JUDGMENT OF THE COURT (Fifth Chamber)
11 July 2002 *

In Case C-210/00,

REFERENCE to the Court under Article 234 EC, by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Käserei Champignon Hofmeister GmbH & Co. KG

and

Hauptzollamt Hamburg-Jonas,

on the validity of point (a) of the first subparagraph of Article 11(1) of Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1), as amended by Commission Regulation (EC)

* Language of the case: German.

No 2945/94 of 2 December 1994 (OJ 1994 L 310, p. 57), and on the interpretation of the concept of '*force majeure*' in the first indent of the third subparagraph of Article 11(1) of the same regulation,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting for the President of the Fifth Chamber, A. La Pergola and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Käserei Champignon Hofmeister GmbH & Co. KG, by J. Gündisch, Rechtsanwalt,

— the Commission of the European Communities, by M. Niejahr, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Käserei Champignon Hofmeister GmbH & Co. KG, represented by J. Gündisch and U. Schrömbges, Rechtsanwalt, and the Commission, represented by G. Braun, acting as Agent, at the hearing on 27 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2001,

gives the following

Judgment

1 By order of 4 April 2000, received at the Court on 26 May 2000, the Bundesfinanzhof (Federal Finance Court) referred for a preliminary ruling under Article 234 EC two questions, the first relating to the validity of point (a) of the first subparagraph of Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1), as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 (OJ 1994 L 310, p. 57, hereinafter 'Regulation No 3665/87'), and the second relating to the interpretation of the concept of '*force majeure*' in the first indent of the third subparagraph of Article 11(1) of the same regulation.

2 Those questions have arisen in proceedings between Käserei Champignon Hofmeister GmbH & Co. KG (hereinafter 'KCH') and the Hauptzollamt Hamburg-Jonas (hereinafter the 'Hauptzollamt') concerning the imposition on KCH of the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 for applying for an export refund in respect of a product which did not give rise to entitlement to such a refund.

The legal framework

3 Regulation No 2945/94 amended *inter alia* Article 11 of Regulation No 3665/87. The first, second and fifth recitals read as follows:

'Whereas the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; whereas in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules;

Whereas to ensure the correct functioning of the system of export refunds, sanctions should be applied regardless of the subjective element of fault; whereas it is nevertheless appropriate to waive the application of sanctions in certain cases notably in cases of an obvious error recognised by the competent authority and to provide for a higher sanction in cases of intent;

...

Whereas past experience and irregularities and notably fraud recorded in this context show that this measure is necessary and appropriate, that it will act as an adequate deterrent and that it is to be uniformly applied throughout the Member States.'

4 The first, third and eighth subparagraphs of Article 11(1) of Regulation No 3665/87 provide as follows:

'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.

...

The sanction referred to under (a) shall not apply:

— in the case of *force majeure*,

— in exceptional cases characterised by circumstances beyond the control of the exporter, which occur after the acceptance by the competent authorities of the export declaration or the payment declaration...

— in cases of obvious error as to the refund requested, recognised by the competent authority,

— in cases where the request for the refund is in accordance with Commission Regulation (EC) No 1222/94, and in particular Article 3(2) thereof, and has been calculated on the basis of the average quantities used over a specified period,

— in case of adjustment of the weight in so far as the deviation in the weight is due to a difference in the weighing method applied.

...

The sanctions shall be without prejudice to additional sanctions laid down at national level.'

5 On 18 December 1985, the Council adopted Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1). That regulation draws a distinction between, on the one hand, irregularities which are intentional or caused by negligence and, on the other hand, other irregularities.

6 Article 4 of Regulation No 2988/95 provides that any irregularity is to involve withdrawal of the unduly obtained advantage.

7 Article 5(1) of the same regulation provides that intentional irregularities or those caused by negligence may lead to administrative penalties such as payment of an administrative fine, payment of an amount greater than the amounts unduly received, temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme, or the loss of a security or deposit provided for the purpose of complying with the conditions laid down by rules.

8 Article 5(2) of Regulation No 2988/95 reads as follows:

'Without prejudice to the provisions laid down in the sectoral rules existing at the time of entry into force of this Regulation, other irregularities may give rise only to those penalties not equivalent to a criminal penalty that are provided for in

paragraph 1, provided that such penalties are essential to ensure correct application of the rules.'

