the consignments were brought back into the Federal Republic of Germany in one instance and sent on to Italy in the other, in both cases unaltered and by the same means of transport.

3. The case concerns two different export transactions, each involving several consignments:

First, between April and June 1987 the plaintiff exported several consignments of a product based on potato starch under the description 'Emes E' (CN code 3906 90 2300) to Switzerland. The recipients of the goods were declared to be the undertakings FUGA AG and LUKOWA AG, both established at the same address in Lucerne, and both managed and represented by the same group of persons. Invoices were in all cases made out to LUKOWA AG.

Immediately after their release for home use in Switzerland, the export consignments designated as 'Emes E' were transported back into Germany unaltered and by the same means of transport under an external Community transit procedure recently set up by LUKOWA AG. On arrival in Germany they were cleared by the recipient for home use on payment of the relevant import duty.

* Original language: German.

1 — See Part II point 4 below for the full designation of the Regulation.

Second, the plaintiff exported several consignments of a wheat starch-based product to Switzerland in May and June 1987 under the description 'Emsize W 2' (CN code no. 3812 11 0000). Again, the recipients were FUGA AG or LUKOWA AG. Immediately after their release for home use in Switzerland, those export consignments were forwarded, unaltered and by the same means of transport under an external Community transit procedure recently set up by FUGA AG, to Italy, where they were released for home use on payment of the relevant import duty. The transport company invoiced FUGA AG for the through transport of the goods from their point of departure in Germany to their destination in Italy.

Under those circumstances, by decisions of 16 May 1991 and 22 June 1992, the HZA revoked the relevant export refund decisions in respect of those consignments and demanded repayment of the export refunds granted, amounting to DEM 66 722.89 and DEM 253 456.69 respectively.

The administrative complaints made against the decisions to recover the refunds were unsuccessful, as was the subsequent action brought before the Finanzgericht (Finance Court). An appeal on a point of law is now pending in the case.

II — The export refund scheme

4. The conditions for the granting of export refunds at the material time were governed by the horizontal provisions of Regulation (EEC) No 2730/79, as amended by Regulation No 568/85,[2] laying down common detailed rules for the application of the system of export refunds on agricultural products.

5. The first subparagraph of Article 9(1) provides:

'Without prejudice to the provisions of Articles 10, 20 and 26, the refund shall only be paid upon proof being furnished that the product in respect of which customs export formalities have been completed has, within 60 days from the day of completion of such formalities

— in the cases specified in Article 5, reached its destination unaltered, or

2 — Commission Regulation of 29 November 1979 (OJ 1979 L 317, p. 1) as amended by Commission Regulation (EEC) No 568/85 of 4 March 1985 amending for the 10th time Regulation (EEC) No 2730/79 laying down common detailed rules on the system of export refunds on agricultural products (OJ 1985 L 65, p. 5); unless otherwise stated articles cited are articles of this Regulation.

— in other cases, left the geographical territory of the Community unaltered.'

6. Article 10(1) provides:

'In the following circumstances payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the geographical 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 the time limits referred to in Article 31:

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

or

(b) where, by reason of the difference between the rate of refund on the exported product and the amount of the import duty applicable to an identical product on the day when customs export formalities are completed, it is possible that the product may be re-introduced into the Community.

In the cases referred to in the preceding subparagraph, the provisions of Article 20(2), (3), (4), (5) and (6) shall apply.

In addition, the competent authorities of the Member States may require that additional proof be provided which shows, to their satisfaction, that the product has actually been placed on the market in the non-member country of import in the unaltered state.'

7. Article 20(2), (3), (4), (5) and (6) provides:

'2. A product shall be considered to have been imported when the customs entry formalities for home use in the non-member country concerned have been completed.

3. Proof that these formalities have been completed shall be furnished by production of:

(a) the relevant customs document, or a copy or photocopy thereof certified as true by either the body which endorsed the original document, an official agency of the non-member country concerned or an official agency of a Member State, or

(b) the customs entry certificate made out in accordance with the specimen in Annex II in one or more official languages of the Community and in a language used in the non-member country concerned; or

(c) any other document endorsed by the customs authorities of the non-member country concerned on which the products are identified and which proves that they have been released for home use in that country.

4. If, however, owing to circumstances beyond the control of the exporter, none of the documents specified in paragraph 3 can be produced, or they are considered inadequate, proof that customs entry formalities for home use have been completed may be furnished by production of one or more of the following documents:

(a) to (g)...

5. In addition, the exporter shall in all cases where this Article applies produce a copy or photocopy of the transport document.

6. ...'

8. The provisions governing payment of the export refund distinguish between differentiated and non-differentiated rates of refund. [3] Where an export refund paid is under non-differentiated rates, unless doubts exist as to whether the product concerned has reached its destination, payment of the refund depends only on proof that the product in respect of which export customs formalities have been completed has, within 60 days from the day of completion of such formalities, left the geographical territory of the Community unaltered (Article 9(1), second indent). For payment of export refunds at differentiated rates, however, proof must always be furnished that the product has been imported into the non-member country or one of the non-member countries for which the refund is prescribed (Article 20(1)).

