



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 24 January 2013¹

Case C-568/11

Agroferm A/S

v

Ministeriet for Fødevarer, Landbrug og Fiskeri

(Reference for a preliminary ruling from the Vestre Landsret (Denmark))

(Common agricultural policy — Regulation (EC) No 1265/2001 — Production refund for the processing of sugar — Classification in the Combined Nomenclature of a product containing lysine sulphate — Regulation (EC) No 1258/1999 — Recovery of unduly paid sums — Principle of the protection of legitimate expectations)

I – Introduction

1. The objective pursued by the European Union of ensuring that the producers of sugar beet and sugar cane benefit from the necessary guarantees in respect of employment and standards of living² lies at the heart of the present reference for a preliminary ruling. That was, after all, the purpose of the European Union aids paid to the applicant in the main proceedings for producing lysine sulphate from sugar. Subsequently, however, the competent Danish authorities doubted whether the product actually satisfied the conditions attached to the European Union aid. Eventually, it refused to make further payments and demanded the repayment of aids already granted.

2. In these circumstances, what first needs to be clarified in the present proceedings is whether the lysine sulphate produced qualifies for a European Union aid in the form of a production refund. Above all, however, the proceedings provide an opportunity for the clarification of the case-law that has evolved over a number of decades on the protection of legitimate expectations in the context of the granting of European Union aids.

II – Legislative background

3. Until 2006 production refunds for the processing of sugar were granted under Regulation No 1265/2001.³ That regulation contains provisions concerning both the conditions governing entitlement to production refunds and the associated administrative procedure.

¹ — Original language: German.

² — See the second recital of the preamble to Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the market in sugar (OJ 2001 L 178, p. 1).

³ — Commission Regulation (EC) No 1265/2001 of 27 June 2001 laying down detailed rules for the application of Council Regulation (EC) No 1260/2001 as regards granting the production refund on certain sugar products used in the chemical industry (OJ 2001 L 178, p. 63).

A – Entitlement to production refunds

4. Pursuant to Article 14(1)(b) of Regulation No 1265/2001, the issue of a refund certificate gives ‘entitlement to payment of the production refund indicated in the certificate ... after the basic product has been processed in accordance with the conditions laid down in the refund certificate.’

5. Article 1(1) defines ‘basic products’ as including sugar ‘used in the manufacture of the products of the chemical industry listed in Annex I’. Annex I contains a table of Combined Nomenclature codes. The table lists *inter alia*:

‘Chapter 29 Organic chemical products excluding products of subheadings 2905 43 00 and 2905 44

...

ex Chapter 38 Miscellaneous chemical products excluding those falling within subheadings 3809 10, 3809 91 00, 3809 92 00, 3809 93 00 and ex 3824 60’.

6. The Combined Nomenclature constitutes Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.⁴ Pursuant to Article 12(1) of that Regulation, Annex I was determined by Regulations Nos 1789/2003,⁵ 1810/2004⁶ and 1719/2005⁷ in the period relevant to the current proceedings. With respect to the provisions of relevance in the present context, the three versions of Annex I are identical.

7. Chapter 29 of the Combined Nomenclature includes subheading 2922 41 00, ‘Lysine and its esters; salts thereof.’ Note 1 to Chapter 29 of the Combined Nomenclature further provides as follows:

‘1. Except where the context otherwise requires, the headings of this chapter apply only to:

(a) separate chemically defined organic compounds, whether or not containing impurities;

...

(e) the products mentioned in (a), (b) or (c) above dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for a specific use rather than for general use;

(f) the products mentioned in (a), (b), (c), (d) or (e) above with an added stabiliser (including an anti-caking agent) necessary for their preservation or transport; ...

(g) the products mentioned in (a), (b), (c), (d), (e) or (f) above with an added anti-dusting agent or a colouring or odoriferous substance added to facilitate their identification or for safety reasons, provided that the additions do not render the product particularly suitable for a specific use rather than for general use;

...’

4 — OJ 1987 L 256, p. 1, last amended by Council Regulation (EC) No 254/2000 of 31 January 2000, OJ 2000 L 28, p. 16.

