JUDGMENT OF THE COURT

14 December 2000 *

In Case C-110/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesfinanzhof, Germany, for a preliminary ruling in the proceedings pending before that court between

Emsland-Stärke GmbH

and

Hauptzollamt Hamburg-Jonas,

on the interpretation of Articles 10(1) and 20(2) to (6) of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1979 L 317 p. 1), in the version resulting from Commission Regulation (EEC) No 568/85 of 4 March 1985 (OJ 1985 L 65, p. 5),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Emsland-Stärke GmbH, by B. Festge, Rechtsanwalt, Hamburg,

— the Commission of the European Communities, by K.-D. Borchardt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Emsland-Stärke GmbH and the Commission at the hearing on 14 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2000,

gives the following

Judgment

1 By order of 2 February 1999, received at the Court on 31 March 1999, the Bundesfinanzhof (Federal Finance Court) referred to the Court for preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 10(1) and 20(2) to (6) of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1979 L 317, p. 1), in the version resulting from Commission Regulation (EEC) No 568/85 of 4 March 1985 (OJ 1985 L 65, p. 5, hereinafter 'Regulation No 2730/79').

2 Those questions were raised in proceedings between Emsland-Stärke GmbH (hereinafter 'Emsland-Stärke') and Hauptzollamt Hamburg-Jonas (hereinafter 'the HZA') concerning the right of Emsland-Stärke to non-differentiated export refunds for the export of products based on potato starch and wheat starch to Switzerland from April to June 1987.

Legal background

3 At the material time, the conditions to be met for the grant of export refunds were laid down, for all agricultural products, by Regulation No 2730/79.

4 The first subparagraph of Article 9(1) of that regulation provides:

'Without prejudice to the provisions of Articles 10, 20 and 26, the refund shall be paid only upon proof being furnished that the product in respect of which customs export formalities have been completed has, within 60 days from the day of completion of such formalities:

— in the cases specified in Article 5, reached its destination unaltered,

or

— in other cases, left the geographical territory of the Community unaltered.'

5 Under Article 10(1) of Regulation No 2730/79:

'In the following circumstances payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the geographical territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a non-member country and where appropriate into a specific non-member country within the time-limits referred to in Article 31:

(a) where there is serious doubt as to the true destination of the product,

or

(b) where, by reason of the difference between the rate of refund on the exported product and the amount of the import duties applicable to an identical product on the day when customs export formalities are completed, it is possible that the product may be re-introduced into the Community.

In the cases referred to in the preceding subparagraph, the provisions of Article 20 (2), (3), (4), (5) and (6) shall apply.

In addition, the competent authorities of the Member States may require that additional proof be provided which shows, to their satisfaction, that the product has actually been placed on the market in the non-member country of import in the unaltered state.'

6 Article 20(2) to (6) of Regulation No 2730/79 provides:

'2. A product shall be considered to have been imported when the customs entry formalities for home use in the non-member country concerned have been completed.

3. Proof that these formalities have been completed shall be furnished by production of:

(a) the relevant customs document, or a copy or photocopy thereof certified as true by either the body which endorsed the original document, an official

agency of the non-member country concerned or an official agency of a Member State;

or

(b) the customs entry certificate made out in accordance with the specimen in Annex II in one or more official languages of the Community and in a language used in the non-member country concerned;

or

(c) any other document endorsed by the customs authorities of the non-member country concerned on which the products are identified and which proves that they have been released for home use in that country.

4. If, however, owing to circumstances beyond the control of the exporter, none of the documents specified in paragraph 3 can be produced, or they are considered inadequate, proof that customs entry formalities for home use have been completed may be furnished by production of one or more of the following documents:

...

5. In addition, the exporter shall in all cases where this article applies produce a copy or photocopy of the transport document.

6. The Commission may, in accordance with the procedure laid down in Article 38 of Regulation No 136/66/EEC and in the corresponding articles of the other regulations on the common organisation of markets, provide in certain specific cases to be determined that the proof of importation referred to in paragraphs 3 and 4 may be furnished by production of a specific document or in any other way.'