The main proceedings and the questions referred for a preliminary ruling

9 In 1996, KCH exported, under cover of an export declaration, cheese spread manufactured by a third party, under CAP Goods List Number 0406 3039 9500 and, at its request, received an export refund of around DEM 30 000 as an advance payment from the Hauptzollamt.

10 An examination of a sample taken from one of the consignments at the time of export revealed that the goods contained vegetable fat and ought, as a food preparation, to have been assigned to CAP Goods List Number 2106 9098 0000.

11 Since these were goods which were not listed in Annex II to the EC Treaty (now, after amendment, Annex I EC), and thus did not give rise to entitlement to an export refund, the Hauptzollamt demanded from KCH the payment of a penalty under point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87.

12 The Finanzgericht Hamburg (Hamburg Finance Court) (Germany) rejected the application brought by KCH to have that decision annulled, and KCH then brought an application for review before the Bundesfinanzhof.

13 Before the Bundesfinanzhof, KCH argued that point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 was invalid because it infringed the principle of the rule of law and the principle of non-discrimination.

14 The Bundesfinanzhof found, first, that the requirements of point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 were satisfied, so that the Hauptzollamt had had to impose a penalty, since KCH was not in one of the situations listed in the third subparagraph of that provision, in which penalties are not to apply.

15 Second, the Bundesfinanzhof found that a situation in which the composition of goods manufactured by a third party differs from that stipulated in the contract (or simply does not fulfil the requirements which the exporter tacitly assumed to be self-evident) does not constitute *force majeure* for the exporter within the meaning of the first indent of the third subparagraph of Article 11(1) of Regulation 3665/87. In its previous judgments concerning the concept of *force majeure*, the Court had not regarded a failure by an exporter's business partner to fulfil his contractual obligations as an abnormal and unforeseeable circumstance but required that the trader take proper precautions against such eventualities, either by including appropriate clauses in the contract in question or by effecting specific insurance (Case 109/86 *Theodorakis* [1987] ECR 4319; Case C-347/93 *Boterlux* [1994] ECR I-3933). The Court had not even recognised fraudulent conduct on the part of the exporter's contracting partner as constituting *force majeure* (Case 296/86 *McNicholl and Others* [1988] ECR 1491; *Boterlux*, cited above).

16 Nor, in the view of the Bundesfinanzhof, was this a case such as that envisaged in the third indent of the third subparagraph of Article 11(1) of Regulation 3665/87, i.e., obvious error as to the refund requested, recognised by the competent authority. In fact, it was only by using extensive chemical analyses

that the Hauptzollamt was able to ascertain the true composition of the goods exported, of which the plaintiff in the main proceedings maintained it was unaware.

17 Lastly, in examining whether point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 infringed fundamental rights, the Bundesfinanzhof took the view that it did not, since the provision did not impose a punishment and did not contravene either the principle of proportionality or the principle of non-discrimination.

18 No penal sanction is provided for under point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87. The Bundesfinanzhof observed that a penal sanction is intended to suppress certain forms of conduct in relation to which it expresses social and ethical disapproval. Such a sanction presupposes subjective fault and, in general, the level of severity depends on the degree of fault. The penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 aims only to deter the exporter from providing false information in future, which could jeopardise the financial interests of the Community and the proper implementation of the rules on the relevant common organisations of the market. It does not express any moral or ethical reproach, but merely serves a preventive purpose, as is shown by the fact that fault on the part of the exporter is not a condition for the provision in question to apply.

19 The Bundesfinanzhof found that the fact that the recitals in the preamble to Regulation No 2945/94 refer to a 'sanction' on the exporter was of no consequence, since the word could also be understood in a larger, non-technical sense.

20 In examining Regulation No 2988/95, the Bundesfinanzhof found that Article 5(1) provided for administrative sanctions only when irregularities were

intentional or caused by negligence. However, Article 5(2) provides that sanctions are to be imposed '[w]ithout prejudice to the provisions laid down in the sectoral rules existing at the time of entry into force of this Regulation', which includes the rules on the sanction at issue in the main proceedings.

