

OPINION OF ADVOCATE GENERAL

MENGGOZZI

delivered on 13 September 2007¹

1. By the references for a preliminary ruling in this case, the national court, in essence, asks the Court of Justice (a) whether, regardless of the specific result of so doing, it is possible to consider to be valid the reference which, for the purposes of the grant of export refunds in respect of bovine animals, Regulation No 615/98² makes to Directive 91/628/EEC,³ which lays down the criteria that the Member States must observe for the protection of the animals in question, and (b) whether that reference is to be considered valid in view of the specific results to which it leads. The national court also asks whether Article 5(3) of the regulation in question conforms with the principle of proportionality, in so far as it provides that export refunds are not to be paid for animals for which the competent authority considers, on the basis of the information available to it regarding compliance with Article 1 of that regulation, that Directive 91/628 was not complied with.

I — Legal background

2. The second subparagraph of Article 13(9) of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal,⁴ as amended by Regulation No 2634/97,⁵ makes the payment of export refunds in respect of live animals conditional upon compliance with Community animal-welfare legislation, in particular the provisions concerning the protection of animals during transport.

3. The detailed rules for the application of Regulation No 805/68 are contained in Regulation No 615/98.

1 — Original language: Italian.

2 — Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport (OJ 1998 L 82, p. 19).

3 — Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ 1991 L 340, p. 17), as amended by Council Directive 95/29/EC of 29 June 1995 (OJ 1995 L 148, p. 52).

4 — OJ, English Special Edition 1968(I), p. 187.

5 — Council Regulation (EC) No 2634/97 of 18 December 1997 amending Regulation (EEC) No 805/68 on the common organisation of the market in beef and veal (OJ 1997 L 356, p. 13).

4. Article 1 of Regulation No 615/98 provides that payment of export refunds in respect of live bovine animals is subject, in particular, to compliance with Directive 91/628 during transport to the first place at which the animals are unloaded in the non-member country of final destination.

the checks referred to in Article 4 and/or all other elements at its disposal concerning compliance with Article 1, that the directive on the protection of animals during transport was not complied with.'

5. Under Article 2 of Regulation No 615/98, a check is made on the animals when they leave the territory of the Community. An official veterinarian verifies and certifies (a) that the animals are fit, in accordance with the requirements of Directive 91/628, to make the intended journey, (b) that the means of transport in which the live animals are to leave Community territory complies with the provisions of that directive and (c) that all appropriate provisions had been made for the care of the animals during the journey, as prescribed by that directive.

7. Directive 91/628 lays down the criteria to be observed by the Member States for the protection of animals during transport. In particular, Chapter VII of the Annex to that directive indicates the watering and feeding intervals, journey times and rest periods that must be observed during the transport of live animals. For the transport of bovine animals, point 48(4)(d) and (5) of that chapter lays down the rule (known as the 29-hour rule) that the animals, after travelling for 14 hours, must be given a rest period of at least one hour, during which they must be given liquid and, if necessary, fed; they may then be transported for a further 14 hours, after which they must once again be unloaded, fed and watered and given a rest period of at least 24 hours.

6. Article 5(3) of Regulation No 615/98 provides:

'The export refund shall not be paid for animals which died during transport or for animals for which the competent authority considers, in the light of the documents referred to in paragraph 2, the reports on

8. Finally, point 48(8) of Chapter VII of the Annex to the directive provides that in the interests of the animals the journey times referred to in point 48(3), (4) and (7)(b) may be extended by two hours, taking account, in particular, of the proximity of the place of destination.

II — The facts, the questions submitted and the procedure before the Court of Justice

9. The questions referred to the Court of Justice derive from two separate cases before the national court concerning the rules on export refunds for bovine animals. In both cases, the applicants were denied export refunds for breach of the Community legislation on the protection of animals during transport.

10. In the first case in which a ruling is sought, the company Viamex Agrar Handels ('Viamex') submitted a declaration to the Hauptzollamt Kiel covering the export of 35 live bovine animals to Lebanon.