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

7 According to the order for reference, between April and June 1987, Emsland-Stärke GmbH exported to Switzerland several consignments of a product based on potato starch under the description 'Emes E'. The recipients of the goods were declared to be the undertakings Fuga AG (hereinafter 'Fuga') and Lukowa AG (hereinafter 'Lukowa'), both established at the same address in Lucerne, Switzerland, and managed and represented by the same group of persons. The invoice was addressed in each case to Lukowa. On an application by Emsland-Stärke, and in the light *inter alia* of Swiss customs clearance certificates and freight papers, the HZA granted the company an export refund.

8 Subsequent inquiries conducted by the German customs investigation service revealed that, immediately after their release for home use in Switzerland, the exported consignments marked 'Emes E' were transported back to Germany unaltered and by the same means of transport under an external Community transit procedure recently set up by Lukowa and were released for home use in that Member State on payment of the relevant import duties.

9 In respect of those consignments, by a decision of 16 May 1991, the HZA revoked the decisions granting an export refund and demanded repayment of DEM 66 722.89.

10 The plaintiff also exported several consignments of a wheat starch-based product to Switzerland in May and June 1987, under the description 'Emsize W 2'. Again, the recipients were Fuga or Lukowa. In that case too, the Hauptzollamt granted an export refund.

11 Subsequent inquiries conducted by the German customs investigation service revealed that, immediately after their release for home use in Switzerland, the exported consignments in question were forwarded unaltered and by the same means of transport to Italy under an external Community transit procedure recently set up by Fuga, and that on arrival in Italy they were released for home use on payment of the relevant import duties. The transport company invoiced Fuga for through transport of the goods from their point of departure in Germany to their destination in Italy.

12 In respect of those consignments, by a decision of 22 June 1992, the HZA revoked the decisions granting an export refund and demanded repayment of DEM 253 456.69.

13 Since the administrative complaints made against the decisions ordering recovery were unsuccessful, Emsland-Stärke brought an appeal before the Finanzgericht.

14 In the proceedings before that court, Emsland-Stärke submitted that the export refunds were wrongly reclaimed, since all the goods had been released for home use in Switzerland. It explained that, in respect of three consignments there was

evidence that, before their re-exportation, the goods had been sold in Switzerland by Fuga to Lukowa. It asserted that the goods were not re-imported into the Community with intent to deceive and that it did not know what the purchasers intended to do with the goods in Switzerland.

15 The Finanzgericht dismissed the appeal and Emsland-Stärke brought an appeal on a point of law (Revision) before the Bundesfinanzhof, claiming that there had been a breach of Article 10(1) of Regulation No 2730/79.

16 The Bundesfinanzhof observes that in the cases set out in that provision it is necessary to adduce evidence that the product was imported into the non-member country. The second subparagraph of Article 10(1) of Regulation No 2730/79 refers in that regard to the rules of evidence in Article 20(2) to (6) of that regulation which are also applicable in the case of differentiated rate refunds.

17 The Bundesfinanzhof observes that, in the case in the main proceedings, proof that the customs formalities for release for home use had been completed was furnished by Emsland-Stärke by the production of a customs entry certificate, the document referred to in Article 20(2) of Regulation No 2730/79. The transport documents produced by the plaintiff in the main proceedings, presentation of which is required by Article 20(5), likewise show that the products were in each case physically brought to the non-member country in question (Switzerland), even if they were immediately forwarded from there.

18 The national court states that if, in a case such as the present, those documents were not to be regarded as sufficient proof of the product's importation, it needs to be decided what further evidence may be required. If, for example, it were possible to prove that the goods reached the market of the non-member country by demonstrating that they were sold on in that country, it would have to be clarified under what circumstances such a sale should be granted recognition. The Bundesfinanzhof observes that in respect of the three consignments which were

sold on in the non-member country in the present case, the question arises whether the close commercial and personal connection between the undertakings which were party to the resale are such as to preclude recognition of such a transaction as proof of importation into that country.