5 — Commission Regulation (EC) No 1789/2003 of 11 September 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2003 L 281, p. 1).

6 — Commission Regulation (EC) No 1810/2004 of 7 September 2004 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2004 L 327, p. 1).

7 — Commission Regulation (EC) No 1719/2005 of 27 October 2005 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2005 L 292, p. 1).

8. Chapter 38, which concerns ‘Miscellaneous Chemical Products’, includes heading 3824, ‘...; chemical products and preparations of the chemical or allied industries ..., not elsewhere specified or included’.

9. Chapter 23 of the Combined Nomenclature, finally, contains heading 2309, ‘Preparations of a kind used in animal feeding’.

B – Production refund procedure

10. With respect to the administrative procedure, Article 2 of Regulation No 1265/2001 provides:

‘1. The production refund shall be granted by the Member State in whose territory processing of the basic products takes place.

2. The Member State may grant the refund only if customs control, or administrative inspection affording equivalent guarantees, ensures that the basic products are used for the purpose specified in the application referred to in Article 3.’

11. Article 3 of Regulation No 1265/2001 provides:

‘1. The production refund shall be granted only to processors who guarantee that the control provided for in Article 2(2) can be carried out at any time and who have submitted an application specifying the chemical product in the manufacture of which the basic product is to be used.

2. The Member State concerned may make entitlement to the refund subject to prior approval of the processors referred to in paragraph 1.’

According to the referring court, the Danish law applicable in the main proceedings required the prior approval of the Danish customs administration.

12. The refund certificate, which, pursuant to Article 14(1) of Regulation No 1265/2001, gives entitlement to payment of a production refund, indicates, pursuant to Article 12(3)(d), ‘the use to which the basic product is to be put’.

13. Pursuant to Article 10(1)(c) of the regulation, the application for a production refund must indicate ‘the tariff heading and description of the chemical product for the manufacture of which the basic product is to be used’.

14. Pursuant to Article 13(b) of Regulation No 1265/2001, which applies both to the application and to the refund certificate, ‘the indication of the use of the basic product may, on application and with the agreement of the competent authorities of the Member State concerned, consist merely of the chapter of the Combined Nomenclature within which the chemical product or products to be manufactured fall.’

15. In the period of relevance in the present context, the production refunds granted by the Member States were financed, pursuant to Article 1(1) and (2)(b) and Article 2(2) of Regulation No 1258/1999,⁸ from the general budget of the European Communities.⁹ Article 8(1) of that regulation imposes inter alia the following obligations on the Member States:

‘The Member States shall, in accordance with national provisions laid down by law, regulation or administrative action, take the measures necessary to:

...

(b) prevent and deal with irregularities;

(c) recover sums lost as a result of irregularities or negligence.’

16. Article 1(2) of Regulation No 2988/95¹⁰ defines ‘irregularity’ as ‘any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities ... by an unjustified item of expenditure’.

III – Main proceedings and proceedings before the Court of Justice

17. From August 2004 until June 2006 the Danish company Agroferm A/S (‘Agroferm’) produced in Denmark lysine sulphate, which it manufactured from sugar in a fermentation process and marketed as an animal feed additive. From August 2004 until March 2006 Agroferm received production refunds for the sugar used totalling DKK 70.6 million, which is currently equivalent to EUR 9.5 million.

18. On 19 May 2004 Agroferm applied to the Danish customs administration for a ‘prior approval’ with a view to obtaining production refunds. In the application Agroferm stated that it planned to manufacture lysine, which should be classified under subheading 2922 41 00 of the Combined Nomenclature. On 16 June 2004 the customs administration gave approval until the end of May 2007. Subsequently, the Danish authority for the food industry issued refund certificates, each valid for five months from the time of issue.

19. In October 2005 and March 2006 the Danish customs administration took samples of the product manufactured by Agroferm. An analysis of the samples revealed that the product consisted of only 66% lysine sulphate, the remainder comprising by-products of the manufacturing process, mainly in the form of cell mass. On 9 May 2006 the Danish authority for the food industry refused to continue paying production refunds on the ground that there was uncertainty about the classification of the product manufactured.

