



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 December 2014*

(Reference for a preliminary ruling — Agriculture — Regulation (EEC) No 3665/87 — Articles 4(1) and 13 — Regulation (EEC) No 2220/85 — Article 19(1)(a) — Export refunds — Advance payments on refunds — Conditions for the release of the guarantee furnished to ensure the repayment of the advance)

In Case C-128/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal da Relação de Lisboa (Portugal), made by decision of 17 January 2013, received at the Court on 18 March 2013, in the proceedings

Cruz & Companhia Lda

v

Instituto de Financiamento da Agricultura e Pescas, IP (IFAP),

Caixa Central — Caixa Central de Crédito Agrícola Mútuo, CRL,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), A. Rosas, E. Juhász and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 June 2014,

after considering the observations submitted on behalf of:

- Cruz & Companhia Lda, by B. Lacerda, R. Freitas and J. Freitas, advogados,
- the Portuguese Government, by L. Inez Fernandes and M. Folgado Moreno, acting as Agents,
- the European Commission, by P. Guerra e Andrade and D. Triantafyllou, and by M. Afonso, acting as Agents,

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

* Language of the case: Portuguese.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 4(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 1829/94 of 26 July 1994 (OJ 1994 L 191, p. 5) ('Regulation No 3665/87'), and of Article 19(1)(a) of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products (OJ 1985 L 205, p. 5), as amended by Commission Regulation (EC) No 3403/93 of 10 December 1993 (OJ 1993 L 310, p. 4) ('Regulation No 2220/85').
- 2 The request was made in the context of proceedings between Cruz & Companhia Lda ('Cruz & Companhia'), on the one hand, and the Instituto de Financiamento da Agricultura e Pescas, IP (IFAP) and the Caixa Central — Caixa Central de Crédito Agrícola Mútuo, CRL ('CCAM'), on the other hand, concerning the refusal to release a bank guarantee ensuring the repayment of the amount of an advance on an export refund, paid in respect of exports of wine carried out in 1995, and the triggering of that bank guarantee.

Legal context

- 3 Article 56 of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine (OJ 1987 L 84, p. 1) provided:

'(1) To the extent necessary to enable the products [covered by the common organisation of the markets in the wine sector] to be exported in economically significant quantities on the basis of the prices for those products on the world market, the difference between those prices and prices in the Community may be covered by an export refund. ...

(2) The refund shall be the same for the whole Community. It may be varied according to destination.

The refund shall be granted on application by the party concerned.

(3) The Council, acting by a qualified majority on a proposal from the Commission, shall adopt general rules for the granting of export refunds and criteria for fixing the amount of such refunds.

(4) Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 83.

...'
- 4 Article 71(2) of Regulation No 822/87 provided as follows:

'Natural or legal persons or groups of persons who hold products listed in Article 1 [including products connected with wine, as in this case] in the exercise of their trade, in particular producers, bottlers and processors, as well as merchants to be determined, shall be obliged to keep goods inwards and outwards registers in respect of those products.'
- 5 The common detailed rules for the application of the system of export refunds on agricultural products were established by the Commission in Regulation No 3665/87.

6 The third, fourth and sixteenth recitals in the preamble to Regulation No 3665/87 stated:

‘... the general rules laid down by the Council provide for the refund to be paid upon proof being furnished that the products have been exported from the Community; ...

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

...

... to enable exporters to finance their transactions more easily, Member States should be authorised to advance all or part of the amount of the refund as soon as the export declaration is accepted, subject to the provision of security to guarantee repayment of the amount advanced if it should later be found that the refund ought not to have been paid.’

7 Under Article 4(1) of Regulation No 3665/87:

‘Without prejudice to the provisions of Articles 5 and 16, the refund shall be paid only upon proof being furnished at the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state.’

8 The first paragraph of Article 13 of Regulation No 3665/87 provided:

‘No refund shall be granted on products which are not of sound and fair marketable quality, or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose.’

9 Article 18(1)(b) of Regulation No 3665/87 stated:

‘Proof that the product has been cleared through customs for release for consumption shall, at the exporter’s choice, be furnished by production of one of the following documents:

...