19 Against that background, the Bundesfinanzhof decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) On a proper interpretation of Article 10(1) in conjunction with Article 20(2) to (6) of Regulation (EEC) No 2730/79, does an exporter lose his right to payment of an export refund, determined at a single rate for all non-member countries without variation according to destination, if the product in respect of which the export refund was paid, and which is sold to a purchaser established in a non-member country, is, immediately after its release for home use in that non-member country, transported back to the Community under the external Community transit procedure and is there released for home use on payment of import duties, without any infringement being established?

(2) Would the answer be different if, before the product was re-imported into the Community, the purchaser in the non-member country sold it to an undertaking with which he was personally and commercially connected, which is also established in that non-member country?'

20 It is appropriate to consider the questions together.

The questions referred for a preliminary ruling

Arguments of the parties

21 The answer which Emsland-Stärke proposes to the first question is that the exporter does not forfeit its right to an export refund in the circumstances under consideration. It observes that the main proceedings concern refunds at a rate which is not differentiated according to destination and to obtain which it is sufficient, except in the cases listed under (a) and (b) in the first subparagraph of Article 10(1) of Regulation No 2730/79, to prove that the goods left the geographical territory of the Community.

22 It also observes that, under Article 20(2) of Regulation No 2730/79, a product is considered to have been imported into a non-member country 'when the customs entry formalities for home use in the non-member country concerned have been completed'. The objectively verifiable criterion for the goods' entry for home use should be considered sufficient since, otherwise, significant legal uncertainty would arise for the recipient of the refund. It observes in that regard that if the products did not ultimately remain in the non-member country this was a result of a decision made by the purchaser established in that country on the basis of commercial considerations.

23 As regards the second question, and the lots sold on by Fuga to Lukowa in particular, Emsland-Stärke considers that, as a result of the price charged and the quantity sold, the goods had an impact on the Swiss market in modified starch. It submits that it is immaterial that the purchaser was a sister company of the vendor, as neither the contract for sale nor the price was fictitious. If the Swiss sister company of the importer had not bought the goods from that importer it would have bought the same quantity elsewhere in Switzerland, since, at the time of purchase it required precisely that quantity of modified starch.

24 In reply to the Commission's observations regarding abuse of rights, Emsland-Stärke, basing its argument on Case 117/83 *Könecke* v *BALM* [1984] ECR 3291, paragraph 11, submitted at the hearing that to demand repayment of the export refund or withdraw *ex post facto* the advantage obtained would breach the principle of lawfulness since the general principle of abuse of rights does not constitute a clear and unambiguous legal basis for the adoption of such a measure.

25 Even if that general principle did allow repayment of the advantage obtained to be demanded, that demand could not be addressed to the plaintiff in the main proceedings because it was not that company but its Swiss purchaser which dispatched the goods to be re-imported into the Community.

26 The HZA, which did not submit observations to the Court but whose position was summarised by the national court, contends that the Community legislature did not lay down, in the combined provisions of Articles 10 and 20 of Regulation No 2730/79, different conditions for the grant of non-differentiated refunds and differentiated refunds. In its view, even in the case of non-differentiated refunds, grant of a refund can be contemplated only if the goods play a part on the relevant market in the non-member country and are subject to the laws of that market. The production of a customs document establishing entry for home use in that country merely creates a rebuttable presumption.

27 The Commission points out that, at the material time, there was a significant difference, in the starch sector, between the amount of the export refund and that of the production refund, the former being approximately twice the amount of the latter. Particularly low import duties were the third factor which made a three-way transaction profitable, the goods being first exported to a non-member country before being re-imported into the Community by the same means of transport.

28 The Commission expresses doubts about the applicability of Article 10 of Regulation No 2730/79 in a case such as that in the main proceedings.