20. On 22 November 2006 the same authority demanded the repayment by Agroferm of production refunds amounting to DKK 86.6 million plus interest. Agroferm opposes that demand in the main proceedings on the ground that it received the payments lawfully, or at least in good faith. It also requests the payment of further production refunds already approved for the period until production ceased in June 2006.

8 — Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103).

9 — See recital 36 of the preamble to Regulation No 1260/2001, cited in footnote 2.

10 — Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities’ financial interests (OJ 1995 L 312, p. 1).

21. In these circumstances, the Vestre Landsret (Western High Court), before which the action has been brought, has referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU:

- (1) Does a product which is manufactured from sugar fermented with the aid of *Corynebacterium glutamicum* bacteria and which ... consists of approximately 65% lysine sulphate, in addition to impurities from the manufacturing process (unmodified raw materials, reagents used in the manufacturing process, and by-products), come under heading 2309, heading 2922 or heading 3824 in the Combined Nomenclature, in the version resulting from Annex I to Regulation No 1719/2005?

Is it relevant in this connection whether the impurities have been retained deliberately with a view to making the product particularly suitable, or to improve its suitability, for feed production, or whether the impurities have been retained because it is not necessary or expedient to remove them? What guidelines should be used to assess this matter in any given case?

Is it relevant to the answer that it is possible to manufacture other products containing lysine, including “pure” ($\geq 98\%$) lysine and lysine-HCl products that have a higher lysine content than the lysine sulphate product described above, and is it relevant in this connection that the amount of lysine sulphate and other impurities in the lysine sulphate product described above corresponds to that contained in other producers’ lysine sulphate products? What guidelines should be used to assess this matter in any given case?

- (2) If it is assumed that, according to the principle of legality, the production was not covered by the refund scheme, would it be contrary to EU law for the national authorities, in compliance with national principles of legal certainty and the principle of the protection of legitimate expectations, to refrain, in a case such as the present, from seeking recovery of refund amounts that the producer accepted in good faith?
- (3) If it is assumed that, according to the principle of legality, the production was not covered by the refund scheme, would it be contrary to EU law for the national authorities, in compliance with national principles of legal certainty and the principle of the protection of legitimate expectation, to honour, in a case such as the present, commitments (refund certificates) which were subject to time-limits and which the producer accepted in good faith?

22. Agroferm, the Danish Government and the Commission submitted written comments and also attended the hearing on 22 November 2012.

IV – Legal assessment

23. The request for a preliminary ruling concerns both the legal conditions for the granting of production refunds and the rights which may arise from the conduct of the national authorities during the production refund procedure from the point of view of the protection of legitimate expectations.

24. Thus the referring court’s first question seeks to clarify whether the product manufactured by Agroferm gives entitlement under EU law to production refunds (see under A below). The second and third questions are referred in case the Danish authorities ought not to have granted production refunds. They are intended to clarify what rights the applicant nonetheless derives from the principle of the protection of legitimate expectations vis-à-vis the national authorities (see under B and C below).

A – The first question referred: classification in the Combined Nomenclature

25. In putting its first question, the referring court seeks to establish whether the product manufactured by Agroferm comes under heading 2309, heading 2922 or heading 3824 in Annex I to Regulation No 1719/2005. As that regulation did not, according to Article 2 thereof, enter into force until 1 January 2006, whereas the main proceedings concern production refunds granted from 2004 until 2006, the referring court's question must be understood as requesting an interpretation of the version of the Combined Nomenclature applicable in each of those years.¹¹

26. As evident from Article 2(1) and Article 14(1)(b) in conjunction with Article 1(1) of and Annex I to Regulation No 1265/2001, entitlement to production refunds depends on the heading of the Combined Nomenclature under which the product manufactured by Agroferm should be classified. Such entitlement would have existed if that product should have been classified under heading 2922 or 3824 of the Combined Nomenclature, but not under heading 2309.