21 The Bundesfinanzhof also held that point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 did not contravene the principle of proportionality. First, the fact that the threat of sanction was directed at honest and prudent exporters did not contravene the principle of proportionality because exporters are entirely free to decide whether or not to carry on their activities in the trade sector exporting goods subsidised by export refunds. If they decide, in their own interest, to participate in a system of public payments, they are then required to submit to the rules laid down, including the penalty at issue, without then being able to criticise the severity thereof. Second, the Bundesfinanzhof held that because the customs authorities were thus spared the often difficult task of having to furnish definitive proof of negligence by the exporter, thus avoiding from the outset foreseeable divergencies in the event of evidence being admitted in defence, and the administration of export refunds was thereby simplified, this would be an argument in favour of interpreting the sanction mechanism in point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 as a refund reduction independent of any fault. It held that, in the light of the frequent provision of false information, which is hard to detect, the sanction was not inappropriate, and nor was it excessive having regard to the objective pursued.

22 Lastly, the Bundesfinanzhof held that point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 did not contravene the principle of non-discrimination. Since it did not impose any penal sanction based on the existence of fault, the form and degree of the fault of the refund applicant, or even the complete absence of personal fault, did not by nature constitute criteria for determining the severity of the penalty. The threat of penalty was aimed at deterring in the same way both conduct which was subjectively imprudent and reprehensible and that which was inaccurate only from an objective standpoint.

23 However, considering that it could not itself rule on the question of the validity of point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87, the Bundesfinanzhof decided to refer the matter to the Court.

24 In view of the difficulties in interpreting two judgments of the Court, in Case C-366/95 *Steff-Houlberg and Others* [1998] ECR I-2661 and in Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, concerning the conditions under which exporters could argue good faith, the Bundesfinanzhof also considered it necessary to ask the Court about the interpretation to be given to the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87.

25 In those conditions, the Bundesfinanzhof referred the following questions to the Court:

'1. Is Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products valid in so far as it provides for a penalty even where, through no fault of his own, an exporter has applied for an export refund exceeding that applicable?

2. If the first question is to be answered in the affirmative: can the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 be interpreted as meaning that false information provided in good faith by the refund applicant on the basis of inaccurate data supplied by the manufacturer constitutes in principle a case of *force majeure* where the applicant could not establish that it was false or could do so only by means of checks at the undertaking in which the goods were manufactured?'

The first question

26 By its first question, the national court asks whether point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 is valid in so far as it provides for a penalty even where, through no fault of his own, an exporter has applied for an export refund exceeding that to which he is entitled.

27 KCH argues that the provision contravenes fundamental principles of criminal law inherent in the principle of the rule of law, namely, the principle of '*nulla poena sine culpa*' (no punishment without fault), the principle of proportionality and the principle of non-discrimination.

28 It is appropriate to examine each of those pleas in turn.

Infringement of the principle 'nulla poena sine culpa'

Observations submitted to the Court

29 KCH argues that, in the light of its importance and the fact that it does not aim merely to eradicate the consequences of an unlawful act, the penalty laid down in Article 11 of Regulation No 3665/87 is of a criminal nature. Since it allows for

the imposition of such a penalty even in the absence of any fault, the provision is contrary to the principle '*nulla poena sine culpa*', which is part of the general principles of Community law. This is a principle recognised by Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter 'the ECHR'), by the law of the Member States, and by Community law itself.

30 Examining the case-law of the European Court of Human Rights, KCH submits that, according to that court, the principle '*nulla poena sine culpa*', entrenched in Article 6(2) of the ECHR, also applies to administrative penalties.

31 As regards the law of the Member States, KCH refers to a comparative legal study requested by the Commission as part of the preparatory work for Regulation No 2988/95, which shows that the principle '*nulla poena sine culpa*' applies in almost all of the Member States, and that exceptions are lawful in only a few States and under very limited circumstances.

32 Turning to Community law, KCH refers to the historical background to the provisions relating to the protection of the financial interests of the Community, as well as to a number of judgments of the Court, including Case 188/82 *Thyssen* v *Commission* [1983] ECR 3721; Case 83/83 *Estel* v *Commission* [1984] ECR 2195; Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383; Case C-365/92 *Schumacher* [1993] ECR I-6071; Case C-104/94 *Cereol Italia* [1995] ECR I-2983; Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559; and Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461. Case C-326/88 *Hansen* [1990] ECR I-2911 does not contradict the foregoing, since the penalties in question in that case were the result of national legislation and not Community law.

