



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 August 2018*

(Reference for a preliminary ruling — Regulation (EEC) No 1964/82 — False declarations or deceitful practices in order to secure special export refunds on certain cuts of boned meat of bovine animals — Amendment to Regulation No 1964/82 extending the entitlement to special export refunds — Principle of the retroactive application of the more lenient criminal law — Third sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union)

In Case C-115/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 23 November 2016, received at the Court on 6 March 2017, in the proceedings

Administration des douanes et des droits indirects,

Établissement national des produits de l'agriculture et de la mer (FranceAgriMer)

v

Hubert Clergeau,

Jean-Luc Labrousse,

Jean-Jacques Berthelémy,

Alain Bouchet,

Jean-Pierre Dubois,

Marcel Géry,

Jean-Paul Matrat,

Jean-Pierre Paziot,

Patrice Raillot,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, A. Borg Barthet, M. Berger and F. Biltgen, Judges,

* Language of the case: French.

Advocate General: J. Kokott,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 28 February 2018,

after considering the observations submitted on behalf of:

- Messrs Clergeau, Labrousse, Bouchet and Matrat, by P. Spinosi and B. Paillard, avocats,
- the French Government, by D. Colas and S. Horrenberger and by E. de Moustier, acting as Agents,
- the Greek Government, by G. Kanellopoulos and by A. Vasilopoulou and M. Tassopoulou, acting as Agents,
- the Austrian Government, by G. Eberhard, acting as Agent,
- the European Commission, by A. Lewis and D. Bianchi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2018,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in the course of proceedings brought by the Administration des douanes et droits indirects (Customs and Indirect Taxes Authority, France) and the Établissement national des produits de l'agriculture et de la mer (National Office for Agricultural and Fisheries Products, France; FranceAgriMer) against Messrs Hubert Clergeau, Jean-Luc Labrousse, Jean-Jacques Berthelley, Alain Bouchet, Jean-Pierre Dubois, Marcel Géry, Jean-Paul Matrat, Jean-Pierre Paziôt and Patrice Raillot ('the defendants in the main proceedings'), concerning their criminal liability for engaging in deceitful practices or making false declarations with the aim of obtaining an export advantage.

Legal context

EU law

- 3 Commission Regulation (EEC) No 1964/82 of 20 July 1982 laying down the conditions for granting special export refunds on certain cuts of boned meat of bovine animals (OJ 1982 L 212, p. 48), set out the conditions under which special export refunds could be granted for certain cuts of meat.
- 4 The second recital of that regulation states:

'... on account of the market situation, the economic situation in the beef and veal sector and the scope for selling certain products of the sector, the conditions governing the payment of special export refunds on those products should be determined ...'.

5 For that purpose, Article 1 of that regulation states:

‘Individually wrapped boneless cuts from fresh or chilled hindquarters of adult male cattle shall, when the terms of this Regulation are complied with, qualify for special export refunds.

...’

6 Article 2(1) of that regulation provides:

‘The operator shall submit to the competent authorities indicated by the Member States a declaration stating his intention to bone hindquarters as defined in Article 1 under the terms of this Regulation and to export the entire quantity of boned pieces obtained, each piece being individually wrapped.’

7 Article 1 and Article 2(1) of Regulation No 1964/82 were amended, with effect from 19 January 1998, by Commission Regulation (EC) No 2469/97 of 11 December 1997 amending Regulations No 1964/82, (EEC) No 3846/87 establishing an agricultural product nomenclature for export refunds and (EC) No 1445/95 on rules of application for import and export licences in the beef and veal sector (OJ 1997 L 341, p. 8).

8 The second recital of Regulation No 2469/97 states:

‘Whereas, following implementation of the Agreement on Agriculture concluded during the Uruguay Round of Multilateral Trade Negotiations, arrangements should be introduced to permit better targeting of beef and veal products to which preference is to be given for export to third countries; whereas the introduction of a special refund for boned cuts from forequarters of adult male cattle would meet that objective; whereas the arrangements provided for in Regulation [No 1964/82] should therefore be extended to those products.’

9 Article 1 of Regulation No 1964/82, as amended by Regulation No 2469/97, provides:

‘Individually packaged boneless cuts from fresh or chilled forequarters and hindquarters of adult male cattle with an average lean meat content of 55% [or] more shall, under the conditions laid down in this Regulation, qualify for special export refunds.

...’

10 Commission Regulation (EC) No 1359/2007 of 21 November 2007 laying down the conditions for granting special export refunds on certain cuts of boned meat of bovine animals (OJ 2007 L 304, p. 21) repealed and replaced, with effect from 1 January 2008, Regulation No 1964/82.

11 According to recital 3 of Regulation No 1359/2007:

‘On account of the market situation, the economic situation in the beef and veal sector and the scope for selling certain products of the sector, the conditions governing the payment of special export refunds on these products should be determined. In particular, conditions should be laid down for certain cuts of meat produced by boning quarters of male cattle.’

12 Articles 1 and 2 of that regulation reproduce, in substantially identical terms, the wording of Article 1 of Regulation No 1964/82, as amended by Regulation No 2469/97.

French law

13 Article 426 of the code des douanes (Customs Code) provides:

‘The following shall be deemed to be an undeclared importation or exportation of goods:

...

4° false declarations or schemes having the object or effect of obtaining, in full or in part, a refund, exemption, reduced duty or any advantage in connection with importation or exportation, with the exception of infringements of the rules governing quality or packaging where these infringements do not have the object or effect of obtaining a refund, exemption, reduced duty or financial advantage;

...’

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

14 On 21 December 1990, a judicial investigation against X had been initiated by the procureur de la République de La Rochelle (public prosecutor, La Rochelle, France) in respect of the offence of making false declarations or engaging in deceitful practices within the meaning of Article 426(4) of the Customs Code. That judicial investigation concerned events which allegedly occurred in the course of the activities of Clergeau SA, which deals, in particular, with the purchase, sale, transport, import, export and slaughter of meat.

15 On 25 May 2010, the indictment division of the cour d’appel de Poitiers (Court of Appeal, Poitiers, France) closed that judicial investigation and remitted the defendants in the main proceedings to the criminal court.

16 The defendants are charged, in essence, with having committed acts, between 1987 and 1992, with the effect of securing special export refunds for Clergeau pursuant to Regulation No 1964/82, to which it was not entitled, by declaring as ‘boneless cuts from hindquarters’ of adult male cattle, within the meaning of Article 1 of that regulation, cuts of meat falling outside that definition. The defendants in the main proceedings were alleged to have supplied, in the approved export warehouse, boneless cuts coming mainly from the forequarters, whereas only pieces of hindquarters were eligible for the grant of such refunds.

17 By judgment of the tribunal correctionnel de La Rochelle (La Rochelle Criminal Court, France) of 3 December 2013, confirmed on appeal by judgment of the cour d’appel de Poitiers (Court of Appeal, Poitiers) of 12 March 2015, the defendants in the main proceedings were acquitted.

18 The Customs and Indirect Taxes Authority and FranceAgriMer brought an appeal against that judgment before the referring court; the referring court considers that the first plea introduced by FranceAgriMer raises a question of EU law concerning the interpretation of the principle of the retroactive application of the more lenient criminal law enshrined in Article 49(1) of the Charter.

19 In support of that plea, FranceAgriMer maintains, in essence, that the cour d’appel de Poitiers (Court of Appeal, Poitiers) misinterpreted the rules governing the temporal application of criminal law, since it retrospectively applied, to the dispute in the main proceedings, the amendment of the eligibility criteria for special export refunds initially provided for in Regulation No 1964/82. That amendment does not fall within the scope of the principle of the retroactive application of the more lenient criminal law, in so far as it does not apply to the constituent elements of the offence and does not alter the classification of the criminal charge at issue in the main proceedings.

- 20 The referring court notes, at the outset, that Regulation No 1964/82 provided for special export refunds applicable to boneless cuts from hindquarters of adult male cattle. However, subsequent to the events at issue in the main proceedings, that regulation was replaced by Regulation No 1359/2007, which extended the entitlement to those refunds to cuts from forequarters. Thus, in the present case, the question arises of whether those amendments are to be applied to the dispute in the main proceedings in accordance with the principle of the retroactive application of the more lenient criminal law.
- 21 In that regard, that court notes, first of all, that that principle is linked to the idea that criminal offences and penalties may be enacted only if they appear to be necessary. The assessment of that need is specific as regards economic regulation by reason of its changeable nature. In that context, the fact that a measure no longer appears necessary in light of the current economic situation does not mean that a past infringement of that measure is no longer to be penalised.
- 22 Next, the referring court notes that Article 426(4) of the Customs Code implements in French law the duty, based on Article 4(3) TEU, to penalise persons who, by means of false declarations or deceitful practices, obtain special export refunds to which they were not entitled. That national provision, which constitutes the legal basis for prosecutions in the case in the main proceedings, has not undergone any amendment *ratione temporis*.
- 23 Finally, that court takes the view that the application of the principle of the retroactive application of the more lenient criminal law in circumstances such as those of the case in the main proceedings would have the consequence of weakening the prevention and penalisation of abuse of the financial interests of the European Union. Thus, the application of the principle referred to in Article 49(1) of the Charter could preclude compliance with Article 4(3) TEU.
- 24 In those circumstances the Cour de cassation (Court of Cassation, France) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- ‘Is Article 49 of the Charter ... to be interpreted as precluding a situation in which a person is convicted on the ground that he obtained export refunds, to which he was not entitled, by means of deceitful practices or the making of false declarations as to the nature of the goods in respect of which the refunds were requested, although, as a result of changes in the rules which occurred subsequent to the facts of the case, the goods that were in fact exported by that person have since become eligible for those refunds?’

Consideration of the question referred

- 25 By its question, the referring court seeks to ascertain, in essence, whether the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter, must be interpreted as precluding a situation in which a person is convicted on the ground that he wrongfully obtained special export refunds provided for in Regulation No 1964/82, by means of deceitful practices or the making of false statements as to the nature of the goods in respect of which the refunds were requested, although, as a result of changes in the rules which occurred subsequent to those acts, the goods that were exported by that person have since become eligible for those refunds.
- 26 As a preliminary point, it should be noted that the principle of the retroactive application of the more lenient criminal law, as enshrined in Article 49(1) of the Charter, is part of primary EU law. Even before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal value as the Treaties, the Court held that that principle followed from the constitutional traditions

common to the Member States and, therefore, had to be regarded as forming part of the general principles of EU law, which national courts must respect when applying national law (judgment of 6 October 2016, *Paoletti and Others*, C-218/15, EU:C:2016:748, paragraph 25).

- 27 Thus, the fact that the offending conduct at issue in the main proceedings took place from 1987 to 1992, that is to say, before the entry into force of the Treaty of Lisbon on 1 December 2009, does not preclude, as such, the application, in the present case, of the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter.
- 28 Furthermore, it should be noted that, according to the Court's settled case-law, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgment of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 55).
- 29 In this case, it suffices to point out that, according to the information provided by the referring court, the defendants in the main proceedings are prosecuted on the basis of Article 426(4) of the Customs Code for having made false declarations or having engaged in deceitful practices having the effect of obtaining special export refunds provided for in Regulation No 1964/82. Therefore, that provision of the Customs Code is, in particular, designed to punish an infringement of the European Union's financial interests, in accordance with the obligations imposed on Member States by Article 4(3) TEU and Article 325 TFEU.
- 30 In those circumstances, it must be held that the criminal charge provided for in Article 426(4) of the Customs Code and the main criminal proceedings at issue fall within the scope of the fundamental rights guaranteed in the legal order of the European Union within the meaning of the case-law referred to in paragraph 28 of the present judgment, with the result that the referring court must respect, in the context of that procedure, the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter (see, by analogy, judgment of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraph 69).
- 31 However, in order to reply to the question referred by the national court, it should be recalled that, subsequent to the events at issue in the main proceedings, Article 1 of Regulation No 1964/82 was amended, with effect from 19 January 1998, by Regulation No 2469/97, which extended the entitlement to special export refunds, laid down by Regulation No 1964/82, to cuts from forequarters of adult male bovine animals, such as those which are the subject of false declarations or deceitful practices with which the defendants in the main proceedings are charged. That amendment was subsequently reproduced in Article 1 of Regulation No 1359/2007, which codified and replaced Regulation No 1964/82 with effect from 1 January 2008.
- 32 It must therefore be determined whether, in the light of the amendment of the eligibility criteria provided for in Article 1 of Regulation No 1964/82, the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter, must be interpreted as precluding, in circumstances such as those in the main proceedings, a situation in which a person is convicted for having made false declarations or having engaged in deceitful practices, within the meaning of Article 426(4) of the Customs Code.
- 33 In that regard, it should be noted that the application of the more lenient criminal law necessarily involves a succession of laws over time and is based on the conclusion that the legislature changed its position either on the criminal classification of the act or the penalty to be applied to an offence (judgment of 6 October 2016, *Paoletti and Others*, C-218/15, EU:C:2016:748, paragraph 27).

- 34 It should be noted, first, that, as is apparent from the file submitted to the Court, since the commission of the offence at issue in the main proceedings, the offence referred to in Article 426(4) of the Customs Code has not been amended by the French legislature. False declarations or deceitful practices having the effect of securing an advantage relating to exports, such as a special export refund under Regulation No 1964/82, therefore remain a criminal offence in the same manner as at the time of the events at issue in the main proceedings.
- 35 Thus, it must be noted, as observed by the Advocate General in point 41 of her Opinion, that, in the present case, there has been no change in the French legislature's assessment of the criminal classification of the acts in question or the penalty to be applied to the offence of which the defendants in the main proceedings are accused.
- 36 Second, as regards the amendment of the rules of EU law referred to in paragraph 31 of this judgment, it should be noted that, as is apparent from the second recital of Regulation No 2469/97, the introduction of a special export refund for boned cuts from forequarters of adult male cattle was aimed at adapting those rules to the changing realities of the meat market, and in particular to reflect the situation on the world market following the implementation of the agreements concluded in the framework of the Uruguay Round of Multilateral Trade Negotiations.
- 37 Consequently, the choice of the EU legislature to amend the eligibility criteria laid down in Article 1 of Regulation No 1964/82 was based on a purely economic and technical assessment of the situation on the world meat market.
- 38 It must therefore be held that, by that amendment, the legislature did not seek to call into question the criminal classification or the assessment by the competent national authority of the penalty to be applied to conduct having the effect of unduly securing special export refunds provided for in Regulation No 1964/82, such as the false declarations or deceitful practices of which the defendants in the main proceedings are accused.
- 39 Furthermore, as observed by the French Government in its written observations, it should also be noted that the amendment which took place in the context of EU rules has not altered the constituent elements of the offence of which the defendants in the main proceedings are accused.
- 40 Since that offence concerns false declarations or deceitful practices with the effect of securing special export refunds under Regulation No 1964/82, the fact that, subsequent to the acts at issue in the main proceedings, the goods in respect of which the refunds were requested have become eligible for that refund does not appear, as such, to be likely to affect the criminal nature of such false declarations or deceitful practices.
- 41 In the light of all the foregoing, the answer to the question referred is that the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter, must be interpreted as not precluding a situation in which a person is convicted on the ground that he wrongfully obtained special export refunds provided for in Regulation No 1964/82, by means of deceitful practices or the making of false statements as to the nature of the goods in respect of which the refunds were requested, although, as a result of changes in those rules which occurred subsequent to the acts complained of, the goods that were exported by that person have since become eligible for those refunds.

Costs

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

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

The principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a situation in which a person is convicted on the ground that he wrongfully obtained special export refunds provided for in Commission Regulation (EEC) No 1964/82 of 20 July 1982 laying down the conditions for granting special export refunds on certain cuts of boned meat of bovine animals, by means of deceitful practices or the making of false statements as to the nature of the goods in respect of which the refunds were requested, although, as a result of changes in those rules which occurred subsequent to the acts complained of, the goods that were exported by that person have since become eligible for those refunds.

[Signatures]