9. The rules regarding how proof of importation of the product into a non-member

3 — A differentiated refund is at rates which differ according to the destination of the products (cf. Article 20(1)). In contrast, there is no distinction on the basis of the destination of the products in the case of a non-differentiated refund. The present proceedings relate to non-differentiated refunds.

country is to be furnished are laid down in Article 20(2), (3), (4), (5) and (6) for both non-differentiated and differentiated refund rates. Differentiated refunds are governed directly by these provisions, while for non-differentiated refunds reference is made to the first sentence of the second subparagraph of Article 10(1).

10. Under Article 20(2) a product is considered to have been imported once the customs formalities for release for home use in the non-member country in question have been completed. Proof of completion of these formalities is furnished by submission of the relevant customs document (or a certified copy or photocopy, where appropriate) or a customs entry certificate (Article 20(3)).

III — The reference for a preliminary ruling

11. The Bundesfinanzhof found that a customs entry certificate existed for each consignment. The transport documents, which were also before the court, showed that in both instances the products had been physically taken to the non-member country in question (Switzerland), although they were then immediately forwarded onwards.

12. The referring court cites the judgments of the Court in Case 89/83 *Hauptzollamt Hamburg-Jonas* v *Dimex* and Case C-27/92 *Möllmann-Fleisch* v *Hauptzollamt Hamburg-Jonas*,[4] where the Court held that proof of completion of customs formalities amounted only to rebuttable evidence that the product in question had actually reached its destination. In *Dimex*, no customs entry certificate existed and the circumstances in the country in question gave rise to the assumption that the other documents submitted did not irrefutably prove the import of the goods in question into the intended country of destination. In *Möllmann-Fleisch*, although a customs entry certificate existed it was undated and there was evidence that the re-export of the goods had been ordered for veterinary reasons.

13. In the present case, the goods did not remain in Switzerland solely as a result of a subjective decision by the purchaser. The question therefore arose whether the condition that goods must be imported into the non-member country can for that reason alone be regarded as unfulfilled. There is some doubt in that regard, since Article 20 only refers to the completion of customs entry formalities for home use. Proof of release for home use may only be furnished by other documents if that fact cannot be substantiated by the official documents prescribed for the purpose and listed in Article 20(2) of the Regulation.

4 — Case 89/83 *Hauptzollamt Hamburg-Jonas* v *Dimex* [1984] ECR 2815 at paragraph 11, and Case C-27/92 *Mollmann-Fleisch* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-1701.

14. None the less, it should not be overlooked that the second sentence of the second subparagraph of Article 10(1) provides that additional proof may be called for to show that the product in question has actually been placed on the market in the non-member country of import. However, no definition is given as to what precisely is to be understood by the term 'market in the non-member country of import', nor is it clear whether this means more than that the goods have access to the market through their release for home use. In particular, it is not made clear what conditions, apart from the release of the goods for home use, have to be fulfilled for the goods to be considered to have actually been placed on the 'market of the non-member country of import'.

15. If importation of the goods and, as proof of this, the objective criterion of their actual release for home use, were to be considered insufficient to justify payment of export refunds, this would result in considerable legal uncertainty for those entitled to such refunds. The lack of specific criteria would make it very difficult, if not impossible, for an exporter to stipulate the terms a purchaser would have to fulfil in order not to forfeit his claim to an export refund.

16. If the difference between the export refund granted and the import duty to be levied on importation into the Community were a decisive factor in the commercial calculations by the purchaser resident in the non-member country that led to the goods being re-imported into the Community, then in the view of the Bundesfinanzhof the question would arise whether that fact could defeat the right to a refund under Article 10(1)(1)(b) if the Commission has not determined whether Article 10(1)(1)(b) applies as provided for in Article 10(2). In any event, it was not argued in this case that it had been so determined. Moreover, Article 10(1)(b) of the Regulation is intended only to establish a further case in which proof that the product has been imported into a non-member country may be required before the export refund is paid, and is not concerned with the specific situation in which it is suggested that proof of the goods' release for home use, by means of presentation of a customs entry certificate, which would normally also prove importation of the product in question into that non-member country, should not be granted recognition.

17. Finally, in the view of the referring court, it should be borne in mind that re-importation into the Community does not of itself lead to loss of the export refund.

18. Should in a case such as the present, proof of the product's release for home use in the non-member country not be regarded as sufficient proof of its importation, it would need to be decided what further proofs might be required. If, for example, it were possible to prove that the goods reached the market of the non-member

country by demonstrating that they were sold on in that country, clarification would be necessary regarding the circumstances under which such a sale should be granted recognition. In respect of three consignments in the present case, the question could arise whether the close commercial and personal connection between the undertakings which were party to the sale in the non-member country should preclude recognition of such a transaction as proof of importation into the non-member country.

19. Against that background the referring court decided to suspend proceedings and seek a preliminary ruling from the Court on the following questions:

1. On a proper interpretation of Article 10(1) in conjunction with Article 20(2) to (6) of Regulation (EEC) No 2730/79, does an exporter lose his right to payment of an export refund, determined at a single rate for all non-member countries without variation according to destination, if the product in respect of which the export refund was paid, and which is sold to a purchaser established in a non-member country, is, immediately after its release for home use in that non-member country, transported back into the Community under the external Community transit procedure and is there released for home use on payment of import duty, without any infringement being established?

2. Would the answer be different if, before the product was re-imported into the Community, the purchaser in the non-member country sold it to an undertaking with which he was personally and commercially connected, which was also established in that non-member country?