33 The Commission expresses agreement with the arguments of the Bundesfinanzhof. It adds that, as the Court acknowledged in Case 137/85 *Maizena* [1987] ECR 4587 (paragraph 13) and *Germany* v *Commission*, cited above (paragraphs 25 and 26), the legal nature of a penalty depends not only on its seriousness but also on its purpose and the overall context in which it is situated.

34 According to the Commission, the argument to the effect that an administrative sanction, once it is beyond a certain level, becomes a repressive criminal penalty, cannot be accepted. First, such an approach would run counter to the case-law of the Court. Next, the necessary boundary between administrative sanctions and criminal penalties would be rendered arbitrary and impossible to justify in an objective manner. Lastly, the protection of traders against excessive penalties is already ensured by the application of the principle of proportionality.

Answer of the Court

35 Since the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 is likely to breach the principle '*nulla poena sine culpa*' only if it is of a criminal nature, the issue of whether the provision must be seen as being of a criminal nature must be examined.

36 In that regard, it should be pointed out first of all that the Court, when asked specifically about the criminal nature of sanctions laid down in rules under the Common Agricultural Policy, such as the loss of security, imposed at a flat rate and independently of any culpability on the part of the trader, and the temporary exclusion of a trader from the benefit of a scheme of aid, has concluded that such penalties are not of a criminal nature (*Maizena*, cited above, paragraph 13, and *Germany* v *Commission*, cited above, paragraph 25).

37 There are no factors justifying a different answer in the present case in respect of the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87.

38 As the Court pointed out in paragraph 19 of the judgment in *Germany* v *Commission*, cited above, temporary exclusion from the benefit of a scheme of aid, like surcharges calculated based on the amount of aid unduly paid, are intended to combat the numerous irregularities which are committed in the context of agricultural aid, and which, because they weigh heavily on the Community budget, are of such a nature as to compromise the action undertaken by the institutions in that field to stabilise markets, support the standard of living of farmers and ensure that supplies reach consumers at reasonable prices.

39 In the same vein, the ninth recital in the preamble to Regulation No 2988/95 states that 'Community measures and penalties laid down in pursuance of the objectives of the Common Agricultural Policy form an integral part of the aid systems' and that 'they pursue their own ends'.

40 Regulation No 2945/94, which amended Regulation No 3665/87, states in the first recital in its preamble, that 'the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; whereas in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules'.

41 In explaining the nature of the breaches complained of, the Court has emphasised on several occasions that the rules breached were aimed solely at traders who had

freely chosen to take advantage of an agricultural aid scheme (see, to that effect, *Maizena*, paragraph 13, and *Germany* v *Commission*, paragraph 26). In the context of a Community aid scheme, in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of Community public funds.

42 In the present case, it is not disputed that only those traders who have applied for the export refunds are likely to have the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 imposed on them, when it appears that the information provided by those traders in support of their application is incorrect.

43 Lastly, it should be pointed out that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 consists of the payment of a penalty, the amount of which is determined on the basis of the amount which would have been unduly received by the trader had an irregularity not been detected by the competent authorities. It is, therefore, an integral part of the export refund scheme in question and is not of a criminal nature.

44 It follows from all of the foregoing considerations that point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 cannot be said to be of a criminal nature. It follows that the principle '*nulla poena sine culpa*' is not applicable to this penalty.

45 Nor does the examination of the law of the Member States conducted by KCH in its written observations support a finding that the principle '*nulla poena sine*

culpa' is applicable in general in the law of the Member States to penalties such as that laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87. KCH itself refers to a number of Member States, such as the Kingdom of Denmark, the French Republic, Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, where there are cases of penalties irrespective of fault.

46 As regards the case-law of the Court, suffice it to point out that, in paragraph 14 of *Maizena*, the Court explicitly found that the principle '*nulla poena sine culpa*' did not apply to the imposition of penalties such as the loss of security at issue in that case. In *Germany* v *Commission*, which also involved a penalty imposed under the Common Agricultural Policy, the Court reached the same conclusion.