(b) a certificate of unloading and release for consumption drawn up by an international control and supervisory agency approved by the Commission in accordance with the procedure referred to in paragraph 4. The date and number of the customs document of release for consumption must appear on the certificate concerned.’

10 Article 22 of Regulation No 3665/87, included in Chapter 2, entitled ‘Advances on refunds for direct exports’ provided:

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

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

(2) The amount advanced shall be calculated taking account of the rate of refund applicable for the declared destination, corrected, as necessary, by other amounts provided for by Community rules.’

11 Article 33(1) of Regulation No 3665/87 provided:

‘When the entitlement to a refund has been proved in respect of products or goods admitted under the provisions of this chapter the sum due shall be set off against the amount paid in advance. In cases where the entitlement for the quantity exported is for an amount higher than that paid in advance, the difference shall be paid to the person concerned.

Where the amount due for the quantity exported is less than that paid in advance, in particular where paragraph 2 is applied, the competent authority shall initiate without delay the procedure laid down in Article 29 of Regulation (EEC) No 2220/85 with a view to payment by the operator of the difference between those two amounts, plus 20%.’

12 Regulation No 2220/85 established the provisions governing the guarantees to be provided inter alia either under Regulation No 822/87 or under the regulations implementing that regulation.

13 Included under Title IV, entitled ‘Advance payments’, Article 19 of Regulation No 2220/85 provided:

‘(1) The security shall be released when:

(a) final entitlement to the sum granted as advance has been established,

or

(b) the sum granted, plus any addition provided for in the specific Regulation, has been repaid.

(2) Once the deadline for showing final entitlement to the sum granted has passed without production of evidence of entitlement, the competent authority shall immediately follow the procedure in Article 29.

...’

14 Article 1 of Commission Regulation (EEC) No 2238/93 of 26 July 1993 on the accompanying documents for the carriage of wine products and the relevant records to be kept (OJ 1993 L 200, p. 10) provided:

‘(1) This Regulation lays down detailed rules for the application of Article 71 of Regulation (EEC) No 822/87 with regard to accompanying documents for the carriage of wine products without prejudice to the application of [Council] Directive 92/12/EEC [on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1)]. It lays down:

(a) rules for the certification of origin for quality wines produced in specified regions and the certification of provenance for table wines entitled to a geographical ascription in the documents accompanying the carriage of these wines which are also issued pursuant to Community provisions based on Directive 92/12 ...;

(b) rules for the issue of documents accompanying the carriage of the wine products listed in Article 1(2) of Regulation (EEC) No 822/87:

— within a Member State, where such consignments are not accompanied by a document prescribed by Community rules based on Directive 92/12 ...;

— exportation to a third country;

— in intra-Community trade when:

— carriage is effected by a small producer exempted by the Member State in which the carriage originates from the need to complete a simplified accompanying document,

or

— a wine product not subject to excise duty is transported;

(c) additional provisions for completing:

— the accompanying administrative document or the commercial document used in its place,

— the simplified accompanying document or the commercial document used in its place,

in the case of consignments of the wine products referred to in Article 1(2) of Regulation (EEC) No 822/87.

(2) This Regulation also lays down rules on the keeping of records of entry and withdrawal by persons holding wine products in the course of their occupation.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 15 Cruz & Companhia is a commercial company which is engaged in the marketing of wine, spirits and derivatives thereof, including production, storage and purchase for resale. In the course of its business, that company exported wine to Angola at a lower price than it would have obtained if it had sold the wine on the European Union market.
- 16 In June 1995, Cruz & Companhia applied to the Instituto Nacional de Intervenção e Garantia Agrícola ('the INGA') for advance payment of the refund. It submitted, for that purpose, the documents concerning acceptance of the export declaration, proof that the products had left the customs territory of the European Union within 60 days following that acceptance, and a bank guarantee drawn up at the CCAM on 14 June 1995, for an amount equal to the amount of the advance payment on the refund, plus 15%.
- 17 An advance on the refund was paid to Cruz & Companhia on 26 June 1995.
- 18 After completing the export, Cruz & Companhia submitted to the INGA the documents relating to the export, namely, the invoices, certificate, declaration of composition of the goods, the selected sample and the import declaration document.
- 19 The goods entered the third country of destination and were cleared through customs.
- 20 The INGA never returned the bank guarantee to Cruz & Companhia.
- 21 Following an inspection to check the regularity of the wine exports carried out by Cruz & Companhia, the INGA ordered, by decision of 29 July 2004, the repayment of the sum received by Cruz & Companhia by way of export refund, within 30 days, subject to the penalty of triggering the mechanisms required for enforcement of the bank guarantee.
- 22 Cruz & Companhia, which did not make a voluntary payment of the sum claimed, brought an action before the Tribunal Administrativo e Fiscal de Viseu against the decision of the INGA on 29 July 2004. On 25 July 2008, that court dismissed the action of Cruz & Companhia as unfounded.