20. The plaintiff and the Commission appeared in the proceedings before the Court. Reference will be made below to the arguments of the parties.

IV — The arguments of the parties

The plaintiff

21. The plaintiff relies on the distinction drawn in Regulation No 2730/79 between refunds at a non-differentiated rate, for which proof that the goods left the geographical territory of the Community is generally sufficient, and refunds at a differ-

entiated rate, for which importation into a non-member country pursuant to Article 20(1) of the Regulation must be proved.

22. The plaintiff also points out that under Article 20(2) of Regulation No 2730/79, goods are deemed to have been imported 'when the customs formalities for home use in the non-member country in question have been completed.' The objective criterion of release of the goods for home use must be regarded as sufficient, since otherwise, significant legal uncertainty would arise for those entitled to refunds.

23. Re-importation into the Community of goods exported from the Community to a non-member country is permissible, even if an export refund has been paid in respect of such goods. The plaintiff argues that if import duty is levied, there cannot be a presumption that the export refund is recoverable.

24. The plaintiff therefore proposes that the first question referred be answered as follows:

'Article 10(1) in conjunction with Article 20(2), (3), (4), (5) and (6) of Regulation (EEC) No 2730/79 is to be construed to the effect that an exporter does not lose his right to payment of an export refund at a non-differentiated rate for all non-member countries, if the product sold to a purchaser established in a non-member country and in respect of which the export refund was paid, is, without any infringement being established, transported back into the Community under the external Community transit procedure immediately after its release for home use in the non-member country in question, and released there for home use on payment of import duty.'

25. The plaintiff submits that the second question need only be answered if the first question is answered in the affirmative, to the effect that an exporter would in fact lose his right to an export refund if the criteria set out in the first question were met.

26. According to the plaintiff, the price of the goods and the quantity sold had had an impact on the Swiss market in modified starch. The fact that the purchaser was a sister firm of the seller was immaterial, as neither the contract of sale nor the price was fictitious. Had the Swiss sister firm of the importer not bought from the latter it would have bought the same quantity elsewhere in Switzerland, since, at the time of purchase, its requirement was for precisely that amount of modified starch.

27. The plaintiff therefore submits that, if the first question referred is answered in the affirmative, the second question should be answered as follows:

'The answer to the question would be different if the product had been sold by the purchaser established in the non-member country to an undertaking with which he was personally and commercially connected, also established in the non-member country, before it was re-imported into the Community.'

28. As regards the observations by the Commission regarding abuse of rights and the consequences thereof, the plaintiff raised the following objections in the oral proceedings:

Firstly, the recovery of export refunds is contrary to the 'constitutional requirement of a specific enactment', which is a component of the fundamental principle of lawfulness of administration in a State governed by the rule of law and as such should be observed in Community law. The recovery of export refunds is a punitive administrative act requiring a clear legal basis, just as penalties may only be imposed if they are founded on a clear and unambiguous legal basis. [5] A general legal principle is inadequate for this requirement of certainty.

Secondly, even if a right of recovery were to be upheld on the basis of general legal principles, the question would arise as to the correct addressee of that right. The plaintiff had passed the export refund paid to him on to the purchaser within the purchase price, and thus no longer benefited from it. Moreover, it was not the plaintiff who had re-imported the goods into the Community, but the purchaser. Since import duty had also been paid, any advantage which might exist consists in the difference between the export refund and the import duty, which also calls for clarification by the Court.

The Hauptzollamt

29. The HZA, whose position is summarised in the order for reference, argued before the referring court, *inter alia,* that even in non-differentiated rate cases, export refunds could only be granted where the goods participated in the non-member market in question and had been subject to the commercial law of that country. Article 10 in conjunction with Article 20 of

5 — Cf. Case 117/83 *Könecke* [1984] ECR 3291.

Regulation No 2730/79 do not amount to the enactment by the Community legislature of separate conditions for the grant of non-differentiated and differentiated refunds. In the case of the exportation of goods not included in Annex II (to the Treaty), the conditions relating to proof are simply relaxed in that a customs document need not be presented for each exportation. The requirements for the granting of a refund are not met simply by presentation of a customs document evidencing release for home use. The presumption that the goods were subsequently placed on the market is rebuttable, and was rebutted in the cases cited. It is irrelevant that import duty was paid on the re-importation which disqualified the goods for the refund.

The Commission

30. The Commission firstly raises doubts regarding the applicability of Article 10 to the present case.

31. In the oral proceedings the Commission's representative made further observations regarding the commercial background to the transactions which are the subject of the case. He pointed out that the 1986/1987 trading year had been a transition year as regards the starch regime, with production subsidies at that time reduced to half their usual level, while export refunds had remained substantial.[6] The 'detour' via Switzerland taken by the goods would thus have been of particular commercial interest that year.

32. There are three different conditions for the acquisition of a right to a non-differentiated refund:

(1) The product must as a rule have left the geographical territory of the Community unaltered, pursuant to Article 9(1) of the Regulation.

(2) Where there may be serious doubts as to the true destination of the product, or where by reason of the difference between the rate of refund and the amount of import duty there is a danger that the exported product may be re-imported into the Community, the entitlement arises when the product has been imported into a non-member country (Article 10(1) of the Regulation).