1. Heading 2922

27. Agroferm argues that the product which it manufactured falls under CN code 2922 41 00, which is a subheading of heading 2922. That subheading includes lysine salts. According to the referring court, the lysine sulphate manufactured is a lysine salt of that kind. However, the product manufactured by Agroferm consists of only 65% lysine sulphate, the remainder largely comprising cell mass resulting from the manufacturing process.

28. To determine whether the product none the less comes under subheading 2922 41 00, the principles developed by the Court of Justice in the context of the classification of goods for customs purposes should be consulted. Although the present case concerns a production refund and therefore has no bearing on customs law, Regulation No 1265/2001 refers explicitly to the Combined Nomenclature, which was established for customs law purposes.¹² According to those principles of interpretation, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is, in general, to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters.¹³

29. According to Note 1(a) to Chapter 29, that chapter and, therefore, subheading 2922 41 00 include only 'separate chemically defined organic compounds, whether or not containing impurities'. Consequently, two conflicting requirements must be observed. While the compounds covered by the chapter must be 'separate', they may also contain 'impurities'.

30. The Danish Government and the Commission contend that the requirements laid down in that note are not satisfied, since the cell mass remaining after the manufacturing process was not removed, and the product did not therefore have the necessary degree of purity.

31. By tolerating impurities, the note makes it clear that the terms 'separate' and 'chemically defined' do not require the compound to be 100% pure, the reason being that, as a general rule, it is unlikely to be technically possible to meet that requirement. However, since the compound must, in principle, be 'separate', the product cannot be said to contain mere impurities if it comprises other substances,

¹¹ — See paragraph 6 above.

¹² — See also the judgments in Case C-201/96 *LTM* [1997] ECR I-6147, paragraphs 13 to 16, and Case C-270/96 *Laboratoires Sarget* [1998] ECR I-1121, paragraphs 11 to 15.

¹³ — See, for example, the judgments in Case 40/88 *Weber* [1989] ECR 1395, paragraph 13; Case C-142/06 *Olicom* [2007] ECR I-6675, paragraph 16; and of 6 September 2012 in Case C-524/11 *Lowlands Design Holding*, paragraph 23.

even though a higher degree of purity is technically possible. As precisely that is the case, according to the referring court, the cell mass contained in Agroferm's product is not a mere impurity. Since only the objective characteristics of a product are decisive, it is irrelevant in this respect that a higher degree of purity is, according to the referring court, commercially inappropriate.

32. Furthermore, a comparison with other notes to Chapter 29 reveals that constituents of a product which are deliberately contained in the compound to serve a specific purpose cannot be regarded as impurities, Note 1(e) to (g) to Chapter 29 specifying the purposes for which and the conditions under which solution in substances other than water or the addition of other substances is harmless. Such requirements would be irrelevant if the very addition of such substances could be regarded as contamination within the meaning of Note 1(a). However, neither the subsequent addition nor the leaving of substances in the product for a specific purpose may be regarded as contamination. Otherwise, arranging the manufacturing process appropriately might enable the requirements of Note 1(e) to (g) to Chapter 29 to be circumvented.

33. According to the referring court, the cell mass contained in Agroferm's product serves specific purposes. Firstly, it is intended to prevent the bonding of moisture in the lysine sulphate; secondly, the cell mass is intended to make the compound more suitable for use as a feed additive. That being the case, the cell mass cannot be regarded as a mere impurity within the meaning of Note 1(a) to Chapter 29.

34. In view of these statements, there is no need to discuss the explanations of the World Customs Organization on the Harmonized Commodity Description and Coding System, to which the Commission also refers. Although, according to settled case-law, they are an important aid to the interpretation of the Combined Nomenclature, they are not legally binding.¹⁴ They are accordingly of lesser importance than those obtained from the interpretation of the legally binding Combined Nomenclature, with particular reference to Note 1 to Chapter 29.

35. Thus the product manufactured by Agroferm should not be classified under subheading 2922 41 00 of the Combined Nomenclature, since it does not meet the requirements set out in Note 1(a) to Chapter 29.

2. Heading 2309

36. The Danish Government and the Commission argue that the product manufactured by Agroferm should instead be classified under heading 2309, which includes 'Preparations of a kind used in animal feeding'.

