

JUDGMENT OF THE COURT
17 July 1997 *

In Case C-334/95,

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

Krüger GmbH&Co. KG

and

Hauptzollamt Hamburg-Jonas,

on (i) the validity of Article 17(1) of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), as amended by Council Regulation (EEC) No 3904/87 of 22 December 1987 (OJ 1987 L 370, p. 1), read in combination with its annex, and on the consequences of any declaration of invalidity and (ii) the interpretation of Article 244 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) and Article 177 of the EC Treaty,

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J. L. Murray and L. Sevón (Presidents of Chambers), P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and R. Schintgen (Rapporteur),
Judges,

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Krüger GmbH&Co. KG, by H. J. Priess, of the Brussels Bar,

- the Hauptzollamt Hamburg-Jonas, by E. von Reden, Regierungsdirektor, Head of the Hauptzollamt,

- the Council of the European Union, by J.-P. Hix, of its Legal Service, acting as Agent,

- 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 Krüger GmbH&Co. KG, the Council and the Commission at the hearing on 21 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,

gives the following

Judgment

- 1 By order of 21 September 1995, received at the Court on 23 October 1995, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on (i) the validity of Article 17(1) of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), as amended by Council Regulation (EEC) No 3904/87 of 22 December 1987 (OJ 1987 L 370, p. 1, hereinafter 'Regulation No 804/68'), read in combination with its annex, and on the consequences of any declaration of invalidity and (ii) the interpretation of Article 244 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter 'the Community Customs Code') and Article 177 of the EC Treaty.

The questions have been raised in proceedings between Krüger GmbH&Co. KG (hereinafter 'Krüger') and the Hauptzollamt (Principal Customs Office) Hamburg-Jonas (hereinafter 'the Hauptzollamt') concerning repayment of a refund disbursed for the export of milk products.

Article 17(1) of Regulation No 804/68 provides:

'To the extent necessary to enable the [milk] products ... to be exported either in the unaltered state or in the form of goods listed in the Annex ... on the basis of the prices for those products in international trade, the difference between those prices and prices in the Community may be covered by an export refund.'

The Annex to Regulation No 804/68 lists, amongst the products which may attract a refund:

CN code	Description of goods
ex 2101 10	Preparations with a basis of coffee

At the time of the facts in question, subheading 2101 10 of the Combined Nomenclature, as established in the Annex to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), in the version contained in Commission

Regulation (EEC) No 2505/92 of 14 July 1992 (OJ 1992 L 267, p. 1), concerned the following goods:

CN code	Description of goods
2101 10	— Extracts, essences and concentrates of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee:
2101 10 11	— — — With a coffee-based dry matter content of 95% or more by weight
2101 10 19	— — — Other
2101 10 91	— — — Preparations: Containing no milkfats, milk proteins, sucrose, isoglucose, glucose or starch or containing less than 1.5% milkfat, 2.5% milk proteins, 5% sucrose or isoglucose, 5% glucose or starch
2101 10 99	— — — Other

- 6 Commission Regulation (EC) No 3115/94 of 20 December 1994, amending Annexes I and II to Regulation No 2658/87 (OJ 1994 L 345, p. 1), adopted following the 1994 GATT round, made a distinction, amongst the 'preparations', between those with a basis of extracts, essences or concentrates of coffee, coming under a new subheading 2101 10 92, and 'other' preparations, coming under a new subheading 2101 10 98. The former subheadings 2101 10 91 and 2101 10 99 were abolished.

7 The Community Customs Code provides in Article 1:

'Customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement them. The Code shall apply, without prejudice to special rules laid down in other fields

— to trade between the Community and third countries,

— ...'

8 Article 161(1) of the Community Customs Code provides:

'The export procedure shall allow Community goods to leave the customs territory of the Community.

Exportation shall entail the application of exit formalities including commercial policy measures and, where appropriate, export duties.'

9 The first subparagraph of Article 243(1) of the Community Customs Code provides:

'Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.'

10 Finally, Article 244 of the Community Customs Code provides:

‘The lodging of an appeal shall not cause implementation of the disputed decision to be suspended.

The customs authorities shall, however, suspend implementation of such decision in whole or in part where they have good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

Where the disputed decision has the effect of causing import duties or export duties to be charged, suspension of implementation of that decision shall be subject to the existence or lodging of a security. ...’

