OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 27 November 2001 [1]

I — Introduction

1. By order of 4 April 2000 the Bundesfinanzhof (Federal Finance Court) of the Federal Republic of Germany referred to the Court for a preliminary ruling two questions concerning a penalty rule relating to export refunds. Essentially, the Bundesfinanzhof wishes to know whether the penalty rule, according to which in the event of an unintentional discrepancy between the refund requested and the refund actually applicable the refund granted is the refund actually applicable less half the difference, may not be invalid in so far as it does not depend upon the exporter being at fault. Alternatively, assuming that in these circumstances the penalty rule does continue to apply, it wishes to know how the concept of '*force majeure*' used in that rule is to be interpreted.

II — The legal framework

2. The first, third, fourth and seventh subparagraphs of Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products [2] as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 [3] (hereinafter 'Regulation No 3665/87') include the following:

'1. Where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to:

(a) half the difference between the refund requested and the refund applicable to the actual exportation;

(b) twice the difference between the refund requested and the refund applicable, if

1 — Original language: German.

2 — OJ 1987 L 351, p. 1.

3 — OJ 1994 L 310, p. 57.

the exporter has intentionally supplied false information...

3. The first, second and third recitals in the preamble to Regulation No 2945/94 read as follows:

The sanction referred to under (a) shall not apply:

'Whereas the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; whereas in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules;

— in the case of *force majeure*...

Where the reduction referred to under (a) or (b) results in a negative amount, the exporter shall pay that negative amount...

Whereas to ensure the correct functioning of the system of export refunds, sanctions should be applied regardless of the subjective element of fault; whereas it is nevertheless appropriate to waive the application of sanctions in certain cases notably in cases of an obvious error recognised by the competent authority and to provide for a higher sanction in cases of intent;

The sanctions shall be without prejudice to additional sanctions laid down at national level.'

Whereas, where an exporter has supplied wrong information that wrong information could lead to an undue payment of the

refund if the error is not discovered, whilst, where the error is discovered it is entirely proportional to sanction the exporter for an amount in proportion to the amount which he would have received unduly if the error would not have been discovered; whereas in the case where the wrong information was supplied intentionally it is equally proportional to provide for a higher sanction.'

4. Articles 4 and 5 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests[4] (hereinafter 'Regulation No 2988/95') read as follows:

'Article 4

1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

— by total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

3. Acts 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.

4. The measures provided for in this Article 4 shall not be regarded as penalties.

Article 5

1. Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

(a) payment of an administrative fine;

4 — OJ 1995 L 312, p. 1.

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

(d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;

(e) temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme;

(f) the loss of a security or deposit provided for the purpose of complying with the conditions laid down by rules or the replenishment of the amount of a security wrongly released;

(g) other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectoral rules adopted by the Council in the light of the specific requirements of the sectors concerned and in compliance with the implementing powers conferred on the Commission by the Council.

2. Without prejudice to the provisions laid down in the sectoral rules existing at the time of entry into force of this Regulation, other irregularities may give rise only to those penalties not equivalent to a criminal penalty that are provided for in paragraph 1, provided that such penalties are essential to ensure correct application of the rules.'

III — Facts and procedure

5. In 1996, the plaintiff in the main proceedings, Käserei Champignon Hofmeister GmbH & Co. KG (hereinafter 'the plaintiff'), exported, under cover of an export declaration, cheese spread under CAP Goods List Number 0406 3039 9500 and, at its request, received an export refund of around DM 30 000 as an advance payment from the Hauptzollamt Hamburg-Jonas (Hamburg-Jonas Principal Customs Office) (hereinafter 'the defendant'). An examination of a sample taken from one of the

consignments at the time of export revealed that the goods contained vegetable fat and ought, as a food preparation, to have been assigned to CAP Goods List Number 2106 9098 0000.

6. In its submission, the plaintiff states that when, after the discovery of the vegetable fat, it made inquiries of its supplier it was informed that between 22 January and 5 August 1996 the production line manager responsible for cheese spread production had added vegetable fat to the product. He had added the fat because it improved the taste of the spread and had considered himself justified in so doing under Section 1(4)(3) of the German Käseverordnung (Cheese Regulation). Neither the management of the manufacturing company nor that of the plaintiff could have anticipated such a mistake on the part of a responsible manager.

7. Since these were non-Annex-II goods and the plaintiff had failed to submit a manufacturer's declaration on their composition, as required in these circumstances to obtain an export refund, pursuant to Article 7(1) of Commission Regulation (EC) No 1222/94, [5] the defendant demanded, by a now unappealable decision, the return of the export refund granted plus 15%.

8. By a further decision, which was contested in the main proceedings, the defendant demanded that the plaintiff pay a penalty pursuant to point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87.

9. According to the Bundesfinanzhof, the complaint raised by the plaintiff in respect of the penalty amount was rejected by the Finanzgericht (Finance Court). The plaintiff's application for a review on a point of law was directed against that judgment.

10. Before the Bundesfinanzhof, the plaintiff argued that Article 11(1) of Regulation No 3665/87 was invalid because it infringed the principle of the rule of law and the principle of non-discrimination. On this point, the Bundesfinanzhof put forward a number of considerations. Alternatively, the plaintiff argued that its situation was one of *force majeure* within the meaning of the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87.

11. The Bundesfinanzhof found that the requirements of the first subparagraph of

5 — Commission Regulation (EC) No 1222/94 of 30 May 1994 laying down common detailed rules for the application of the system of granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds (OJ 1994 L 136, p. 5).