37. The purpose of a product may be an objective criterion for classification if it is inherent to the product, which is assessed on the basis of its objective characteristics and properties.¹⁵ The product here at issue was marketed only as an *additive* to animal feed and, according to the referring court, its objective characteristics indicate that it was predestined for that purpose. Agroferm does not therefore consider classification under heading 2309 possible.

38. However, heading 2309 makes no mention of the restriction of the preparations to products suitable for use as a feed on their own. The product manufactured by Agroferm must therefore be classified under heading 2309 of the Combined Nomenclature.

¹⁴ — See the judgments in Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 17, Case C-400/05 *B.A.S. Trucks* [2007] ECR I-311, paragraph 28, and Case C-423/10 *Delphi Deutschland* [2011] ECR I-4003, paragraph 24; see also, for example, the judgment in Case C-215/10 *Pacific World and FDD International* [2011] ECR I-7225, paragraph 29, which describes the explanations as 'useful aids.'

¹⁵ — Judgments in Case C-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381, paragraph 13, *Olicom*, cited in footnote 13, paragraph 18, and of 22 November 2012 in Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *DIGITALNET*, paragraph 43.

3. Heading 3824

39. As heading 3824 of the Combined Nomenclature concerns only products which are ‘not elsewhere specified or included’ and as the product manufactured by Agroferm must, as has been shown, be classified under heading 2309, it does not come under heading 3824.

4. Interim conclusion

40. The answer to the first question referred should therefore be that a product such as that at issue in the main proceedings, which consists of 65% lysine sulphate and otherwise of impurities from the manufacturing process and is used as an animal feed additive, must be classified under heading 2309 of the Combined Nomenclature.

B – *The second question referred: repayment of production refunds*

41. The referring court puts its second question in case Agroferm was not entitled to a production refund for the product manufactured. As has been shown, the product should not be classified under a heading which gives entitlement to a production refund pursuant to Regulation No 1265/2001. The second question therefore needs to be answered.

42. In putting this question, the referring court seeks to establish whether, in view of principles of legal certainty and the protection of legitimate expectations to be observed under *national* law, it is contrary to EU law for national authorities to omit to recover refunds in proceedings such as these.

1. Application of the principle in EU law of the protection of legitimate expectations

43. The question referred is obviously posed against the background of recurring case-law on the common agricultural policy according to which it cannot be regarded as contrary to Community law for national law, as far as the recovery of sums wrongly paid by public authorities is concerned, to take into account the principles of legal certainty and the protection of legitimate expectations, since those principles form part of the legal order of the European Union.¹⁶

44. That case-law may give the impression that it is at the Member States’ discretion to decide whether or not they apply the principle of the protection of legitimate expectations to the recovery of payments governed by EU law. Although it would thus be permissible under EU law for legitimate expectations to be protected by national law in such cases, that view would mean, as the Commission also appears to see it, that such protection of legitimate expectations was not required under EU law.

45. That view cannot be endorsed, however.

46. It is in fact *imperative* that, when enforcing EU law, the Member States observe the principle of the protection of legitimate expectations as that principle is uniformly defined *in EU law* for all Member States (see under (a) below). Consequently, the principle in EU law of the protection of legitimate expectations must be applied to the recovery of payments governed by EU law at least when — as in the present case — their recovery is also governed by EU law (see under (b) below).

¹⁶ — See the judgments in Case 265/78 *Ferwerda* [1980] ECR 617, operative part, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 30, Case C-366/95 *Steff-Houlberg Export and Others* [1998] ECR I-2661, paragraph 16, Joined Cases C-80/99 to C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 60, and Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 56; see also the judgment in Case C-158/06 *ROM-projecten* [2007] ECR I-5103, paragraph 24, for structural funds.