11 According to the evidence before the national court, during 1993 Krüger exported a mixture of unskimmed milk powder and extracts of coffee under the name ‘Cappuccino Tasse’. Upon customs clearance, Krüger correctly declared these goods as a food preparation in instant cappuccino form called ‘Cappuccino’ under tariff subheading 2101 10 99.

12 The Hauptzollamt granted Krüger an export refund amounting to DM 89 411 for the quantities of skimmed milk or skimmed milk powder used in the manufacture of the product in question.

13 By letter of 3 February 1994 Krüger asked the Hauptzollamt why its subsidiary had not been granted export refunds for the same type of product.

14 On 11 February 1994 the Hauptzollamt informed Krüger that the Community rules allowed export refunds to be granted in respect of skimmed milk contained in food preparations with a basis of coffee but not in respect of milk contained in food preparations having a basis of extracts, essences or concentrates of coffee.

15 Taking the view that the export refunds previously granted to Krüger had been wrongly paid to it, the Hauptzollamt, by decision of 30 May 1994, demanded repayment of an amount of DM 89 411.

16 Relying on the second paragraph of Article 244 of the Community Customs Code, Krüger applied to the Finanzgericht Hamburg for suspension of implementation of that decision.

17 By order of 21 September 1995 the Finanzgericht Hamburg granted that application on the ground that there were good reasons for doubting the validity of the decision in question. It considered that Regulation No 804/68 could infringe the second subparagraph of Article 40(3) of the EC Treaty in so far as it did not grant export refunds on milk products contained in food preparations made from extracts, essences or concentrates of coffee.

- 18 In view of the importance of the case, the Finanzgericht Hamburg, pursuant to the combined provisions of the second sentence of Paragraph 128(3) and point 1 of Paragraph 115(2) of the Finanzgerichtsordnung (Code of Procedure for Fiscal Courts), granted leave for an appeal on a point of law to the Bundesfinanzhof against the interim order. At the same time, however, it expressed its doubts about the compatibility of the grant of such leave with the second paragraph of Article 177 of the Treaty.
- 19 In the same order, the Finanzgericht Hamburg therefore submitted the following questions to the Court for a preliminary ruling:
1. Does Regulation (EEC) No 804/68, read in conjunction with the Annex thereto, as amended by Regulation (EEC) No 374/92, infringe the second subparagraph of Article 40(3) of the EC Treaty, and is it consequently invalid, inasmuch as it does not provide for the grant of an export refund for milk and/or milk products contained in food preparations falling within Combined Nomenclature Code No 2101 10 and produced with a basis of extracts, essences or concentrates of coffee?
 2. Does a breach of the prohibition of discrimination preclude the recovery of an export refund granted in respect of milk and/or milk products contained in food preparations falling within Combined Nomenclature Code No 2101 10 and produced with a basis of extracts of coffee?
 3. Is Article 244 of Regulation (EEC) No 2913/92 (the Customs Code) applicable to the suspension of implementation of decisions ordering the recovery of an export refund which has been granted?
 4. If the answer to Question 3 is in the affirmative: in cases in which there exists doubt as to the validity of the Community legislation on which the decision is based, is the suspension of implementation to be determined in accordance with Article 244 of the Customs Code or in accordance with which other criteria?

- 22 It is established case-law that, in the procedure laid down by Article 177 of the Treaty providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it.
- 23 With this in mind, the Court of Justice may have to reformulate the questions referred to it or to examine whether a question relating to the validity of a provision of Community law is based on a correct reading of the provision in question.
- 24 As far as the present reference is concerned, it must first be determined whether Article 17(1) of Regulation No 804/68, read in conjunction with its annex which refers to subheading 2101 10 of the Combined Nomenclature, is to be interpreted as authorizing the grant of export refunds only in respect of milk products contained in preparations having a basis of coffee, to the exclusion of those contained in preparations having a basis of extracts, essences or concentrates of coffee.
- 25 Account must accordingly be taken of the purpose of Regulation No 804/68, of the wording of subheading 2101 10 of the Combined Nomenclature referred to in the annex to the regulation and of the structure of that tariff heading.
- 26 In Article 17(1), Regulation No 804/68 provides that as part of the common organization of the markets in the milk and milk products sector, the Community may grant export refunds in respect of milk products sold in an unaltered state or in respect of those included in the composition of other products. The purpose of these refunds, equal to the difference between the prices of milk products in international trade and prices in the Community, is to guarantee, in the event of necessity, the sale of Community products on the world market.