(3) In exceptional cases, the requirements under Article 10(1) of the Regulation may be tightened by the competent

6 — The subsidy levels for the products in question for the period from April to June 1987 amounted to: 289.90 ecus/t (OJ 1987 L 58, p. 9), 226.53 ecus/t (OJ 1987 L 85, p. 30) and 235.58 ecus/t (OJ 1987 L 121, p. 41).

authorities in the Member States. An entitlement to a non-differentiated export refund would then only arise once the product had actually been placed on the market of the non-member country of import (Article 10(1) of the Regulation).

33. 'Exceptional cases' are understood by the Commission as cases where no refund is specified for a particular country, for instance because of an embargo, which does not affect the non-differentiated character of the refund specified for other non-member countries, but there remains a danger of the embargo being circumvented.

34. The Commission emphasises that both the second and the third conditions for entitlement to a non-differentiated refund only apply if doubts regarding the true destination or the danger of re-importation (2nd condition) or exceptional circumstances (3rd condition) exist from the outset, i.e. before payment of the refund. This follows from not only the wording of the Regulation but also its internal logic ('... payment of the... refund shall be conditional... on...'). This interpretation has also been confirmed by the Court in Case C-347/93 *Belgian State* v *Boterlux*. [7]

7 — Case C-347/93 *Belgian State* v *Boterlux* [1994] ECR I-3993.

35. The Commission finds that in the present case, the HZA only became aware that the goods had been re-imported into the Community after payment of the export refund, following the customs investigation. The demand for additional proof beyond that of release for home use in Switzerland was not made until after payment of the refund.

36. In addition, the action taken by the HZA in resorting to the third condition for the export refund is problematic, regardless of the timing of the demand for proof.

37. However, if there is no doubt that the export transaction met the requirements for the application of the second condition, then its constituent requirements were also fulfilled.

38. No legal basis for recovering export refunds in a case such as the present existed until the legislation which later superseded Regulation No 2730/79 came into force.

39. In the view of the Commission, however, the actual circumstances under which the products in question were first exported into Switzerland, and then immediately re-imported back into the Community after

being released for home use there, give sufficient cause from the point of view of abuse of rights to examine the recovery ordered by the HZA of the refunds paid.

40. Here, the Commission expressly cites Article 4(3) of Regulation (EC, Euratom) No 2988/95 of the Council on the protection of the European Communities' financial interests. [8]

41. Although this Regulation was not yet in force at the material time, its provisions relating to the refusal or withdrawal of an advantage obtained in breach of Community law by the artificial creation of the required conditions was simply the codification of a legal principle already generally applicable within Community law. This legal principle exists in almost all Member States and has already been applied in appropriate circumstances in the case-law of the Court. The Commission refers in this connection to Case 125/76 *Cremer* v *BALM*, [9] Case 250/80 *Anklagemyndigheden* v *Hans Ulrich Schumacher, Peter Hans Gerth, Johannes Heinrich Gothmann and Alfred C. Töpfer*, [10] Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas*, [11] and the Opinion of Advocate General Tesauro in Case C-441/93 *Panagis Pafitis and Others* v *Trapeza Kentrikis Ellados A.E. and Others*. [12]

42. The Commission argues that three elements must be present cumulatively for an abuse of rights to be presumed:

(1) an objective element, that is to say, evidence that the conditions for the grant of a benefit were created artificially, that is to say that a commercial operation was not carried out for an economic purpose but solely to obtain from the Community budget the financial aid which accompanies that operation. This requires analysis on a case-by-case basis both of the meaning and the purpose of the Community rules at issue, and of the conduct of a prudent trader who manages his affairs in accordance with the applicable rules of law and with current commercial and economic practices of the sector in question;

(2) a subjective element, namely the fact that the operation in question was carried out essentially to obtain a financial advantage incompatible with the objective of Community rules;

(3) a procedural law element relating to the burden of proof. That burden falls on the relevant national administration. However, in the case of abuses even prima facie evidence which might

8 — OJ 1995 L 312, p. 1.

9 — Case 125/76 *Cremer* v *BALM* [1977] ECR 1593.

10 — Case 250/80 *Anklagemyndigheden* v *Hans Ulrich Schumacher, Peter Hans Gerth, Johannes Heinrich Gothmann and Alfred C. Töpfer* [1981] ECR 2645.

11 — Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779.

12 — Opinion in Case C-441/93 *Panagis Pafitis and Others* v *Trapeza Kentrikis Ellados A.E. and Others* [1996] ECR I-1347, I-1349.

reverse the burden of proof is admissible.

43. The test of whether these different elements were present would be a matter for the national court. However, the Commission noted that, as regards the objective element, the financial gain arising from the difference between the refund sum and the import duty was substantial. Moreover, the time between the export and re-import of the products into the Community was very short, and the same means of transport was used.

44. As regards the subjective element, the Commission is of the view that no final assessment can be made on the basis of the facts as presented by the referring court.

45. The Commission therefore proposes that the following rider be added to the answer to the first question:

'Under the legal principle in Community law of abuse of rights, financial advantages are not granted, and can be withdrawn subsequently, if the relevant commercial operation is proved to have had as its aim the obtaining of an advantage contrary to the objectives of the relevant Community rules, inasmuch as compliance with the conditions for obtaining this advantage was created artificially.'

46. The Commission is of the view that in the light of the answer to the first question, there is no need to answer the second question.