29 It points out that there are three different conditions for the acquisition of a right to a non-differentiated export refund.

30 The first, which is the general condition set out in Article 9(1) of Regulation No 2730/79, is that the product must have left the geographical territory of the Community unaltered. That condition was fulfilled as regards the products at issue in the main proceedings.

31 The first and second subparagraphs of Article 10(1) of Regulation No 2730/79 provide, moreover, that where there is serious doubt as to the true destination of the product, or where, by reason of the difference between the rate of refund on the exported product and the amount of import duties it is possible that the product may be re-introduced into the Community, a second condition must be fulfilled for entitlement to a refund, namely that the product must have been imported into a non-member country. According to the Commission, it is clear from the wording and the structure of the rules that the circumstances under which the second condition must be fulfilled must exist from the outset, that is to say before the refund is granted. That interpretation is, moreover, confirmed by the case-law of the Court in Case C-347/93 *Belgian State* v *Boterlux* [1994] ECR I-3933.

32 The Commission observes in that regard that, in the main proceedings, it was only after the refund was granted and after the inquiries by the German customs investigation service that the HZA became aware of the fact that the goods were re-dispatched to the Community and demanded further evidence.

33 It observes, further, that even if the circumstances of the case in the main proceedings undoubtedly required that the second condition be fulfilled, in that there was a significant difference between the amount of the export refund and the amount of import duties, the proof that the condition was fulfilled was provided in accordance with the rules.

34 The third condition, laid down in the third subparagraph of Article 10(1) of Regulation No 2730/79 must be fulfilled in certain exceptional cases, in which the competent authorities of the Member States may require that additional proof be provided which shows that the product has actually been placed on the market in the non-member country of import. The Commission specifies that by 'exceptional cases' it means, for example, an embargo, in respect of which special measures are taken to prevent its being ignored, as it might be if goods are diverted by another non-member country.

35 The Commission takes the view that the rule imposing that third condition cannot be used to deal with an abuse of rights discovered in the course of checks after the event, that is to say after payment of the export refund. Like the second condition for acquiring the right, this is a provision which, on the basis of objective criteria, covers certain situations which necessitate more rigorous conditions for payment of an export refund. In a case such as that in the main proceedings, that provision does not constitute a sufficient basis for demanding the repayment of the export refunds granted.

36 Whilst Regulation No 2730/79 does not constitute, it argues, a legal basis for demanding repayment of export refunds, the Commission none the less considers that, in the light of the circumstances of the case in the main proceedings, the abuse of rights aspect of the matter must be examined.

37 In that connection it cites Article 4(3) of 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), according to which '[a]cts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal'.

38 Whilst that regulation was not applicable at the material time, the Commission none the less considers that the paragraph cited simply expresses a general principle of law already in force in the Community legal order. It points out that this general legal principle of abuse of rights exists in almost all the Member States and has already been applied in the case-law of the Court of Justice, although the Court has not expressly recognised it as a general principle of Community law. In that connection the Commission cites Case 125/76 *Cremer* v *BALM* [1977] ECR 1593; Case 250/80 *Töpfer and Others* [1981] ECR 2465; Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779; and the Opinion in Case C-441/93 *Pafitis and Others* v *Trapeza Kentrikis Ellados* [1996] ECR I-1347.

39 The Commission contends that the concept of an abuse of rights comprises three elements:

— an objective element, that is to say, evidence that the conditions for the grant of a benefit were created artificially, that is to say, that a commercial operation was not carried out for an economic purpose but solely to obtain from the Community budget the financial aid which accompanies that operation. This requires analysis, on a case-by-case basis, both of the meaning and the purpose of the Community rules at issue and of the conduct of a prudent trader who manages his affairs in accordance with the applicable rules of law and with current commercial and economic practices in the sector in question.

— a subjective element, namely the fact that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the Community rules.