- 27 As regards, more particularly, milk products used in products made from coffee, the Annex to Regulation No 804/68 refers to subheading 2101 10 of the Combined Nomenclature with the description 'Preparations with a basis of coffee' and the prefix 'ex' before the code number of the subheading.
- 28 That tariff subheading makes a distinction between extracts, essences and concentrates of coffee, on the one hand, and preparations on the other.
- 29 The reference, in the annex to Regulation No 804/68, to preparations is explained by the fact that only the latter can contain milk products.
- 30 At the level of the subheading 'Preparations', the Combined Nomenclature makes a distinction, not between preparations with a basis of coffee and those with a basis of extracts, essences or concentrates of coffee, but between those which do not contain, or contain only a slight proportion of, milkfat, milk proteins, sucrose, isoglucose, glucose or starch (code 2101 10 91) and other preparations (code 2101 10 99).
- 31 In these circumstances, the description 'ex 2101 10 Preparations with a basis of coffee', in the annex to Regulation No 804/68, cannot be interpreted literally as covering only preparations with a basis of coffee but must, on the contrary, be understood as covering all preparations made from coffee products comprising milk products.
- 32 That interpretation of Regulation No 804/68 cannot be challenged on the ground that the proportion of milk products entering into preparations with a basis of extracts, essences or concentrates of coffee is low. Being confined only to making

provision for the grant of export refunds by the Community, Regulation No 804/68 contains no rule to the effect that export refunds are excluded where the proportion which the milk product represents in the value of the exported product does not exceed a certain level.

33 Moreover, this reading of Regulation No 804/68 is the only reading capable of giving it practical effect. The relevant provisions of the directive would be deprived of their *raison d'être* if they were to be interpreted as allowing export refunds only for preparations with a basis of coffee, whose existence on the market has not been established, as the observations submitted to the Court show.

34 Consequently, Article 17(1) of Regulation No 804/68, read in conjunction with its annex, which refers to subheading 2101 10 of the Combined Nomenclature, as established in the Annex to Regulation No 2658/87 in the version amended by Regulation No 2505/92, is to be interpreted as allowing export refunds to be granted in respect of milk products contained in both preparations with a basis of coffee and preparations with a basis of extracts, essences or concentrates of coffee.

35 Given that reading of Regulation No 804/68, it is not necessary to examine either the validity of that regulation with reference to the principle of non-discrimination, since the argument relating to breach thereof is based on a reading of the regulation as not allowing export refunds for milk products contained in preparations with a basis of extracts, essences or concentrates of coffee while allowing such refunds for milk products contained in preparations with a basis of coffee, or the consequences to be drawn from any declaration of invalidity of that regulation.

The third question

- 36 By this question, the Finanzgericht asks in effect whether Article 244 of the Community Customs Code is applicable to demands for repayment of export refunds.
- 37 First of all, it is clear from the wording of Article 243(1) and the second paragraph of Article 244 of the Community Customs Code that the appeals envisaged by these provisions are appeals against decisions of the authorities of the Member States concerning application of the customs rules.
- 38 It follows, next, from Article 161 of the Community Customs Code that the export procedure entails application of exit formalities allowing Community goods to leave the customs territory of the Community, including commercial policy measures and export duties.
- 39 However, export refunds are not part of this export procedure for Community goods but are based on regulations establishing common organizations of markets in various agricultural products. Their purpose is to cover the difference between the price of those products in international trade and prices in the Community so as to allow those products to be exported on the world market and guarantee the income of Community producers. Export refunds thus constitute the external aspect of the common pricing policy within the Community and cannot therefore be regarded as measures governed by customs rules.
- 40 The answer to the third question must therefore be that Article 244 of the Community Customs Code is not applicable to demands for repayment of export refunds.

The fourth question

- 41 The fourth question is asked only in the event of an affirmative reply to the third question.
- 42 Since a negative reply has been given to the third question, it is therefore unnecessary to examine the fourth.