(a) Protection of legitimate expectations when national authorities enforce EU law

47. Particularly in the case of the European Union's law on value added tax, settled case-law of the Court of Justice requires the Member States to observe the principle in EU law of the protection of legitimate expectations when applying the European Union's rules.¹⁷ Furthermore, in the context of the common agricultural policy, too, the Court has repeatedly ruled that the principle in EU law of the protection of legitimate expectations must be observed by every national authority entrusted with the application of EU law.¹⁸

48. If, on the other hand, it was possible for each Member State to apply a different principle of the protection of legitimate expectations when enforcing EU law, each would in effect apply EU law differently. While some would afford no more than limited protection of legitimate expectations, others might be more generous, to the advantage of undertakings in their territory and possibly to the disadvantage of the Community budget. Such an interpretation of EU law must be rejected in particular because such different treatment might lead to serious distortions of competition among the Member States.

49. Nor may the validity of the principle in EU law of the protection of legitimate expectations depend on whether EU law is enforced in each case by authorities of the European Union or of the Member States. Although, according to case-law, the principle of the protection of legitimate expectations may be invoked as against EU rules only to the extent that the European Union itself has previously created a situation which can give rise to a legitimate expectation,¹⁹ such legitimate expectations may be associated as much with acts of the EU legislature as with those of European Union authorities.²⁰

50. There is, moreover, no inconsistency between the Member States being bound by the principle in EU law of the protection of legitimate expectations and the settled case-law according to which a practice of a Member State which does not conform to EU law cannot give rise to a legitimate expectation in an individual who benefits from the resulting situation.²¹ That statement is associated with the fact that the expectation of unlawful conduct is not, as a rule, deserving of protection, since the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of Community law, and the conduct of a national authority responsible for applying Community law which acts in breach of that law cannot give rise to a legitimate expectation on the part of a trader of beneficial treatment contrary to EU law.²² This, however, concerns the substantive scope of the protection in EU law of legitimate expectations and does not call into question, for example, its general application to acts of enforcement of national authorities.²³

17 — See, for example, the judgments in Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraph 26, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 44, and Case C-107/10 *Enel Maritsa Iztok 3* [2012] ECR I-3873, paragraph 29.

18 — See the judgments in Case 316/86 *Krücken* [1988] ECR 2213, paragraph 22, and Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 33.

19 — See the judgments in Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 56, and Case C-606/10 *Association nationale d'assistance aux frontières pour les étrangers* [2012] ECR, paragraph 78.

20 — In this regard, see in particular the judgments in *Duff and Others*, cited in footnote 19, paragraphs 20 and 14, and *Niemann*, cited in footnote 19, paragraph 56 et seq.

21 — Judgments in Case 5/82 *Maizena* [1982] ECR 4601, paragraph 22, *Lageder and Others*, cited in footnote 18, paragraph 34, and *Association nationale d'assistance aux frontières pour les étrangers*, cited in footnote 19, paragraph 81.

22 — Judgments in *Krücken*, cited in footnote 18, paragraph 24, *Lageder and Others*, cited in footnote 18, paragraph 35, Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 31, and Case C-153/10 *Sony Supply Chain Solutions (Europe)* [2011] ECR I-2775, paragraph 47, and the case-law cited.

23 — In this regard, see also the judgments in *Krücken*, cited in footnote 18, paragraphs 22 to 24, and *Lageder and Others*, cited in footnote 18, paragraphs 33 to 35.

(b) Enforcement of EU law in the recovery of payments governed by EU law

51. In the present case, then, the Danish authorities should have observed the principle in EU law of the protection of legitimate expectations, to the extent that they were enforcing EU law when recovering the production refunds.

52. In this respect, doubts may arise about the Court's settled case-law according to which, in the absence of provisions of Community law, disputes concerning the recovery of amounts wrongly paid under EU law must be decided by national courts in application of their own domestic law.²⁴

53. In the present case, however, Article 8(1)(c) of Regulation No 1258/1999 is a provision of EU law which requires the recovery by the authorities of the Member States of sums lost as a result of irregularities.²⁵ An irregularity within the meaning of Article 1(2) of Regulation No 2988/95 has occurred in the present case in that Agroferm ought not to have received a production refund. The Kingdom of Denmark was therefore obliged by EU law to recover that refund.