11. According to the original route declared to the Kiel authorities, the journey in question was to be from Neumünster to Rasa, lasting a total of 28 hours. It is apparent, however, from the order for reference that the cargo in question left the place of dispatch

at 1.30 pm and did not reach Prosecco until 4 pm the next day; the first leg of the journey lasted nine and a half hours and was followed by a break of two hours for the animals to recover; the second leg of the journey lasted 15 hours — longer than planned — because, in particular, of two stops, one to record the details of an accident and one for a roadside vehicle check. At Prosecco, according to the order for reference, the journey was resumed on instructions from the competent border veterinarian after a break of 20 hours, during which the animals were unloaded, fed and watered, finally reaching Rasa about four and a half hours later.

12. By notice of 1 February 2001, the Hauptzollamt Hamburg-Jonas ('the Hauptzollamt') rejected Viamex's application for an export refund on the basis of Article 5(3) of Regulation No 615/98 because it considered that Viamex had breached Community animal welfare legislation during the journey. In particular, the Hauptzollamt observed that it was apparent from the details of the journey submitted by Viamex that it had not observed the maximum journey time laid down in point 48(4)(d) of Chapter VII of the Annex to Directive 91/628 because the second leg of the journey had lasted more than 14 hours. It also observed that, when the journey time of 29 hours was exceeded, no rest period of at least 24 hours was given as required by point 48(5) of that chapter, since the stop at Prosecca was of only 20 hours.

13. The Hauptzollamt then dismissed Viamex's complaint concerning the withholding of the export refund, rejecting as irrelevant Viamex's explanation for its failure to observe the 24 hour rest period, namely that the breach was attributable solely to the conduct of the Italian border veterinarian, who had instructed the lorry driver to continue the journey after a break of only 20 hours, after ascertaining that the animals were fit to travel. The Hauptzollamt observed, first, that it was not apparent from the documents produced by Viamex that it was the border veterinarian who gave instructions to continue the journey and that, in any event, it was the responsibility of the carrier to keep himself informed of the rest periods prescribed by the directive and to apply them correctly.

14. In the order for reference, the national court took a decision on the differing views expressed in the administrative proceedings, concluding, on the basis of inquiries made of the driver responsible for the transport operation in question, that it was clear that the journey had been continued on instructions from the competent veterinarian and that the driver could not have had any influence on that decision; according to the national court, that was borne out by findings it had made in other cases involving similar issues of observance of the rest times laid down by the directive in question.

15. In the second case in which a ruling is sought, Zuchtvieh-Kontor GmbH (ZVK) declared to the Hauptzollamt Bamberg — Zollamt Coburg — its intention to export 32 live bovine animals to Egypt, for which it applied for and subsequently obtained advance payment of an export refund.

16. After completion of the journey, the competent customs office, after examining the details of the journey filed by ZVK, issued an amendment notice requiring reimbursement, under Article 5(3) of Regulation No 615/98, of the export refund granted to ZVK as an advance payment, together with a surcharge, for its failure to comply with the Community animal-welfare legislation in the transport operation in question.

17. Although the order for reference is not particularly clear regarding the details of the transport operation in question, it is apparent that (a) according to the competent Hauptzollamt, ZVK did not, in the transport operation in question, observe the limits on journey times laid down by point 48(4)(d) of Chapter VII of the Annex to Directive 91/628 and (b) that the journey time concerned included a stop of almost seven hours at the exit point from the customs territory of the Community for the purposes of the check by the border veterinarian.

18. In response to the decisions dismissing the complaints submitted by Viamex against the decision withholding the export refund and by ZVK against the amendment notice requiring reimbursement of the advance payment of the refund, those companies appealed to the Finanzgericht Hamburg for their annulment, and that court, entertaining doubts as to the validity of Article 1 of Regulation No 615/98 and the compatibility of Article 5(3) thereof with the principle of proportionality, stayed its proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

protection of animals during transport was not complied with, compatible with the principle of proportionality?

19. Under Article 23 of the Statute of the Court of Justice, observations were submitted by Viamex, ZVK, the Hauptzollamt, the Swedish Government and the Commission. Viamex, ZVK, the German Government and the Commission were represented at the hearing.