The fifth question

- 43 By this question the Finanzgericht asks the Court in effect to state the criteria on the basis of which it may decide to suspend implementation of a domestic administrative decision if it has doubts as to the validity of the Community act which serves as its basis.
- 44 In order to reply to that question it is sufficient to refer to the judgment given in Case C-465/93 *Atlanta Fruchthandelsgesellschaft (I)* [1995] ECR I-3761 in which the Court held that interim relief can be ordered by a national court only if:
- that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
 - there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

— the national court takes due account of the Community interest; and

— in its assessment of all those conditions, the national court respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.

45 However, the Commission has emphasized that, in taking due account of the Community interest, the national court must, where it is minded to grant interim relief, give the Community institution which adopted the act whose validity is in doubt an opportunity to express its views.

46 It is for the national court which has to assess the Community interest upon an application for interim relief to decide, in accordance with its own rules of procedure, which is the most appropriate way of obtaining all relevant information on the Community act in question.

47 The answer to the fifth question must therefore be that a national court may suspend implementation of a national administrative decision based on a Community act only if:

— that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

— there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage from being caused to the party seeking the relief;

- the national court takes due account of the Community interest; and
- in its assessment of all those conditions, the national court respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.

The sixth question

- 48 By this question the Finanzgericht seeks to ascertain in effect whether the second paragraph of Article 177 of the Treaty precludes a national court which has ordered suspension of implementation of a national administrative decision and referred to the Court of Justice for a preliminary ruling a question on the validity of the Community act on which the decision is based from granting leave to appeal against its decision.
- 49 In order to give a useful reply to that question it must be examined whether a domestic procedural rule allowing leave to be granted for an appeal against such a decision is compatible with, on the one hand, the duty of a national court which considers an act of Community law to be invalid to make a reference to the Court of Justice and, on the other hand, the right which any national court has under Article 177 to make a reference to the Court of Justice.
- 50 It follows from the judgment in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 and the judgment in *Atlanta Fruchthandelsgesellschaft (I)*, cited above, that, where a national court suspends implementation of a national administrative decision based on a Community act whose validity is challenged, it has an obligation to refer to the Court of Justice a question on the validity of that act.

51 That obligation is founded on the necessity to ensure that Community law is applied uniformly and to safeguard the Court's exclusive jurisdiction to rule on the validity of an act of Community law.

52 The need to comply with those overriding considerations is not affected by the fact that an appeal can be lodged against the decision of the national court. If that decision were to be set aside or reversed on appeal, the preliminary ruling procedure would have no further purpose and Community law would again be fully applicable.

53 Moreover, a national procedural rule which makes provision for this possibility does not prevent implementation of the preliminary ruling procedure by the court ruling at last instance, which is obliged, under the third paragraph of Article 177 of the Treaty, to make a reference if it has doubts concerning the interpretation or validity of Community law.

54 The answer to the sixth question must therefore be that the second paragraph of Article 177 of the Treaty does not preclude a national court which has ordered suspension of implementation of a national administrative decision and referred to the Court for a preliminary ruling a question on the validity of the Community act on which the decision is based from granting leave to appeal against its decision.

Costs

55 The costs incurred by the Council of the European Union and the Commission of the European Communities, which have 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 Finanzgericht Hamburg by order of 21 September 1995, hereby rules:

1. Article 17(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products, as amended by Council Regulation (EEC) No 3904/87 of 22 December 1987, read in conjunction with its Annex which refers to subheading 2101 10 of the Combined Nomenclature, as established in the Annex to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, in the version contained in Commission Regulation (EEC) No 2505/92 of 14 July 1992, is to be interpreted as allowing export refunds to be granted in respect of milk products contained in both preparations with a basis of coffee and preparations with a basis of extracts, essences or concentrates of coffee.
2. Article 244 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code is not applicable to demands for repayment of export refunds.
3. A national court may suspend implementation of a national administrative decision based on a Community act only if:
 - that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

- there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage from being caused to the party seeking the relief;

 - the national court takes due account of the Community interest; and

 - in its assessment of all those conditions, the national court respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.
4. The second paragraph of Article 177 of the EC Treaty does not preclude a national court which has ordered suspension of implementation of a national administrative decision and referred to the Court for a preliminary ruling a question on the validity of the Community act on which the decision is based from granting leave to appeal against its decision.

Rodríguez Iglesias

Murray

Sevón

Kapteyn

Gulmann

Edward

Puissochet

Hirsch

Jann

Ragnemalm

Schintgen

Delivered in open court in Luxembourg on 17 July 1997.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President