47 In other areas, the Court has accepted that a system of strict criminal liability penalising breach of a Community regulation is not in itself incompatible with Community law (*Hansen*, paragraph 19; Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111, paragraph 36).

48 Contrary to the submissions of KCH, the fact that *Hansen* concerned national penalties does not make it completely irrelevant for the purposes of describing the state of Community law. The Court was asked about the interpretation of Community law and, moreover, explicitly concluded, in paragraph 20 of its judgment, that the general principles of Community law do not preclude the application of national provisions under which an employer whose employees infringe a Community regulation may incur strict criminal liability.

49 The rest of the case-law referred to by KCH is not decisive. In most of the cases referred to, the penalty is examined in the light of the principle of proportionality rather than the principle '*nulla poena sine culpa*' (cases cited above, *Thyssen* v *Commission*, paragraphs 18 to 22; *Schumacher*, paragraphs 25 to 31; *Cereol Italia*, paragraphs 13 to 27; *National Farmers' Union and Others*, paragraphs 49 to 55; and *Molkereigenossenschaft Wiedergeltingen*, paragraphs 33 to 45). As for the judgment in *Estel* v *Commission*, in paragraphs 38 to 43 of which the Court held that a steel company penalised by the Commission for having exceeded the production quota imposed on it had committed an error which was not excusable and that, accordingly, the Commission had not breached the principle '*nulla poena sine culpa*', that judgment was delivered in an area far removed from agricultural regulations and without the Court ruling explicitly on whether the penalty in question was of a criminal nature or not.

50 Moreover, Regulation No 2988/95, which KCH has relied on several times in its arguments, has not brought about any change to the state of Community law as described in this judgment. In the first place, Article 5(2) thereof shows that the system of penalties established by that regulation applies without prejudice to the provisions laid down in the sectoral rules existing at the time of its entry into force, which was the case with Article 11 of Regulation No 3665/87, as it stood after amendment by Regulation No 2945/94.

51 Secondly, although Article 5(2) of Regulation No 2988/95 provides that irregularities which are not intentional or negligent may give rise only to those penalties laid down in Article 5(1) which are not equivalent to a criminal penalty, there is no indication that, when examining that condition, criteria are to be applied which differ from those used by the Court in paragraphs 35 to 44 of this judgment.

52 Lastly, it should be recalled that the fact that the principle '*nulla poena sine culpa*' is not applicable to penalties such at those at issue in the main proceedings does

not leave the person subject to the regulation without legal protection. The Court has held in this connection that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis. Moreover, it is settled case-law that provisions of Community law must comply with the principle of proportionality (see *Maizena*, cited above, paragraph 15), which will be examined in the context of the second plea put forward by KCH.

Breach of the principle of proportionality

Observations submitted to the Court

53 KCH contends that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 is inappropriate for achieving the intended purpose and is not proportionate in the light of that purpose.

54 First, the penalty is not appropriate for preventing irregularities committed by an exporter, because it does not take account of the role of the exporter in the financing of the agricultural price maintenance system, as outlined in *Oelmühle and Schmidt Söhne*, cited above. It entails major financial loss for the exporter, because he does not keep the refund, but passes it on to producers through a product purchase price which is overvalued in relation to world market prices. KCH also points out that, contrary to what is stated in the first recital of Regulation No 2945/94, refunds are not granted on the basis of solely objective criteria, but after the exporter has filed a declaration drawn up by him. Moreover, precise declarations are difficult to make in the agricultural sector, since agricultural products do not tend to be of uniform quality and defects can be present which are impossible to detect.

55 Second, the penalty is not necessary, because when an exporter must return an unduly received refund which he has already passed on to the producer through an overvalued purchase price, he has already sustained financial loss. Article 5(1) of Regulation No 2988/95 states, moreover, that only irregularities which are intentional or caused by negligence may lead to certain administrative penalties, which would indicate that the Council did not believe it necessary to punish unintentional irregularities. Another reason the penalties laid down in Article 11 of Regulation No 3665/87 are not necessary is because German law already provides for penalties for inaccurate information in export or payment declarations, and because there are already other penalties under other Community regulations.