- 23 Cruz & Companhia appealed against that decision before the Tribunal Central Administrativo do Norte. By judgment of 9 July 2009, now final, that court dismissed the appeal and upheld the decision of the Tribunal Administrativo e Fiscal de Viseu.
- 24 Cruz & Companhia brought proceedings before the referring court against the IFAP, the body which replaced the INGA, and the CCAM, seeking a declaration that the subject-matter of the bank guarantee was extinguished on 31 August 1995, the date on which the documents proving that the goods had entered Angola were submitted, and that, in those circumstances, the enforcement of the guarantee by the IFAP was unlawful. Likewise, Cruz & Companhia sought an order against the CCAM that it should not pay the IFAP the bank guarantee at issue, and an order for payment by the IFAP, by way of compensation, of the sums it claimed.
- 25 The question is raised before the referring court whether a right to the definitive grant of the amount of the refund was established and, as a result, whether it was necessary to release the security for the repayment of the amount of the advance, since the exporter has submitted the acceptance of the export declaration and proof that the goods left the customs territory of the European Union within a period of 60 days and entered the third country of destination, or whether it was, in addition, necessary to ensure that the amounts received by way of advance payments on refunds were payable.
- 26 In those circumstances, the Tribunal da Relação de Lisboa decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
- (1) Must the guarantee furnished be considered extinguished in the event of advance repayment of the refund, provided that it is ascertained that the exporter has submitted the documents concerning acceptance of the export declaration and proof that the goods left the customs territory of the European Union within a maximum period of 60 days after that acceptance?
 - (2) Is this, *a fortiori*, the case where the exporter has even proved clearance of those products through customs in the importing third country?
 - (3) Alternatively, should the view be that in addition to verification of such requirements, release of the guarantee presupposes the lack of any right on the part of the State, for any other reason — relating to export irregularities — to repayment of the refund advanced?

The questions referred for a preliminary ruling

- 27 By its questions, which should be examined together, the referring court asks, in essence, whether Article 19(1)(a) of Regulation No 2220/85 must be interpreted as meaning that the guarantee furnished by an exporter to ensure the repayment of the advance received by way of export refund must be considered to be extinguished where it is established that the exporter submitted the acceptance of the export declaration, proof that the goods left the customs territory of the European Union within a maximum period of 60 days after that acceptance, and the proof of clearance of those goods through customs in the importing third country.
- 28 First of all, it should be noted that, under Article 22 of Regulation No 3665/87, on application by the exporter, Member States are to advance all or part of the amount of the refund as soon as the export declaration has been accepted, on condition that a security is lodged.
- 29 With regard to the conditions in which that security must be released, it must be noted that Article 19(1)(a) of Regulation No 2220/85, included under Title IV, entitled 'Advance payments', provides that the security is to be released where the right to the definitive grant of the amount of the refund has been established.