54. In addition, the Court of Justice concluded in the joined cases of *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* that an obligation imposed by EU law on Member States to recover payments also forms the legal basis for the recovery. During the proceedings the Court had been asked whether the requirement laid down in Article 23(1) of Regulation No 4253/88²⁶ that Member States 'recover sums lost as a result of irregularities' also forms an independent legal basis for recovery from recipients not entitled to those sums. The Court replied that that provision imposes an obligation on the Member States without there being any need for authority to do so under national law.²⁷ From that it must be inferred that the obligation imposed by that provision on Member States to recover undue payments also forms an independent basis in European law for the recovery of such sums by national authorities from the recipient.

55. If, then, recovery is effected on the basis of EU law, it follows that the principle in EU law of the protection of legitimate expectations must also be applied by the national authorities. That is precisely what the Court of Justice ruled in the judgment in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*.²⁸

56. That being the case, there is no need in the current proceedings to determine whether the principle in EU law of the protection of legitimate expectations must be applied, if only because the granting of the production refund is governed by EU law in the form of Regulation No 1265/2001. In either case, the Danish authorities must observe the principle in EU law of the protection of legitimate expectations, since they are required by Article 8(1)(c) of Regulation No 1258/1999 to enforce EU law.

24 — See only the judgments in *Deutsche Milchkontor and Others*, cited in footnote 16, paragraph 19, and Joined Cases C-383/06 to C-385/06 *Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008] ECR I-1561, paragraph 48.

25 — This specific recovery requirement laid down in Article 8(1)(c) of Regulation No 1258/1999 has priority over the general obligation laid down in Article 4 of Regulation No 2988/95; with respect to Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), see the judgments in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, cited in footnote 24, paragraph 39, and Case C-465/10 *Chambre de commerce et d'industrie de l'Indre* [2011] ECR I-14081, paragraph 33.

26 — Cited in footnote 25.

27 — See the judgment in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, cited in footnote 24, paragraph 31 and 40.

28 — See the judgment in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, cited in footnote 24, paragraph 53.

2. Substance of the principle in EU law of the protection of legitimate expectations

57. To give the referring court a helpful answer, the Court of Justice should also state its position in the current proceedings on the substance of the protection of legitimate expectations under EU law. In other words, the question that arises in the present context is whether a processor in a situation such as Agroferm's can refuse to repay production refunds granted to him by relying on the principle in EU law of the protection of legitimate expectations.

58. Granting protection of legitimate expectations presupposes, firstly, good faith on the part of the undertaking, that is to say, the expectation that an aid is lawful.²⁹ Good faith can be deemed not to exist even if the undertaking has omitted to carry out inspections incumbent on it.³⁰ Good faith cannot therefore be generated negligently. In this respect doubts already exist in Agroferm's case, since it should have asked itself as a matter of course whether a product consisting of only 65% lysine sulphate can be a 'separate' and 'chemically defined' compound within the meaning of Note 1(a) to Chapter 29 of the Combined Nomenclature, and it had the option of obtaining binding tariff information pursuant to Article 12 of the Customs Code.³¹

59. In addition to the good faith required for the protection of legitimate expectations to be granted, it is necessary, according to the case-law, for the conduct of the administrative authorities to have given rise to a reasonable and legitimate expectation in the mind of a reasonably prudent economic agent.³² The question here is, on the one hand, whether good faith was based on the conduct of the administrative authorities and, on the other, whether it was right for an expectation to result from the conduct of the authorities. As has been shown,³³ the answer is in the negative in particular when the authority has acted in breach of an unambiguous provision of EU law. Thus the conduct of an authority must always be assessed in connection with the underlying EU law.

60. As regards Agroferm having reasonable and legitimate expectations, it must therefore first be said that the 'prior approval' granted for the period from 16 June 2004 until the end of May 2007 cannot be seen as the basis of a legitimate expectation, since, as the Danish Government has rightly argued, that approval concerns, pursuant to Article 3(2) of Regulation No 1265/2001, only the processor, not the product manufactured.

61. According to the regulation, that approval must be distinguished from the refund certificate, which, pursuant to Article 14(1) of Regulation No 1265/2001, alone gives entitlement to the payment of a production refund. As Articles 18 and 20 of Regulation No 1265/2001 show, neither an advance payment nor the payment of the production refund may be made without a refund certificate.