56 Lastly, the penalty is not proportionate, because it would allow the smallest error to be penalised regardless of whether the exporter knowingly caused damage or was able to avoid or prevent the error.

57 The Commission, by contrast, argues that Article 11(1) of Regulation No 3665/87 does not breach the principle of proportionality. It refers to the arguments developed in the order for reference, including: first of all, irregularities in the common agricultural policy sector cannot be effectively combated simply by recovery of unduly received benefits; second, penalties which are limited to proven cases of fault would have only a small deterrent effect, because it is often very difficult or even impossible to prove fault; third, in the case of the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87, the additional amount due is calculated in relation to on the level of aid unduly granted to the exporter, because it equals the difference between the refund requested and the amount actually owing.

58 The Commission further points out that, in matters concerning the common agricultural policy, the Community legislature has a wide discretion; con-

sequently, the legality of a measure can be affected only if it is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue or if the institution has manifestly exceeded the bounds of its discretion, which is not the case here.

Answer of the Court

59 In this connection, it should be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions are appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (*Maizena*, cited above, paragraph 15; and Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 15).

60 Regulation No 2945/94, which amended Article 11 of Regulation No 3665/87, states in the first and second recitals of its preamble that it aims to combat irregularities and fraud detected in the area of export refunds. Those recitals highlight how export refunds are granted on the basis of solely objective criteria concerning the product and its geographical destination. They state that, to ensure the correct functioning of the system of export refunds, penalties should be applied regardless of the subjective element of fault, in order to encourage exporters to comply with the Community rules.

61 The recitals quite rightly highlight the difficulties involved in proving fraudulent intent. Whilst the authorities have only the information relating to the product and its destination at their disposal and the exporter is often the last link in a contractual chain of purchases for resale, there is a real risk that he will avoid responsibility for the inaccuracy of his declaration because of the possibility of error, negligence or fraud further back up the chain.

62 Therefore, contrary to what KCH argues, that it is precisely to take account of the role of the exporter as the last participant in the chain of production, processing and export of agricultural products that Article 11 of Regulation No 3665/87 makes him responsible for the accuracy of his declaration, subject to the possibility of a penalty in the event of non-compliance.

63 It is not disputed that it is difficult to draw up perfectly accurate declarations. It should be emphasised, however, that the exporter's duty to guarantee the accuracy of the declaration should provide an incentive for him to carry out checks on the product brought for export which are appropriate in terms of both thoroughness and frequency. It should also be remembered that the exporter can choose with whom he wishes to conclude contracts and can hedge against their shortcomings either by incorporating the necessary clauses into the relevant contracts or by effecting specific insurance.

64 It follows that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 cannot be said to be inappropriate for achieving the objective of combating irregularities and fraud.

65 Turning to Article 5 of Regulation No 2988/95, suffice it to recall that, as found in paragraphs 50 and 51 of this judgment, it does not exclude the application of certain penalties in the event of irregularities which are not intentional or caused by negligence.

66 The existence of other penalties under national or Community law, and the fact that the exporter already sustains financial loss simply because of the reimbursement of the refund, do not in any way show that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 is not unnecessary. On the contrary, the irregularities and frauds

detected in the area of export refunds, referred to in the fifth recital of the preamble to Regulation No 2945/94, confirm that those other penalties and mere reimbursement of the refund were not sufficient to have a deterrent effect and encourage exporters to take the necessary steps to ensure compliance with Community rules.

67 Lastly, the proportionate nature of the penalty is evidenced, first, by the distinction drawn by Article 11 of Regulation No 3665/87 between intentional and unintentional irregularities and, next, by the several situations in which the article states that the penalty is not to apply, such as *force majeure*, and, last, by the correlation established between the amount of the penalty and the amount of loss which the Community budget would have sustained had the irregularity not been discovered.

68 It follows from these various factors that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 does not breach the principle of proportionality, since it cannot be considered to be inappropriate for attaining the objective pursued by Community law, namely to combat irregularities and fraud, and does not go beyond what is necessary to achieve that objective.