47. However, it points out that there is a difference between the proof to be adduced for the second and third conditions. 'Customs documents' have to be furnished for the second condition, while for the third condition 'commercial documents' have to be produced as well. The term 'commercial documents' here is to be regarded as including contracts for the onward sale of the products in question; however, the weight of such documents would be considerably reduced if the products in question, before re-importation into the Community, were sold by a purchaser established in a non-member country to an undertaking with which he was personally and commercially connected, also established in the non-member country.

V — Assessment

The first question

48. Although the referring court asks expressly for an interpretation of Article 10 of the Regulation, the Commission correctly points out that it must first be determined whether the rule applies to a case such as the present.

49. Non-differentiated export refunds are governed generally by Article 9 of the Regulation. Under this, it is necessary and sufficient for the claim to a refund to arise for the goods to have left the territory of the Community unaltered within 60 days of completion of the customs export formalities. That condition is unquestionably met in the present case, and remains unaffected by the fact of subsequent re-importation into the Community.

50. In the case of non-differentiated refunds, the claim can be made conditional on further requirements, although only under the special conditions laid down in Article 10 of the Regulation. Such special conditions are either doubts regarding the true destination of the product (Article 10(1)(a)), or the 'possibility', which can be described as a theoretical danger, that the product may be re-introduced into the Community due to the difference between the rate of refund and the import duty applicable to the same product (Article 10(1)(b)).

51. The facts of the present case could at the most come under the rule in Article 10(1)(b). There is disagreement between the parties as to the actual magnitude of the difference between the export refunds and the import duty on re-importation. Whereas the Commission, referring to Protocol No 2 of the Agreement between the European Economic Community and the Swiss Confederation,[13] presumes that no import duty was levied on the goods which are the subject of the dispute, the plaintiff points out that this preferential rule only applies to products originating from and manufactured in the country of export. In the present case, although the goods had been exported from Switzerland, they were products of Community origin and had been declared as such on re-importation. Import duty had been paid, and the goods had even been subject to excise duty. The referring court assumed in its order for reference that in both transactions, import duty had been levied on re-importation into the Community.

13 — OJ 1972 L 300, p. 189.

52. The amount of the difference between the export refunds and the import duty is ultimately a matter of fact to be decided by the court in the Member State. None the less, an essential pre-condition for the application of Article 10(1)(b) is that the theoretical danger of re-importation due to the difference between the rates of export refund and import duty, should have existed when the goods were exported. Article 10(1)(b) of the Regulation only applies if this condition is met.

53. If, on the basis of the objective facts, doubts exist within the meaning of Article 10(1)(a) and Article 10(1)(b) as to the purpose for which the goods were exported, proof of importation of the goods into a non-member country must be provided in instances where non-differentiated export refund rates apply.

54. If we assume in the following analysis that the present case does in fact fall within Article 10(1)(b), this premiss then leads, in the light of the second subparagaph of Article 10(1), to the conclusion that Article 20(2), (3), (4), (5) and (6) of the Regulation applies. Under this, a product is considered to have been imported 'when the customs entry formalities for home use in the non-member country concerned have been completed'. [14] This condition has unquestionably been met in the present case. The first subparagraph of Article 10(1) of the Regulation does not provide any basis for recovering export refunds already paid.

55. There is also a possibility that the third subparagraph in Article 10(1) might be considered applicable. Under this, 'the competent authorities of the Member States may require that additional proof be provided which shows, to their satisfaction, that the product has actually been placed on the market in the non-member country of import in the unaltered state'. From the account of the facts by the referring court it is clear that the national court held this provision to be applicable at first instance in the present case. In the judgment at first instance it found that the goods, with their brief sojourn in Switzerland and their immediate re-importation by the same means of transport, had not been placed on the market in order to be marketed there.

56. The Commission, however, contends that the rule can only be applied in specific exceptional cases, in order, for example, to ensure that an embargo already imposed would not be circumvented by a detour through another non-member country. In the present case there was thus no scope for the application of the third subparagraph of Article 10(1).

57. The view can also be advanced, on the basis of the structure of the rules in Articles 9 and 10 of the Regulation which impose stricter requirements as to proof on

14 — Cf. Article 20(2) of the Regulation.

the exporter where doubts exist as to the purpose being served by the refunds, that the third subparagraph in Article 10(1) could only be applicable if there were increased grounds for suspicion regarding possible irregularities. [15] The ninth recital in the preamble to Regulation No 2730/79 states in this regard:

'Whereas certain export transactions can lead to abuses; whereas, in order to prevent such abuses, payment of the refund should be subject to the condition that the product has not only left the geographical territory of the Community but has also been imported into a non-member country and, where applicable, actually marketed there;'.

58. Both the grounds for suspicion and the consequent obligation to provide proof must exist before payment of the refunds, however. That is clear from Article 10(1) of the Regulation, which reads... 'payment of the... refund shall be conditional upon ...'. This approach was confirmed by the *Boterlux* [16] decision, where the Court held that 'Member States may also require such proof *before granting a non-differentiated refund* if there is suspicion or proof that abuses have been committed'. [17]

59. This condition also follows from the subsequent — and, thus, in the present case, inapplicable — Commission Regulation (EC) No 800/1999 laying down common detailed rules for the application of the system of export refunds on agricultural products, [18] which includes more detailed provisions than Article 10 of Regulation No 2730/79, and Article 20(4) of which expressly provides in its first sentence:

'Paragraph 1 shall apply *before* the refund has been paid'. [19]

60. In the main proceedings, the export refunds have already been paid. Furthermore, all the formal requirements for a refund claim have been met. Article 10(1) of the Regulation accordingly does not provide any legal basis for the right of recovery claimed by the Hauptzollamt.