‘(1) Is Article 1 of Regulation (EC) No 615/98 valid inasmuch as it links the grant of an export refund to compliance with Directive 91/628/EEC on the protection of animals during transport?’

A — *Arguments of the parties*

(2) If the first question should be answered in the affirmative: is Article 5(3) of Regulation (EC) No 615/98, according to which export refunds are not to be paid for animals for which the competent authority considers, in the light of all elements at its disposal concerning compliance with Article 1 of Regulation (EC) No 615/98, that the directive on the

20. ZVK considers that the reference made by Article 1 of Regulation No 615/98 is not valid in so far as it makes the grant of export refunds conditional upon compliance with provisions concerning an entirely different matter, namely the protection of animals. Animal welfare should, in its view, be ensured by means of more appropriate instruments, such as, for example, a system of specific penalties. Moreover, that reference is contrary to the principle of a legal certainty, in that it relates generally and indiscriminately to the entire directive, including provisions which have only an indirect impact on animal welfare. In the alternative, ZVK asserts that Article 5(3) of the regulation in question, by providing for

forfeiture of the right to export refunds for any breach of the directive, regardless of its actual impact on animal welfare, is manifestly disproportionate to the aim pursued by the legislature, which was, precisely, to ensure effective protection of animal welfare and not, in contrast, to penalise conduct that does not detract from that objective. Finally, the manifestly disproportionate nature of the provision in question is confirmed by the lack of any possibility of reimbursement being waived in cases of force majeure, in which 'blatant injustices' would be obviated if entitlement to the refunds were maintained.

21. For their part, the Commission, the Hauptzollamt and the Swedish Government consider that Article 1 of the regulation in question is valid and that Article 5(3) thereof is consonant with the principle of proportionality.

22. With regard to the question of validity, those parties observe that the link made between two distinct areas — the rules on export refunds and animal-welfare legislation — was made at an early stage by the Council when it adopted basic Regulation No 805/68, for which the Commission merely laid down detailed implementing arrangements by means of Regulation No 615/98, with which this case is concerned. In any event, the protection of animals reflects a public-interest requirement of which the

Community takes full account in shaping the common agricultural policy and of which the systems of export refunds represent an essential instrument.

23. Moreover, Article 5(3) of the regulation in question, on the basis of which export refunds are withheld for any failure to observe any provision of Directive 91/628, regardless of the gravity of that failure, is in conformity with the principle of proportionality since no measures exist for attainment of the aim of animal protection which are liable to have a lesser impact on exporters. The Commission observes in that regard that the rules laid down by the directive represent minimum standards of animal protection and any non-observance of them, however slight, would mean that animal welfare was compromised, which is why the Community legislature, in requiring compliance with the directive in question, intentionally laid down an objective condition for the availability of refunds in order to make certain that the Community did not finance exports made in breach of a Community public-interest requirement.

24. In its written observations, Viamex put forward its own interpretation of the provisions of Directive 91/628 relevant to this case, contending in particular that the exceptional extension of the journey by two hours should apply in this case in view of the proximity of the place of destination, which

may be regarded as being the exit point from the customs territory of the Community. Moreover, failure to observe journey and rest times should be permissible in circumstances of force majeure, such as those which arose in the present case, where the journey took longer than planned because of an accident and the rest period of 24 hours was not observed on account of instructions given to the carrier by the border veterinarian.

III — Legal analysis

25. By its question, the national court asks the Court of Justice to rule whether Article 1 of Regulation No 615/98 can be regarded as valid in so far as it makes the payment of export refunds conditional upon compliance with Directive 91/628.

26. In particular, the referring court expresses doubts as to the validity of the abovementioned article on account of a number of different considerations which I shall now examine.

27. In the first place, the Finanzgericht Hamburg queries the legitimacy of the

reference made by Article 1 of Regulation No 615/98 to the directive on the protection of animals, having regard to the different aims pursued in each case. It considers that to make the payment of refunds subject to proof of compliance with Directive 91/628 gives rise to a condition for payment of refunds which has no direct or indirect connection with the aims embodied in that system of financing and, moreover, entails penalisation of conduct which does not harm the financial interests of the Community. The national court wonders, therefore, whether the reference in question can be regarded as valid, since it specifically penalises exporters for failure to comply with any conditions concerning transport laid down by the directive by divesting them of the right to the refunds (or requiring them to reimburse any advance paid on account of the refunds), regardless of whether the exporter is responsible for the failure to fulfil those conditions and regardless of the gravity of that failure.

28. As regards the first point, it should be borne in mind that Regulation No 615/98, which lays down the arrangements for applying the rules on export refunds to the beef and veal sector, was adopted by the Commission in implementation of the basic regulation, Regulation No 805/68 on the common organisation of the market in beef and veal, as amended by Council Regulation No 2634/97 of 18 December 1997.

29. More specifically, Article 1 of Regulation No 615/98 is a measure for the implementation of requirements expressly laid down in Article 13(9) of basic Regulation No 805/68. Article 13(9), as amended by the abovementioned Regulation No 2634/97, makes payment of export refunds in the beef and veal sector conditional upon compliance with the Community animal-welfare rules, in particular those for the protection of animals during transport, among which specific mention is made, in the first recital in the preamble to Regulation No 2634/97, of Directive 91/628.

in the basic regulation between the two distinct sets of rules on export refunds and animal welfare. That link was legitimately established by the Council in the exercise of the broad discretionary powers it enjoys in implementing the common agricultural policy. Indeed, by attaching importance to animal-welfare legislation in the context of the rules on export refunds, the Council took care to uphold one of the public-interest requirements which, as the Court of Justice has made clear, the institutions must take into account in pursuing the objectives of the agricultural policy, particularly in relation to the common organisation of the market.⁶

30. It follows that the decision, about which the national court has doubts, to attach importance to Community animal-welfare legislation when laying down the rules on export refunds under which entitlement to a refund is forfeited where that legislation is infringed is a choice made by the Council at an early stage in the basic regulation establishing the common organisation of the market in the beef and veal sector, for which the Commission merely laid down the implementing rules in Regulation No 615/98.

32. Moreover, the Community animal-welfare legislation, as well as responding to the common wish not to expose animals to pointless suffering and to make both a direct and an indirect contribution to safeguarding the quality of food products, is designed to set minimum common standards of protection for all Member States in order to avoid differences of treatment as between traders and distortions affecting the free movement of goods.

31. Although the national court's observations do not relate to Article 13(9) of the basic regulation but are concerned only with Article 1 of Regulation No 615/98, which lays down the rules for implementing it, it must be borne in mind that a link is established

6 — See, for example, Case 68/86 *United Kingdom v Council* [1988] ECR 855, paragraph 12. The importance of animal-welfare requirements in the formulation and implementation of Community policies in the agricultural sector is expressly recognised in the Protocol on protection and welfare of animals annexed to the Treaty of Amsterdam (OJ 1997 C 340, p. 110).

33. If, as indicated, the choice made by the Council in Regulation No 85/68, as amended by Regulation No 2634/97, to establish a link between the rules on refunds and Community animal-protection legislation must be regarded as intrinsically legitimate, the same must apply to the reference to that legislation made by the Commission when regulating refunds by means of Regulation No 615/98, in the exercise of powers delegated to it for that purpose by the Council.

34. Moreover, recourse to the device of cross-referencing, which is also used in other areas of Community legislation,⁷ is not contrary to any specific provision or general principle of Community law.

35. I therefore consider that the national court's doubts as to the validity of the abovementioned Article 1 of Regulation No 615/98, regarding the aspects considered in the foregoing points, are unfounded.

⁷ — The Swedish Government cites, in that regard, Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1).

36. As regards the second point, namely the concrete results of the reference in question, the Finanzgericht Hamburg, in formulating its request for a preliminary ruling, observes first of all that, as a result of the reference, a series of provisions which are 'regrettably vague' is incorporated in the regulation, and therefore in the rules on entitlement to export refunds for the animals in question, and points out that neither the exporter nor the authority with responsibility for refunds can grasp how those provisions should be put into practice; it then goes on to say that 'both the national authorities and the courts are precluded *a limine* from deciding against the refusal of a refund or from only refusing a refund in part on grounds of proportionality where infringements of the directive are purely minor or not culpable'.⁸

37. By those observations, the Finanzgericht Hamburg shows that it perceives a close link between its question as to the validity of the reference made by Article 1 of Regulation No 615/98 to Directive 91/628 and its question on the proportionality of the consequences which Article 5(3) imposes for failure to comply with the transport conditions laid down by the directive; it makes that connection in order to ask the Court of Justice to clarify whether, under Community law, that reference, although legitimate in itself, is rendered invalid by being made to

⁸ — See the order for reference.

a directive that contains 'regrettably vague' provisions and therefore does not seem to impose a proportionate penalty on its addressees.

38. The specificity of the question thus put to the Court is important in deciding how to resolve the problems arising in the main proceedings in so far as the specific and concrete rules governing the right to refunds provided for in Regulation No 615/98 pursue an aim very different from the specific and concrete aim pursued by Directive 91/628 regarding the protection of animal health during transport; the latter requires Member States to ensure that, in the course of transport, certain requirements are met, by providing, in Article 18, that the Member States are to adopt 'specific appropriate measures' in order that any infringement of the directive committed by natural or legal persons will be penalised and making the assumption that, within the time-limits for implementing it, the Member States will 'particularise' them; Regulation No 615/98, on the other hand, 'penalises' failure to observe the rules on transport contained in the directive by recourse not to a system of specific appropriate measures, ranked according to the seriousness of each type of infringement, but to the single and severe measure of forfeiture of the right to the refund, which is imposed for any infringement of the directive.

39. The rules laid down by the directive do not in themselves have a direct impact on the traders for whom the transport operation is carried out, but create a situation in which traders are impacted directly by the implementing legislation of the Member States.

40. Having been shifted from their original context of transport to a context resulting from the reference contained in Regulation No 615/98, those rules have a direct impact on individual exporters. It follows that both those rules and any decision adopted on the basis of them — having regard to the functions attributed to them by that reference — cannot be regarded as legitimate (a) if they do not have a clear and unambiguous basis and (b) if their effects prove to be disproportionate.

41. In particular, the Court has made it clear that in accordance with the fundamental principle of legal certainty, on the basis of which Community legislation must be clear and its application must be foreseeable for all interested parties, a penalty, even if of a non-criminal nature, may be imposed only if it has a clear and unambiguous legal basis.⁹ Furthermore, the principle of proportionality

⁹ — See, for example, Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15, and Case C-172/89 *Vandermoorle v Commission* [1990] ECR I-4677, paragraph 9.

requires that instruments adopted by a Community institution are appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it¹⁰ and that, therefore, any burdens imposed on any economic operators are commensurate with the aims pursued by the Community action.

or reduce to a minimum any delay during transport or suffering by animals when strikes or other unforeseeable circumstances impede' its application and, by virtue of the second sentence of that provision, they must adopt special measures at ports and border inspection posts to expedite the transport of animals under conditions in keeping with the requirements of the directive.

42. The Finanzgericht's request for clarification from the Court of Justice of course involves verification of the compatibility with those two requirements of the reference made in the regulation to the directive, and that examination must not overlook the need for a proper balance between pursuit of the Community's political aims and legal protection of the persons to whom they are addressed.

44. In view of that shared responsibility for ensuring that the health of bovine animals is protected during transport, considerable importance necessarily attaches to the clear finding, referred to in point 13 above, made in the order from the Fourth Chamber of the Finanzgericht Hamburg of 10 January 2006.

43. In that regard, it is necessary to take account of the fact that the directive provides that the responsibility for protecting the health of animals during transport falls not only on the exporter or his representative but also on the Member States; they, by virtue of the first sentence of Article 7(1) of the directive, are required to ensure 'that the necessary measures are taken to prevent

45. As noted, in that order the Finanzgericht bases its question to the Court of Justice on the finding to which the Court, in discharging the functions attributed to it by Article 234 EC, must have regard: it found that, after a rest period of 20 hours following the first stage of the journey, which, according to the directive, should have been followed by a rest period of 24 hours, the subsequent onward transport of the animals took place 'on the instructions of the competent veterinarian'

10 — See *Maizena*, paragraph 15, and Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59.

in accordance with the practice according to which 'the official veterinarian normally decides the time of loading and onward transport of animals and that drivers do not have any say as to after how many hours of rest the means of transport should once again leave the staging point', after, of course, it has been ascertained that resumption of the journey would not adversely affect the care of the animals.

animals are in good health and may or must continue their journey, infringed the principle of proportionality, by virtue of which, as repeatedly made clear by the Community case-law referred to in point 41, the institutions may not, in using their powers, go beyond what is necessary in order to pursue the objectives for which those powers were conferred on them. By adopting those rules, the Council and the Commission, glossing over the fact that Community law, in relation to the health of animals, also places responsibility on the Member States, went further than what might be necessary and reasonably required of exporters.

46. The abovementioned finding:

- (a) clearly confirms what has already been noted regarding the fact that the directive prescribes the action to be taken and imposes responsibility for the protection of animal health not only on exporters but also on the Member States, and

47. It follows that the questions submitted by the Finanzgericht Hamburg, read in the light of the foregoing considerations, must be answered in the affirmative. That applies both to Case C-37/06 and to Case C-58/06.

- (b) manifestly shows that the Council regulation and the Commission regulation, by placing all responsibility for the health of animals on the shoulders of the exporter and providing automatically and rather inflexibly for a penalty to be imposed on exporters for failure to fulfil time requirements the observance of which may also depend on the conduct of the administrative authorities of the Member States, even in cases where the national authorities, to which the Community has entrusted the task of supervision in this area, certify that the

48. It cannot be said that the conclusion I reach in the foregoing point conflicts with the case-law in which the Court of Justice has held to be compatible with the principle of proportionality — and therefore valid — rules based principally on 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. Those

rules, by providing, in the context of the promotion and protection of European Community participation in international trade in beef and veal, for a right to refunds and advances, under cover of a security in the form of a bank guarantee for the authority paying the refunds to operators who export such meat to non-member countries, make it clear, even for cases in which the originally planned export operation has been frustrated for reasons of force majeure, that:

(a) the exporter's right to a refund is excluded, and therefore his duty to repay the advance received is triggered, giving rise to forfeiture of the security provided for that purpose, when the animals for which the export procedure was initiated are not placed on the market in the country with reference to which the export procedure was commenced;

(b) where, however, the exporter has succeeded in exporting animals to a non-member country other than the one for which the export procedure was initiated and for which he has been granted an advance, being a country for which the Community has established smaller refunds, the exporter must repay that part of the advance paid to him that exceeds the refund due to him for the export transactions actually carried out.¹¹

49. That case-law is not incompatible with the conclusion I reached in point 47 above because, even if it favours exclusion of any right to the refund and accepts the conformity with the principle of proportionality of a regulation which provides for that right, it relates to cases in which the purposes of that right clearly differ from those for which its exclusion comes about in the present cases.

50. The purpose of the establishment under Regulation No 805/68 of a system of export refunds has been and continues to be to open up the markets of non-member countries and keep them open to exports of beef and veal by ensuring the participation of the European Community in international trade in such animals, in order to relieve the internal market of such surpluses as may arise and at the same time to maintain an adequate level of income for persons engaged in agriculture.¹²

51. Exporters are entitled to refunds only if they can prove that they have placed the animals in question on the market of a non-member country, thereby removing them from the Community market. The grant of refunds to exporters is the *quid pro quo* for the contribution which they make to attainment of the objectives of Community policy by rendering that service. The 'exclusion' of export refunds when animals are not placed on the market in non-member

11 — See to that effect, for example, Case C-299/94 *Anglo-Irish Beef Processors International and Others* [1996] ECR I-1925, paragraph 29, and Case C-263/97 *First City Trading and Others* [1998] ECR I-5537, paragraph 36.

12 — See, for example, *First City Trading and Others*, paragraph 26.

countries does not in reality amount to an exclusion of present rights or inchoate rights but simply a failure to award *ex novo* rights which would have arisen only if that release on to the market had taken place. Without release of the animals on to the market of a non-member country, to confer upon the exporter entitlement to a refund and to allow him to keep the advance granted in anticipation of the grant of that right would amount to a transfer of Community resources without any basis. There would likewise be no basis for allowing an exporter to keep the difference between the amount advanced to him for an export to a non-member country and the amount due to him when, for reasons of force majeure, he was unable to export the animals to the country in relation to which the export procedure was commenced and exported them to another non-member country for which the Community has established lower refunds.

amount of the refund paid in advance and the amount of the refund actually due'.¹³

53. The reason for exclusion of the right to a refund provided for by the reference made by Article 1 of Regulation No 615/98 to Directive 91/628 is entirely different. As is apparent from Article 18 of Directive 91/628 relating to the protection of animals during transport, and as noted above, that directive obliges the Member States to adopt 'the appropriate specific measures to penalise any infringement' thereof 'by natural or legal persons'. The rule in Article 5(3) of Regulation No 615/98 that the refund is not to be paid to an exporter where that directive has not been 'complied with' does not refer, in contrast to the provisions of Article 33(5) of Regulation No 3665/87, to the absence of the *quid pro quo* in return for which the 'refund' is made available but, rather, imposes a measure on an exporter who brings himself within the scope of the penalties which Article 18 of that directive required the Member States to adopt and which the Community brought into being as it acquired greater experience in that area and the feeling

52. For those reasons, the Court of Justice, in the case-law summarised in point 48, has taken the view that Regulation No 3665/87 is not invalid as being contrary to the principle of proportionality on the ground that it provides for 'forfeiture of a part of the security equal to the difference between the

13 — That is not belied by the provision according to which traders who, after obtaining advances on refunds for exports of bovine animals to non-member countries, do not place those animals on the market in a third country, are not required to make the relevant reimbursement in cases where the animals have been lost in transit as a result of force majeure. That release from the obligation of reimbursement is attributable solely to exceptional recognition of the effort nevertheless made by the exporter to contribute to the implementation of Community policy and it is possible only because it was expressly provided for by the legislature.

emerged that it should take a more effective part in the protection of animals.

of the non-member country of destination or the market of another non-member country the animals for which an export procedure was initiated.

54. Whereas, by excluding the right to a refund in the event of non-release of the animals on to the market of the non-member country by means of Regulation No 3665/87, the Commission prevented a right from arising, by adopting Regulation No 615/98 it had an impact on a legal position intended specifically to give rise to a right to a refund in those cases where exporters, albeit after slight delays not attributable exclusively to them, succeed in releasing on to the market

55. As the source of a penalty, albeit of an administrative nature, intended to affect the rights of persons subject to Community law, Regulation No 615/98 can only be legitimate if its effects are proportionate to the aims pursued. And, as observed earlier, the effects of that regulation are not proportionate.

IV — Conclusions

56. In the light of the foregoing considerations, I suggest that the Court give the following answer to the two questions submitted to it by the Finanzgericht Hamburg:

‘Article 1 of Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as

regards the welfare of live bovine animals during transport must be regarded as invalid insofar as it is contrary to the principle of proportionality in that, by the reference it makes to Council Directive 91/628/EEC on the protection of animals during transport, instead of imposing “specific appropriate penalties”, as required of the Member States by that directive, it places all responsibility for the protection of animals upon the exporter and provides automatically and inflexibly for the exporter to forfeit his right to a refund, imposing that penalty for failure to observe time requirements the non-observance of which may also result from the conduct of the national authorities and maintaining that penalty even in cases where those authorities, taking the view that the animals are in good health, instruct the carrier to continue the journey even though those time requirements have not been complied with.’