Breach of the principle of non-discrimination

Observations submitted to the Court

69 KCH argues that, by imposing wholesale punishment on different types of behaviour, regardless of whether it is non-culpable or characterised by simple

negligence, negligence or serious negligence, point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 breaches the principle of non-discrimination laid down in Article 40(3) of the EC Treaty (now, after amendment, Article 34(2) EC). Such undifferentiated treatment cannot be objectively justified either by the effort to combat fraud, which presupposes intent, or by reasons of administrative simplicity.

70 The Commission disagrees with this argument. It contends that the lack of differentiation is objectively justified for the reasons discussed by the national court. It emphasises that fault is difficult, if not impossible, to prove. It reiterates that the Community legislature has wide discretionary power and that there should be a finding of breach of the prohibition on discrimination only if the institution concerned has committed a manifest error of assessment.

Answer of the Court

71 The Court has consistently held that the principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (*National Farmers' Union*, cited above, paragraph 61).

72 This principle is not breached by point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87. As emphasised by the national court,

the provision has a deterrent function and is aimed at preventing both conduct which is subjectively careless and reprehensible and information which is simply inaccurate from an objective standpoint. In the light of the objective of deterrence, the culpable or non-culpable nature of the conduct in question becomes of no importance and, consequently, the application of the same penalty to all of these types of conduct cannot be considered to be contrary to the principle of non-discrimination.

73 Consequently, examination of the first question has not revealed any factors capable of calling into question the validity of point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87, in so far as it penalises an exporter who, without fault on his part, applies for an export refund which exceeds that to which he is entitled.

The second question

Observations submitted to the Court

74 By its second question, the national court asks whether the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 is to be interpreted as meaning that false information provided in good faith by the refund applicant on the basis of inaccurate data supplied by the manufacturer of the exported goods constitutes in principle a case of *force majeure* where the applicant could not

establish that it was false or could do so only by means of checks at the factory where the goods were manufactured.

75 KCH takes the view that it was in a situation of *force majeure* as contemplated in the case-law of the Court, that is, external, abnormal and unforeseeable circumstances, whose consequences could not have been avoided in spite of the exercise of all due care. It points out that the incorrect information in its refund application was based on inaccurate information from the manufacturer, a reputable company in Germany. It was a production line manager there who took the initiative to add vegetable fat to the exported cheese spread. This constituted a totally unexpected and unusual event. It could not be detected by the usual checks, which KCH had, in fact, carried out, but only through checks carried out at the manufacturing plant.

76 KCH is aware that, in accordance with the customary interpretation of *force majeure*, a trader is responsible for the negligence of his contractual partner. It takes the view, however, that, in the light of the case-law *Steff-Houlberg and Others* and *Oelmühle and Schmidt Söhne*, both cited above, an exporter may rely on manufacturer's data, the accuracy of which he himself is unable to verify. Nor should the exporter be required to check the manufacturing process himself. KCH acknowledges that those judgments involved the recovery of Community subsidies under national law, but argues that there is no reason why the same principles should not be applied to the sanctions laid down under the export refund system.

77 KCH adds that only a broad interpretation of the concept of *force majeure* in the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 can dispel the doubts as to the validity of the penalty laid down in point (a) of the first subparagraph in the light of the principles of criminal law inherent in the concept of the rule of law, because it would give traders an opportunity to exonerate themselves, and would thus take account of the fault principle, albeit in a limited manner.

78 The Commission shares the view of the national court, according to which false information provided in good faith by the exporter on the basis of inaccurate data supplied by the manufacturer cannot constitute a case of *force majeure* as defined in the case-law of the Court, even if the exporter could not establish that it was false or could do so only by means of checks at the factory where the goods were manufactured. The judgments cited by the national court could not lead to any other conclusion, since the situations envisaged were not comparable to the case at hand. Those cases involved the application of national legislation in the context of Community aid which had been unduly paid, whilst the present case involves a provision adopted by the Community itself.

Answer of the Court

79 It should be recalled that the concept of *force majeure* in the sphere of agricultural regulations must be construed as referring to abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided in spite of the exercise of all due care (see Case C-124/92 *An Bord Bainne Co-operative and Inter-Agra* [1993] ECR I-5061, paragraph 11; *Boterlux*, cited above, paragraph 34).