61. In contrast, Regulations subsequent to Regulation No 2730/79, namely both Regulation No 3666/87 [20] as amended by

15 — Cf. the Opinion of the Advocate General in Case C-114/99 *Roquette Frères* [2000] ECR I-8823, I-8825, point 58.

16 — Case C-347/93 (cited in footnote 7).

17 — Cf. *Boterlux* (cited in footnote 7, at paragraph 30, and point 1 of the operative part of the judgment; emphasis added).

18 — Commission Regulation of 15 April 1999 (OJ 1999 L 102, p. 11).

19 — Emphasis added.

20 — Commission Regulation of 27 November 1987 (OJ 1987 L 351, p. 1).

Regulation No 313/97,[21] and Regulation 800/1999,[22] contain provisions[23] which expressly allow for the recovery of refunds paid if an objective set of circumstances, comparable to those in the main proceedings, obtain. The converse conclusion can also be drawn, that is to say that in the absence of an express enabling measure, a claim for recovery of export refunds paid is inadmissible if the sole ground is the re-importation of the goods into the Community.

62. None the less, it must be determined whether, in a case such as the present, where the facts give rise to the suspicion of a bogus transaction, general legal principles might support a right of recovery as mooted by the Commission. For instance, a right of recovery in cases of abuse of the refund regulations would be quite conceivable.

63. The Commission refers in this connection to Article 4(3) of Regulation No 2988/95 concerning the protection of the European Communities financial interests,[24] which codifies a general principle of Community law. That paragraph states:

'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, as the case shall be, either in failure to obtain the advantage or in its withdrawal.'

64. Although the rule is not applicable to the present case given the date of its entry into force, it can none the less serve as a guide when making an assessment.

65. The Court has often had occasion to state its views on the question of abuse of rights in various contexts.

66. In the context of fundamental freedoms the Court has held on more than one occasion that the circumvention of a Member State's rules by an abusive exercise of rights under Community law is inadmissible.[25] The Court has also had to deal

21 — Commission Regulation of 20 February 1997 (OJ 1997 L 51, p. 31).

22 — Cited in footnote 18.

23 — Cf. Article 15(2) of Regulation No 3665/87 as amended by Regulation No 313/97, and Article 20(4)(c) and (d) of Regulation No 800/1999.

24 — Council Regulation of 18 December 1995 (cited in footnote 8).

25 — Cf. Case 229/83 *Leclerc and Others* v *SARL 'Au blé vert' and Others* [1985] ECR 1 at paragraph 27 on the free movement of goods; Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161 at paragraph 43 on the free movement of workers; Case 33/74 *van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR I-1299 at paragraph 13 and Case C-23/92 *TV10* v *Commissariaat voor de Media* [1994] ECR I-4795 at paragraph 21 on the freedom to provide services.

with the phenomenon of abuse of rights in other contexts. For example, it has held an assignment of a claim to be invalid under Community law where the assignor and assignee were acting together to the disadvantage of other creditors. [26] On the other hand, the Court has also held that a blanket clause [27] in a Member State intended to prevent abuses of law was invalid in instances where its application would detract from 'the full effect and uniform application of Community law in Member States'. [28]

67. Under the common agricultural policy, the changing systems of monetary compensatory amounts, accession compensatory amounts and export refunds have on more than one occasion led to legal proceedings between the authorities and traders, [29] and sometimes even between the Community and Member States. [30] There seems to be a particularly fine line between the proper use of instruments of economic control and the abuse of financial incentives in this field. The phenomena of 'roundabouts' [31] and imports 'diverted' via another Member State [32] or non-member country seem to be a latent danger of financial compensatory schemes.

68. In a preliminary ruling concerning refunds in respect of agricultural products, [33] the Court held that the scope of the relevant Regulations 'must in no case be extended to cover abusive practices of an exporter'. [34] In another case dealing with the grant of monetary compensatory amounts, [35] the Court had no hesitation in applying Community rules which resulted in an economic advantage being gained from the export from the Community of products originating in a non-member country. Neither the minimum price rules nor negative monetary compensatory amounts had been applied on importation of the product, while positive monetary compensatory amounts were paid on re-exportation. [36] However, the Court added a qualification to the effect that the position would be different 'if it could be shown that the importation and re-exportation of that cheese [37] were not realised as bona fide

26 — Cf. Case 250/78 *DEKA* v *EEC* [1983] ECR 421.

27 — *Pafitis and Others* (cited in footnote 12, at paragraph 67).

28 — *Pafitis and Others* (cited in footnote 12, at paragraph 68).

29 — On monetary compensatory amounts, see Case 208/84 *Vonk's Kaas Inkoop en Produktie Holland BV* v *Minister van Landbouw en Visserij et Produktschap voor Zuivel* [1985] ECR 4025, and *General Milk Products* (cited in footnote 11); on accession compensatory amounts, see *Töpfer* (cited in footnote 10); and on export refunds, see *Cremer* (cited in footnote 9) and *Boterlux* (cited in footnote 7).