- 30 In its observations to the Court, Cruz & Companhia considers that the purpose of the security lodged is to ensure that the export in respect of which the refund was granted was carried out, that the products arrived in the country of destination and were placed on the market in that country within the time-limit provided for. Referring to a reading of Article 4(1) in conjunction with Article 18(1)(b) of Regulation No 3665/87, it claims that the security must be released where the exporter submits the customs clearance document for, from that time, the right to a refund becomes final.
- 31 In that regard, it follows from the wording of Article 4(1) of Regulation No 3665/87 that the refund is to be paid only upon proof being furnished that the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the European Union.
- 32 That provision makes no mention of a definitive right to the grant of that refund.
- 33 As is apparent from the sixteenth recital in the preamble to Regulation No 3665/87, the security furnished under Article 22 of that regulation is designed to guarantee the repayment of the advance where it appears subsequently that the refund should not have been paid.
- 34 In that respect, it should be noted that Article 13 of that regulation provides that no refund is to be granted on products which are not of sound and fair marketable quality, or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose.
- 35 As regards ‘sound and fair marketable quality’, it must be observed that Article 13 of Regulation No 3665/87 appears in Chapter 1, entitled ‘Entitlement to refund’, of Title 2, entitled ‘Exports to non-member countries’, which shows that ‘sound and fair marketable quality’ is a material condition required for the payment of refunds (see the judgment in *Fleisch-Winter*, C-309/04, EU:C:2005:732, paragraph 28).
- 36 It follows also from Article 13 that the Member States are to check that the products exported to third countries are of sound and fair marketable quality (see, to that effect, the judgment in *Germany v Commission*, C-54/95, EU:C:1999:11, paragraph 49).
- 37 In those written observations, the Portuguese Government contends that, following an examination of the activities of Cruz & Companhia, it was established that that exporter did not hold the prescribed registers provided for by the specific legislation.
- 38 In that regard, it should be recalled that Article 71(2) of Regulation No 822/87 provides that natural or legal persons or groups of persons who hold products in the wine sector listed in Article 1 of that regulation, in the exercise of their trade, in particular producers, bottlers and processors, as well as merchants to be determined, are obliged to keep goods inwards and outwards registers in respect of those products.
- 39 Furthermore, it follows from Article 1(1) of Regulation No 2238/93 that that regulation lays down detailed rules for the application of Article 71 of Regulation No 822/87 with regard to accompanying documents for the carriage of wine products.
- 40 It should be noted that, where the exporter has not fulfilled the obligation to keep registers in accordance with Regulation No 822/87 and Regulation No 2238/93, which is to be determined by the referring court, the Member States are deprived of the possibility of checking whether the products exported to third countries are of sound and fair marketable quality under Article 13 of Regulation No 3665/87 and, consequently, of ensuring that the conditions connected with the system of advanced payment of export refunds are satisfied.

- 41 It follows from settled case-law that it is the exporter who must bear the consequences of non-compliance with the obligations under the system of advance financing of export refunds (see, concerning the interpretation of the second subparagraph of Article 33(1) of Regulation No 3665/87, the judgment in *Groupe Limagrain Holding*, C-402/10, EU:C:2011:704, paragraph 52).
- 42 The answer to the questions referred is therefore that Article 19(1)(a) of Regulation No 2220/85 must be interpreted as meaning that the guarantee furnished by an exporter to ensure the repayment of the advance received by way of export refund must not be considered to be extinguished even where it is established that the exporter submitted the acceptance of the export declaration, proof that the products left the customs territory of the European Union within a maximum period of 60 days after that acceptance, and the proof of clearance of those products through customs in the importing third country, if the other conditions for the grant of the refund, in particular the condition of sound and fair marketable quality of the products exported, provided for in Article 13 of Regulation No 3665/87, are not satisfied.

Costs

- 43 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are 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:

Article 19(1)(a) of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products, as amended by Commission Regulation (EC) No 3403/93 of 10 December 1993, must be interpreted as meaning that the guarantee furnished by an exporter to ensure the repayment of the advance received by way of export refund must not be considered to be extinguished even where it is established that the exporter submitted the acceptance of the export declaration, proof that the goods left the customs territory of the European Union within a maximum period of 60 days after that acceptance, and the proof of clearance of those products through customs in the importing third country, if the other conditions for the grant of the refund, in particular the condition of sound and fair marketable quality of the products exported, provided for in Article 13 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 1829/94 of 26 July 1994, are not satisfied.

[Signatures]