62. The application for a refund certificate to be made pursuant to Article 10 of Regulation No 1265/2001 must indicate, pursuant to Article 10(1)(c) of that regulation, the tariff heading of the product for the manufacture of which the basic product is to be used. It is thus for the applicant himself to classify the product to be manufactured by him in the Combined Nomenclature rather than merely giving a description of the product. Pursuant to Article 12(3)(d) of Regulation No 1265/2001, the refund certificate is issued only for a certain heading or a certain chapter of the Combined Nomenclature, as is evident from the derogation permitted by Article 13(b) of the regulation.

29 — See *Huber*, cited in footnote 16, paragraph 58 and the case-law cited.

30 — See, to that effect, the judgments in *Steff-Houlberg Export and Others*, cited in footnote 16, paragraph 21, and Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, paragraph 29.

31 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 (OJ 1997 L 17, p. 1).

32 — See the judgment in Joined Cases C-181/04 to C-183/04 *Elmeke* [2006] ECR I-8167, paragraph 32 and the case-law cited.

33 — See paragraph 50 above.

63. Accordingly, the expectation of a processor in respect of the payment of a production refund can be protected only if the product manufactured by him is to be classified under the heading or in the chapter of the Combined Nomenclature indicated in the certificate. Even if the Danish authorities did not observe these instructions with respect to the refund certificate — and the request for a preliminary ruling makes no reference hereto — Agroferm should not have expected this in as much as the conduct of the Danish authorities clearly infringed EU law.

3. Interim conclusion

64. The answer to the second question should therefore be that, when recovering unlawfully paid production refunds, national authorities must, pursuant to Regulation No 1265/2001, observe the principle in EU law of the protection of legitimate expectations. The expectation of a processor is, however, protected only in so far as he actually manufactures the product designated by tariff heading in the refund certificate.

C – The third question referred: payment of production refunds committed

65. In its third and final question the referring court asks whether EU law prohibits the payment of production refunds already committed in compliance with the principles of legal certainty and the protection of legitimate expectations which must be taken into account at national level.

66. Unlike the second question referred, the third does not concern the consideration given to the principle of the protection of legitimate expectations in the context of the recovery of a production refund which has already been paid. It is rather a matter of determining whether a commitment made by national authorities must be honoured even though those authorities have established that a production refund has been granted unlawfully.

67. It must first be said in this regard that Article 8(1)(b) of Regulation No 1258/1999 also requires the Member States to prevent irregularities. Pursuant to Article 8(1)(c), they must thus not only recover production refunds paid unlawfully but also refrain from making unlawful payments.

68. The principle in EU law of the protection of legitimate expectations, which must again be applied in this context, does not preclude the granting of production refunds which have already been committed where there is legitimate expectation of a refund certificate being issued, but which have not yet been paid.

69. In the present case, however, such expectation is, as has already been pointed out, protected only in so far as the processor actually manufactures the product designated by tariff heading in the refund certificate. For this reason the answer to the third question is the same as that to the second.

V – Conclusion

70. In view of the foregoing, I propose that the answers to the questions from the Vestre Landsret should be as follows:

- (1) A product, such as that at issue in the main proceedings, which consists of 65% lysine sulphate, the remainder being impurities from the manufacturing process, and which is used as an animal feed additive, must be classified in heading 2309 of the Combined Nomenclature contained in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff as amended by Regulations (EC) Nos 1789/2003, 1810/2004 and 1719/2005.

- (2) When recovering and paying production refunds which, pursuant to Commission Regulation (EC) No 1265/2001 of 27 June 2001 laying down detailed rules for the application of Council Regulation (EC) No 1260/2001 as regards granting the production refund on certain sugar products used in the chemical industry, have been unlawfully approved, national authorities must observe the principle in EU law of the protection of legitimate expectations. The expectation derived by a processor from a refund certificate issued pursuant to Article 12 of Regulation No 1265/2001 is protected only in so far as the product manufactured by him must be classified under the tariff heading indicated in the certificate.