30 — Cf. Joined Cases 92/87 and 93/87 *Commission* v *France and the United Kingdom* [1989] ECR 405.

31 — Cf. *Vonk* (cited in footnote 29, at paragraph 18).

32 — Cf. *Töpfer* (cited in footnote 10).

33 — Cf. *Cremer* (cited in footnote 9).

34 — Cf. *Cremer* (cited in footnote 9, at paragraph 21).

35 — Cf. *General Milk Products* (cited in footnote 11).

36 — Cf. *General Milk Products* (cited in footnote 11, at paragraph 20).

37 — The case dealt with the import and export of New Zealand cheddar cheese.

commercial transactions but *only in order wrongfully to benefit* from the grant of monetary compensatory amounts'. [38]

69. The yardstick for judging the lawfulness of individual import and export transactions is therefore the purpose of the rules in question. In a previous judgement, [39] the Court withheld payment of compensatory amounts from a trader because the objective of offsetting prices had not been attained in the transactions in question and an essential condition for the application of compensatory amounts had not therefore been fulfilled. [40]

70. The point of departure for the further analysis of the matter must therefore be the objective of the export refund scheme. Essentially, the Court has consistently held [41] that non-differentiated refunds are granted in order to compensate for the difference between commodity prices within the Community, and international market prices. The particular features of the import market are not relevant to non-differentiated refunds. By making Community products 'competitive' on the world market in this way, their sale outside the Community becomes viable in commercial terms and also desirable under the common agricultural policy. This effect is described in the second recital in the preamble to Regulation No 800/1999 as those products having left the Community market.

71. That purpose could be frustrated by a re-importation of the goods into the Community immediately after export. However, a blanket condemnation of this would be inappropriate. First, the granting of export refunds is not a subsidy intended to give the exporter a commercial advantage, but, as has already been stated, an instrument to render Community products competitive on the world market, and, second, the re-importation of such goods is subject to its own rules. The objective fact that re-importation has taken place is thus not a sufficient ground for presuming that the purpose has not been achieved.

72. However, if it proves there was no genuine intention to export the goods for marketing outside the Community, the presumption obviously arises that the purpose of the export rules has not been fulfilled. If it is established that the purpose of the Community refund rules has not been fulfilled, the legal consequence may be the withdrawal of the advantage obtained.

73. Applied to the present case, this means that the *objective circumstances*, in the

38 — Cf. *General Milk Products* (cited in footnote 11 at paragraph 21, and also paragraph 22, emphasis added).

39 — Cf. *Töpfer* (cited in footnote 10).

40 — Cf. *Töpfer* (cited in footnote 10, at paragraph 16).

41 — e.g. *Boterlux* (cited in footnote 7, at paragraph 21).

form of immediate re-importation of the goods by the same means of transport without their even being unloaded, and the unified invoicing for export and re-import, give rise to a prima facie presumption that claims have been made under Community export refund rules for a purpose other than that intended. This finding applies equally to both sets of facts in the main proceedings.

74. However, the subjective element, that is to say the intention of the benefiting exporter, i.e. the plaintiff, to claim export refunds for a purpose for which they were not intended, must also be taken into account here. The order for reference mentions the good faith of the plaintiff, and states that the goods were re-imported purely as a result of a commercial decision by their purchaser. In order for the advantage to be withdrawn from the plaintiff, there would have to have been collusion between the plaintiff and the purchaser of the goods, a 'bogus transaction' for the purposes of wrongfully benefiting from Community refund rules.

75. This view is confirmed by the legal basis now in force for a right of recovery which takes the form of a blanket provision laid down by Article 20(4)(c) of Regulation No 800/1999, which states:

'(4) ...

However, the refund shall be deemed to be unwarranted and shall be reimbursed if the competent authorities find, even after the refund has been paid:

(a) ...

(b) ...

(c) that the product exported is re-imported into the Community without having undergone any substantial processing or working within the meaning of Article 24 of Regulation (EEC) No 2913/92, that the non-preferential duty on import is less than the refund granted, *and that export was not carried out as a normal commercial transaction*; [42]

...'.

42 — Emphasis added.

76. The last provision expressly makes irregularities a constituent element of the right of recovery by the authorities.

77. The position is different with certain other legal bases for rights of recovery for export refunds paid, such as in Regulation No 2185/87, Article 15(2) of Regulation No 3665/87 as amended by Regulation No 313/97, or Article 20(4)(d) of Regulation No 800/1999. Those provisions do not include any reference to irregularities, although in all these instances references to the Annexes in the respective Regulations make it clear exactly which goods and products are concerned.

78. The concerns raised in the proceedings by the representatives of the plaintiff in relation to a possible right of recovery are relevant in this connection. In classic cases of administrative action restricting freedoms or rights, the principle, in a State governed by the rule of law, of the constitutional requirement of a specific enactment demands the existence of an enabling measure for any onerous administrative act. The Court formulated this requirement in its judgment of 22 February 1989 in Joined Cases 92/87 and 93/87 [43] as follows:

'... according to the case-law of the Court ... the principle of legal certainty requires that rules imposing charges on the taxpayer be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly.' [44]

79. On the legal bases cited in paragraph 77 above for a right of recovery, a trader knows that under certain objective conditions, he will either be unable to obtain an export refund in respect of certain products specified in a legal instrument, or will have to pay it back if he does obtain one. The requirement of a specific basis for the administrative act is thus satisfied for reasons of legal certainty.

80. The position in relation to a right of recovery due to a possible abuse of rights is completely different; the presumption here is that the abuse of rights as such does not merit protection. The abuse of rights causes the protection guaranteed by the legal system to a trader acting in good faith to be forfeited. The subjective element of an intention to abuse rights is thus an essential condition for any right of recovery having the character of a blanket provision or based on general legal principles. Article 4(3) of Regulation No 2988/95, which concerns the protection of the European Communities' financial interests and as such does not create a new legal principle but merely codifies a general legal principle already existing in Community law — for

43 — Cited in footnote 30.

44 — Joined Cases 92/87 and 93/87 (cited in footnote 30, at paragraph 22).

which reason application of that principle does not depend on the subsequent entry into force of the Regulation — therefore only deals with the artificial creation of compliance with the conditions for obtaining an advantage, and Article 20(4)(c) of Regulation No 800/1999 makes it a condition 'that export was not carried out as a normal commercial transaction'.

81. The pre-condition for a right of recovery based on general legal principles is therefore the intentional bringing about of circumstances which are contrary to the objectives of Community rules, with the aim of creating the formal conditions for obtaining an advantage.

82. In the present proceedings, the plaintiff would have to have acted in collusion with the purchaser of the goods for the advantage obtained to be capable of being withdrawn. Recovery, under general legal principles common to the legal systems of the Member States, of the advantage obtained would be entirely consistent with the rule of law if 'an intention to commit an abuse of rights' were proved.

83. The actual determination whether the subjective element of the intention to commit an abuse of rights is established is a matter for the court of the Member State. The basic presumption as regards the burden of proof is that when asserting a right of recovery, it is for the authority to show and prove the required facts. However, a relaxation of the burden of proof is conceivable in the sense that prima facie evidence of irregular conduct would suffice initially, and the indicted trader would then have to show that he was not at fault.

84. For the sake of completeness, it should be made clear here that the possible withdrawal of the advantage obtained is not a penalty, as this would require an express enabling measure. [45]

85. The answer to the first question is therefore that an exporter only loses his right to payment of an export refund determined at a non-differentiated rate for all non-member countries pursuant to Article 10(1) in conjunction with Article 20(2), (3), (4), (5) and (6) of Regulation (EEC) No 2730/79 if he, in collusion with a purchaser established in a non-member country of the products sold and in respect of which export refunds have been paid, causes the goods to be re-imported back into the Community under an external Community transit procedure immediately after their release for home use in the non-member country concerned.

45 — Cf. Case 117/83 *Könecke* (cited in footnote 5, at paragraph 11).

The second question

86. The referring court asks in the second question whether the answer to the first question would be any different if before re-importation into the Community, the products were sold by the purchaser established in the non-member country to an undertaking also established in the non-member country and with which he was personally and commercially connected.

87. The starting point here is the third subparagraph of Article 10(1), under which the competent authorities of the Member States may require that additional proof be provided showing that the product in question has actually been placed on the market in the non-member country of import in the unaltered state.

88. It has been shown in the discussion on the answer to the first question that this rule relates to a particular condition, the requirements for which are not met in the present case. The following remarks on this question are thus of a purely hypothetical nature. Under the conditions of the third subparagraph of Article 10(1), the additional proof required may consist of commercial documents. A contract of sale for the imported goods between the importer in the non-member country and a trading partner can therefore certainly be regarded as proof of the marketing of the products.

89. However, in the final analysis, this is not the position in the present case. For, if the plaintiff has acted in good faith, then, according to the view put forward here, the pre-conditions for a right of recovery of the export refunds paid are not met. However, if he acted in collusion with a purchaser in a non-member country, in practice the question arises as to who was responsible for the re-importation of the products into the Community by a third party. The referring court expressly mentions the personal and commercial connection between the original purchaser in the non-member country who then acted as the seller, and the company acquiring the goods by way of purchase. In a case of fraudulent collusion between the parties to an export transaction, it must be presumed that a sale of the goods to a company with which there are personal and commercial connections cannot refute the charge of an abuse of rights.

90. In the case cited above concerning an abusive exercise of the right of assignment of a claim, where there was a comparable commercial connection between the assignor and assignee, the Court held that the assignee could not rely on good faith worthy of being protected. [46]

46 — Cf. *DEKA* v *EEC* (cited in footnote 26, at paragraph 18).

91. The answer to the second question is therefore that the sale of the products to a personally and commercially connected undertaking does not in principle alter the answer to the first question.

VI — Conclusion

92. In conclusion, I suggest the following reply to the request for a preliminary ruling:

(1) An exporter only loses his right to payment of an export refund determined at a non-differentiated rate for all non-member countries pursuant to Article 10(1) in conjunction with Article 20(2), (3), (4), (5) and (6) of Regulation (EEC) No 2730/79 if he, in collusion with the purchaser established in a non-member country of the products sold and in respect of which export refunds have been paid, causes the goods to be re-imported back into the Community under an external Community transit procedure immediately after their release for home use in the non-member country concerned.

(2) In principle this remains unaffected if the product was sold by the purchaser established in the non-member country to another undertaking also established in the non-member country and with which he was personally and commercially connected, before it was re-imported into the Community.