80 Even if the fault or error committed by the contracting partner is apt to constitute a circumstance beyond the control of the exporter, they are none the less an ordinary commercial risk and cannot be considered to be unforeseeable in the context of commercial transactions. The exporter is fully at liberty to select his trading partners and it is up to him to take the appropriate precautions, either by including the necessary clauses in the contracts in question or by effecting

appropriate insurance (see, to that effect, *Theodorakis*, cited above, paragraph 8; and *Boterlux*, cited above, paragraphs 35 and 36).

81 As stated in paragraph 62 of this judgment, it is precisely to take account of the role of the exporter as the last participant in the chain of production, processing and export of agricultural products that Article 11 of Regulation No 3665/87 makes him responsible for the accuracy of his declaration, since he is able, through, for example, contractual clauses aimed at obtaining from his contracting partners products which comply with Community provisions, to ensure that irregularities do not occur.

82 As in the case of a commercial retailer who wishes to guarantee to consumers that the product he sells to them has been obtained through channels of reliable quality, it is permissible for an exporter to stipulate certain levels of quality in his contractual dealings with his trading partners. He may require them to carry out stringent checks and notify him of the results. He may also stipulate that he himself may carry out certain checks at the company where the goods were manufactured or entrust that task to independent bodies.

83 The cases *Steff-Houlberg and Others* and *Oelmühle and Schmidt Söhne*, cited above, do not preclude such an interpretation of Community law. It should be recalled that those judgments were given in cases involving references for preliminary rulings from national courts which had to rule on disputes involving the recovery of unduly paid Community aid and which, in accordance with the settled case-law of the Court, had to apply their national law as regards both procedure and substance to the extent to which Community law had not made other provision in the matter (see 130/79 *Express Dairy Foods* [1980] ECR 1887, paragraph 11).

84 In the main proceedings, the conditions for recovery of unduly paid export refunds are laid down in Article 11 of Regulation No 3665/87, which provision, as pointed out in paragraph 22 of the judgment in *Steff-Houlberg and Others*, cited above, did not apply *ratione temporis* to the recovery of the refunds in question there. Since the national provisions did not apply to the recovery of those amounts, it follows that the interpretation of Community law developed by the Court in *Steff-Houlberg and Others* and *Oelmühle and Schmidt Söhne*, both cited above, cannot be applied to the case at hand.

85 Moreover, even if, in proceedings under national law for recovery of amounts unduly paid, the Court has, as the operative part of the judgment in *Steff-Houlberg and Others* shows, interpreted Community law as allowing account to be taken of factors such as negligence on the part of the national authorities and the elapse of a considerable period since the payment of the aid of which recovery is sought, it has not allowed account to be taken of the fault of a third party with whom the aid beneficiary maintains contractual relations, taking the view that such fault falls more within the sphere of the beneficiary than within that of the Community (*Steff-Houlberg and Others*, paragraph 28 and operative part).

86 It follows from the foregoing that the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 is to be interpreted as meaning that false information provided in good faith by the refund applicant on the basis of inaccurate data supplied by the manufacturer of the exported goods does not constitute a case of *force majeure* where the applicant could not establish that it was false or could do so only by means of checks at the factory where the goods were manufactured. Fault on the part of a co-contractor is an ordinary commercial risk and cannot be regarded as unforeseeable in the context of commercial transactions, the exporter having various means at his disposal to protect himself against such an eventuality.

Costs

87 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 4 April 2000, hereby rules:

1. **Examination of the first question referred has not revealed any factors capable of calling into question the validity of point (a) of the first subparagraph of Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994, in so far as it penalises an exporter who, without fault on his part, applies for an export refund which exceeds that to which he is entitled.**

2. On a proper interpretation of the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87, as amended by Regulation No 2945/94, there is no *force majeure* in the situation where an exporter completes an application for export refunds in good faith on the basis of incorrect information supplied by the manufacturer of the exported goods, and he could not have discovered the inaccuracy of the information or could have done so only by means of checks at the factory where the goods were manufactured. Fault on the part of a co-contractor is an ordinary commercial risk and cannot be regarded as unforeseeable in the context of commercial transactions, the exporter having various means at his disposal to protect himself against such an eventuality.

Edward La Pergola Timmermans

Delivered in open court in Luxembourg on 11 July 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber