

JUDGMENT OF THE COURT (Fifth Chamber)

24 November 2005^{*}

In Case C-136/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 3 February 2004, received at the Court on 15 March 2004, in the proceedings

Deutsches Milch-Kontor GmbH

v

Hauptzollamt Hamburg-Jonas,

THE COURT (Fifth Chamber),

composed of J. Makarczyk, President of the Chamber, R. Schintgen and R. Silva de Lapuerta (Rapporteur), Judges,

^{*} Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2005,

after considering the observations submitted on behalf of:

- Deutsches Milch-Kontor GmbH, by U. Schrömbges and O. Wenzlaff, Rechtsanwälte,

- the Commission of the European Communities, by G. Braun, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 The request for a preliminary ruling concerns the interpretation of Commission Regulations (EEC) No 1706/89 of 15 June 1989 fixing the export refunds on milk and milk products (OJ 1989 L 166, p. 36) and (EEC) No 3445/89 of 15 November

1989 establishing the full version, applicable from 1 January 1990, of the agricultural product nomenclature for export refunds (OJ 1989 L 336, p. 1).

- 2 That request was made in the course of proceedings between Deutsches Milch-Kontor GmbH ('Milch-Kontor') and the Hauptzollamt Hamburg-Jonas (Hamburg-Jonas Principal Customs Office, 'the Hauptzollamt') concerning entitlement to the grant of an export refund in respect of cheese intended for processing.

Legal context

- 3 Under Article 17(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), as amended by Council Regulation (EEC) No 3904/87 of 22 December 1987 (OJ 1987 L 370, p. 1; 'Regulation No 804/68'), the difference between the prices in international trade for certain products listed in Article 1 of that regulation and prices for those products in the European Community may be covered by an export refund.
- 4 Regulation No 1706/89 fixes in respect of milk products the export refunds provided for in Article 17 of Regulation No 804/68.

5 The ninth recital in the preamble to Regulation No 1706/89 states:

‘[w]hereas the level of refund for cheeses is calculated for products intended for direct consumption; whereas the cheese rinds and cheese wastes are not products intended for this purpose; whereas, to avoid any confusion in interpretation, it should be specified that there will be no refund for cheeses of a free-at-frontier value less than ECU 140 per 100 kilograms’.

6 Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EEC) No 2886/89 of 2 August 1989 (OJ 1989 L 282, p. 1), establishes the version of the combined nomenclature for goods (‘the combined nomenclature’) applicable to the facts of the main proceedings.

7 Heading 0406 90 of the combined nomenclature relates to ‘Other cheese’. It has a subheading 0406 90 11, ‘[Other cheese] for processing’.

8 Commission Regulation (EEC) No 3846/87 of 17 December 1987 establishing an agricultural product nomenclature for export refunds (OJ 1987 L 366, p. 1) establishes, on the basis of the combined nomenclature, an agricultural product nomenclature for export refunds (‘the refund nomenclature’).

- 9 According to the third paragraph of Article 1 of that regulation, the refund nomenclature is to include subdivisions additional to those of the combined nomenclature as required for the description of goods on which export refunds are granted.

- 10 The version of the refund nomenclature applicable at the time of the facts at issue in the main proceedings was that of Regulation No 3445/89.

The main proceedings and the question referred for a preliminary ruling

- 11 In January 1990, Milch-Kontor exported cheese to Yugoslavia and received an export refund as applied for. The goods exported had been declared as Gouda.

- 12 By decision of 14 August 1995, the Hauptzollamt demanded repayment of the export refund initially granted, on the ground that the goods exported were not commercial Gouda, but a commodity intended for processing.

- 13 The Finanzgericht dismissed the action brought by Milch-Kontor against that decision, finding that the export refund had been obtained unlawfully because, unlike the combined nomenclature, the refund nomenclature contains no subheading on cheese intended for processing.

14 Milch-Kontor brought an appeal on a point of law ('Revision') against the decision of the Finanzgericht before the Bundesfinanzhof.

15 In its order for reference, the Bundesfinanzhof seeks to ascertain whether the refund nomenclature constitutes an independent tariff scheme in addition to the combined nomenclature, or whether it is an extract from the combined nomenclature, containing only the subheadings of those products which must be taken into account for the grant of export refunds.

16 In that respect, the national court observes, first, that Regulation No 3846/87 appears to indicate that the refund nomenclature is merely a compilation of the relevant headings and subheadings of the combined nomenclature.

17 Second, that court points out that, according to the first clause of the ninth recital in the preamble to Regulation No 1706/89, the level of refund for cheeses is calculated for products intended for direct consumption. That could mean that cheeses intended for processing are not eligible for an export refund.

18 Finally, the national court takes the view that, since entry under subheading 0406 90 11 of the combined nomenclature concerns only the tariff classification of goods for the purposes of levying import duties, it should not be ruled out that a product, although classified under that subheading upon the levy of import duties, may none the less be granted export refunds.

- 19 It was in those circumstances that the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Regulation (EEC) No 3445/89 and Regulation (EEC) No 1706/89 be interpreted as meaning that cheese under subheading 0406 90 of the combined nomenclature which, by its nature, is intended for processing in a third country and therefore to be classified for customs tariff purposes under subheading 0406 90 11 of the combined nomenclature in the version in Regulation (EEC) No 2886/89, is excluded from the grant of an export refund?'

On the question referred to the Court

- 20 By its question, the referring court asks essentially whether the export to a third country of goods which are defined as cheese intended for processing in that country and fall under subheading 0406 90 11 of the combined nomenclature may be granted an export refund under Regulations Nos 3445/89 and 1706/89.
- 21 Milch-Kontor and the Commission of the European Communities submit that although subheading 0406 90 11 of the combined nomenclature is not included in the refund nomenclature, that is because it is applicable only to the levy of import duties.

22 None the less, they do not consider that it should be concluded from this that the goods exported are excluded from the grant of export refunds.

23 According to Milch-Kontor, the refund nomenclature constitutes an independent tariff scheme in addition to the combined nomenclature. Thus, goods which, for tariff purposes, are classified under a subheading which is not included in the refund nomenclature could be automatically classified, depending on their composition, under the relevant product code of that nomenclature. Given their nature, cheeses intended for processing, which fall under subheading 0406 90 11 of the combined nomenclature, must therefore be classified under the relevant code of the refund nomenclature, namely product code 0406 90 89 979. In any event, since that code is more precise than subheading 0406 90 11, it is to be preferred.

24 According to the Commission, since subheading 0406 90 11 of the combined nomenclature is exclusively reserved for imports, cheese intended for processing in a third country must be classified under another subheading of heading 0406 90 of that nomenclature, on the basis of its type or composition.

25 Consequently, the Commission takes the view that, if they cannot be classified under any of the product codes in the annex to Regulation No 1706/89 and if they do not satisfy the Community conditions, particularly in relation to quality and price, the goods exported must be excluded from the grant of export refunds.

26 As regards the interpretation of the first clause of the ninth recital in the preamble to Regulation No 1706/89, it is indissociable from the analysis of that recital as a whole. The recital draws a distinction concerning the calculation of the level of refund for cheeses between, on the one hand, products intended for direct consumption and, on the other, cheese rinds and cheese wastes. To avoid any confusion, no refund is to be granted upon the export of cheeses whose free-at-frontier value is less than ECU 140 per 100 kilograms. If that value is exceeded, it is logical to grant a refund even if the product is intended for processing. Consequently, the Commission contends that, in the present case, the grant of the export refund thus depends at least on whether the free-at-frontier price of the exported cheese intended for processing in a third country exceeded that value.

27 As the national court, Milch-Kontor and the Commission point out, subheading 0406 90 11 of the combined nomenclature relating to cheese intended for processing applies solely for the purposes of levying import duties.

28 Consequently, it is logical that that subheading is not one of the subheadings of the refund nomenclature which designates goods covered by the export refund scheme.

29 However, it does not follow that cheese exported in 1990 and intended for processing in a third country is excluded from that scheme.

30 If those goods can be classified, taking account of their type and composition, under another subheading of heading 0406 90 of the combined nomenclature which matches one of the product codes included in the annex to Regulation No 1706/89, an export refund under Article 17(1) of Regulation No 804/68 will then be conceivable.

31 It is for the national court in the main proceedings to carry out such an assessment.

32 As regards the ninth recital in the preamble to Regulation No 1706/89, it is sufficient to recall that the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording (Case C-162/97 *Nilsson and Others* [1998] ECR I-7477, paragraph 54, and Case C-308/97 *Manfredi* [1998] ECR I-7685, paragraph 30).

33 In the light of the foregoing considerations, the answer to the question referred must therefore be that cheese exported in 1990 which, by its nature, is intended for processing in a third country may be covered by an export refund under Article 17 (1) of Regulation No 804/68 provided that it is classified, taking account of its type and composition, under one of the product codes in the annex to Regulation No 1706/89, as defined by the agricultural product nomenclature for export refunds annexed to Regulation No 3445/89.

Costs

- 34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Cheese exported in 1990 which, by its nature, is intended for processing in a third country may be covered by an export refund under Article 17(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, as amended by Council Regulation (EEC) No 3904/87 of 22 December 1987, provided that it is classified, taking account of its type and composition, under one of the product codes in the annex to Commission Regulation (EEC) No 1706/89 of 15 June 1989 fixing the export refunds on milk and milk products, as defined by the agricultural product nomenclature for export refunds annexed to Commission Regulation (EEC) No 3445/89 of 15 November 1989 establishing the full version, applicable from 1 January 1990, of the agricultural product nomenclature for export refunds.

[Signatures]