— a procedural law element relating to the burden of proof. That burden falls on the relevant national administration. However, in the case of the most

serious abuses, even *prima facie* evidence which might reverse the burden of proof is admissible.

40 It falls to the national court to determine whether all three elements exist.

41 As regards the objective element, the Commission observes, however, that, in the case in the main proceedings, the financial gain was significant, given the difference between the amount of the export refund and that of the import duties, the time between the export and the return of the products to the Community was very short and the same means of transport was used.

42 As regards the subjective element, the Commission contends, first, that the information provided by the national court did not allow a final assessment to be made and that, in order to ascertain whether a circular arrangement had been set up, the relationship between Emsland-Stärke and the final purchasers in Germany and Italy needed to be clarified. However, at the hearing it modified its position and specified that complicity in relations between the plaintiff in the main proceedings and the Swiss purchasers had to be established and it was not material whether or not the final recipient was aware of the circular arrangement.

43 The Commission therefore suggested that the following words should be added to the reply to the first question: 'By virtue of the legal principle of abuse of rights in force in Community law, financial advantages are not to be granted or, in some cases, are to be withdrawn retrospectively if it is shown that the commercial operations at issue were for the purpose of obtaining an advantage which is incompatible with the objectives of the applicable Community rules in that the conditions for obtaining that advantage were created artificially.'

44 The Commission considers that a reply to the second question is superfluous in the light of the reply to the first question.

45 However, it states that there is a difference as regards the evidence to be adduced of fulfilment of the second and third conditions for eligibility for a refund. To prove that the second condition has been met, customs clearance documents have to be produced whereas for the third condition commercial documents must also be produced. In that connection, the contracts for resale of the products at issue must be considered to be commercial documents. The evidential value of those documents would, however, be considerably reduced if, before being re-imported into the Community, the products in question were resold by the purchaser established in the non-member country in question to an undertaking, also established in that non-member country, with which it had personal and commercial links.

Findings of the Court

46 It should first be noted that, for the operations at issue in the main proceedings, all the formal conditions for the grant of non-differentiated export refunds laid down by Regulation No 2730/79 were fulfilled.

47 The goods fulfilled the condition in Article 9(1) that they should have left the geographical territory of the Community.

48 As regards the other conditions laid down by Article 10(1) of Regulation No 2730/79, they could have been imposed only prior to the grant of the refund. That is sufficiently clear from the wording of that paragraph, according to which

payment is 'conditional... on the [product's]... having been imported into a non-member country', and from the ninth recital to Regulation No 2730/79 which is in the same terms.

49 That analysis is confirmed by the judgment in *Boterlux*, cited above, in paragraph 30 of which the Court, interpreting a rule comparable to Article 10(1) of Regulation No 2730/79, stated that Member States may also require proof that the product has been released into free circulation in the non-member country of destination before granting a non-differentiated refund if there is suspicion or proof that abuses have been committed.

50 However, in the light of the specific circumstances of the operation at issue in the main proceedings, which might suggest an abuse, that is to say, a purely formal dispatch from Community territory with the sole purpose of benefiting from export refunds, it must be examined whether Regulation No 2730/79 precludes an obligation to repay a refund once granted.

51 In that regard, it is clear from the case-law of the Court that the scope of Community regulations must in no case be extended to cover abuses on the part of a trader (*Cremer*, cited above, paragraph 21). The Court has also held that the fact that importation and re-exportation operations were not realised as *bona fide* commercial transactions but only in order wrongfully to benefit from the grant of monetary compensatory amounts, may preclude the application of positive monetary compensatory amounts (*General Milk Products*, cited above, paragraph 21).

52 A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.

53 It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, *inter alia*, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.

54 It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined (see, to that effect, in particular, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* v *Germany* [1983] ECR 2633, paragraphs 17 to 25 and 35 to 39; Case 222/82 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraphs 17 to 21; and Case C-212/94 *FMC and Others* v *Intervention Board for Agricultural Produce and Ministry of Agriculture, Fisheries and Food* [1996] ECR I-389, paragraphs 49 to 51, and Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* v *Minister van Volkshuisvesting* [2000] ECR I-4475, paragraph 41).

55 The Bundesfinanzhof considers that the facts described in the first question referred for a preliminary ruling establish that the objective of the Community rules has not been achieved. It is therefore for that Court to establish, in addition, the existence of an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by carrying out an artificial operation.

56 Contrary to the assertions of Emsland-Stärke, the obligation to repay refunds received in the event that the two constituent elements of an abuse are established would not breach the principle of lawfulness. The obligation to repay is not a penalty for which a clear and unambiguous legal basis would be necessary, but simply the consequence of a finding that the conditions required to obtain the

advantage derived from the Community rules were created artificially, thereby rendering the refunds granted undue payments and thus justifying the obligation to repay them.

57 Moreover, the argument that a demand for repayment cannot be addressed to the Community exporter on the ground that he did not re-import the goods cannot be accepted either. The re-importation of the goods is only one of the circumstances which demonstrate that the objective of the rules has not been achieved. Moreover, it is the exporter who enjoys the undue advantage of the grant of export refunds when he carries out an artificial operation in order to benefit from that advantage.

58 As regards the second question referred by the national court, it must be observed that the fact that, before being re-imported into the Community the product was resold by the purchaser established in the non-member country concerned to an undertaking also established in that country with which it has personal and commercial links does not preclude the export to the non-member country at issue from being an abuse attributable to the Community exporter. On the contrary, it is one of the factual elements which can be taken into account by the national court to establish the artificial nature of the operation concerned.

59 In the light of these factors, the answer to the questions referred should be that Articles 9(1), 10(1) and 20(2) to (6) of Regulation No 2730/79 must be interpreted as meaning that a Community exporter can forfeit his right to payment of a non-differentiated export refund if (a) the product in respect of which the export refund was paid, and which is sold to a purchaser established in a non-member country, is, immediately after its release for home use in that non-

member country, transported back to the Community under the external Community transit procedure and is there released for home use on payment of import duties, without any infringement being established and (b) that operation constitutes an abuse on the part of that Community exporter.

A finding that there is an abuse presupposes an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it. Evidence of this must be placed before the national court in accordance with the rules of national law, for instance by establishing that there was collusion between that exporter and the importer of the goods into the non-member country.

The fact that, before being re-imported into the Community, the product was sold by the purchaser established in the non-member country concerned to an undertaking also established in that country with which he has personal and commercial links, is one of the facts which can be taken into account by the national court when ascertaining whether the conditions giving rise to an obligation to repay refunds are fulfilled.

Costs

60 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesfinanzhof by order of 2 February 1999, hereby rules:

Articles 9(1), 10(1) and 20(2) to (6) of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products, in the version resulting from Commission Regulation (EEC) No 568/85 of 4 March 1985, must be interpreted as meaning that a Community exporter can forfeit his right to payment of a non-differentiated export refund if (a) the product in respect of which the export refund was paid, and which is sold to a purchaser established in a non-member country, is, immediately after its release for home use in that non-member country, transported back to the Community under the external Community transit procedure and is there released for home use on payment of

import duties, without any infringement being established and (b) that operation constitutes an abuse on the part of that Community exporter.

A finding that there is an abuse presupposes an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it. Evidence of this must be placed before the national court in accordance with the rules of national law, for instance by establishing that there was collusion between that exporter and the importer of the goods into the non-member country.

The fact that, before being re-imported into the Community, the product was sold by the purchaser established in the non-member country concerned to an undertaking also established in that country with which he has personal and commercial links is one of the facts which can be taken into account by the national court when ascertaining whether the conditions giving rise to an obligation to repay refunds are fulfilled.

Rodríguez Iglesias Gulmann La Pergola

Wathelet Skouris Edward

Puissochet Jann Sevón

Schintgen Macken

Delivered in open court in Luxembourg on 14 December 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President