Article 11(1) of Regulation No 3665/87 were satisfied. The defendant had had to impose a penalty in so far as the conditions under which the penalty laid down in that provision did not apply were not fulfilled.

12. However, in the view of the Bundesfinanzhof, a situation in which the composition of goods manufactured by a third party differs from that stipulated in the contract (or does not fulfil the requirements which the exporter tacitly assumed to be self-evident) does not constitute *force majeure* in respect of the exporter within the meaning of the first indent of the third subparagraph of Article 11(1). Thus, in its previous judgments concerning the concept of *force majeure* the Court of Justice had not regarded a failure by an exporter's business partner to fulfil his contractual obligations as an abnormal and unforeseeable circumstance but required that the trader take proper precautions against such conduct either by including appropriate clauses in the contract in question or by effecting specific insurance. [6] The Court of Justice had not even recognised fraudulent conduct on the part of the exporter's contracting partner as constituting *force majeure*. [7]

6 — Cases 109/86 *Theodorakis* [1987] ECR 4319 and C-347/93 *Boterlux* [1994] ECR I-3933).

7 — *Boterlux*, cited in footnote 6, and Case 296/86 *McNicholl and Others* [1988] ECR 1491.

13. The Bundesfinanzhof was also of the view that no case obtained here such as that provided for in the third indent of the third subparagraph of Article 11(1), i.e. a case of obvious error as to the refund requested, recognised by the competent authority.

14. The Bundesfinanzhof then examined whether the Community rule infringed fundamental rights and considered that it did not, since there was no question of a 'punishment' and neither the principle of proportionality nor the principle of non-discrimination had been contravened.

15. The purpose of Article 11(1) of Regulation No 3665/87 was to impose a financial disadvantage on the exporter to deter him from providing false information in future when applying for export refunds and thus from jeopardising the financial interests of the Community and the proper implementation of the rules on the relevant common organisations of the market. A penal sanction had a purpose quite different from that of mere deterrence (prevention), namely to give expression to social and ethical disapproval.

16. Punishments required subjective fault, and the level of the penal sanction depended on how reprehensible the punishable act was. This did not apply to Article 11(1) where the imposition of a penalty was independent of the personal fault of the refund applicant. The refund

reduction was not the mark of an infringement for which the applicant could be blamed personally but was merely intended to counteract such infringement by the threat thereof.

17. The fact that the recitals used the term 'sanction' was of no consequence, since the concept could also be intended in a broader, non-technical, sense.

18. Article 5(1) of Regulation No 2988/95 provided for administrative penalties only where irregularities were caused intentionally or by negligence. Under Article 5(2) of the Regulation, however, penalties were to be introduced '[w]ithout prejudice to the provisions laid down in the sectoral rules existing at the time of entry into force of this Regulation', which included the penalty rule at issue.

19. Moreover, Article 11(1) of Regulation No 3665/87 did not infringe the principle of proportionality. Even if its threatened penalty were also directed at honest and prudent exporters, such an infringement could not arise since the exporter was entirely free to decide whether or not to operate commercially in the trade sector exporting CAP goods subsidised by export refunds. If he decided, in his own interest, to participate in a system of public payments, then he was obliged to submit to the rules laid down, which included the penalty at issue. The fact that the customs authorities were, among other things, thus spared the need to furnish definitive proof of negligence by the exporter, which was often difficult, and the administration of export refunds was thereby simplified also supported the case for interpreting Article 11(1) as a refund reduction irrespective of fault. In relation to its intended purpose and in view of the frequent provision of false information, which was hard to detect, the penalty was not inappropriate nor did it infringe the principle of proportionality.

20. Nor did Article 11(1) of Regulation No 3665/87 contravene the principle of non-discrimination. Since it did not impose any repressive penalty based on fault, the form and degree of the fault of the refund applicant, or the complete absence of personal fault, did not constitute a normal criterion for determining the level of the penalty.

21. As the Bundesfinanzhof did not regard the answer to the question of the validity of Article 11(1) of Regulation No 3665/87 as obvious, it decided to refer the matter to the Court of Justice.

22. In view of the difficulties in interpreting two judgments of the Court [8] concerning the conditions under which exporters can argue good faith, the Bundesfinanzhof also considered it necessary to submit a second question:

'1. Is Article 11(1) of Regulation (EEC) No 3665/87 valid in so far as it provides for a penalty even where, through no fault of his own, an exporter has applied for an export refund exceeding that applicable?

2. If the first question is to be answered in the affirmative:

Can the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 be interpreted as meaning that false information provided in good faith by the refund applicant on the basis of inaccurate data supplied by the manufacturer constitutes in principle a case of *force majeure* where the applicant could not establish that it was false or could do so only by means of checks at the undertaking in which the goods were manufactured?'

IV — First question: validity of Article 11(1) of Regulation No 3665/87 in a case such as that in the main proceedings

23. The plaintiff in the main proceedings sees in this provision an infringement of the fundamental principles of criminal law that stem from the requirement of the rule of law, namely, the principle '*nulla poena sine culpa*' (no punishment without fault), the principle of proportionality and the principle of non-discrimination.

A — '*Nulla poena sine culpa*'

1. The arguments of the parties

24. The plaintiff begins by arguing that the sanction for which the abovementioned

8 — Case C-366/95 *Steff-Houlberg Export and Others* [1998] ECR I-2661 and Case C-298/96 *Oelmühle und Schmidt Söhne* [1998] ECR I-4767.

rule provides constitutes a punishment. It then examines the application of the *nulla poena sine culpa* principle in the law of the Member States, in the context of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Community law and comes to the conclusion that the fault principle is one of the general principles of Community law.

25. The Commission, on the other hand, shares the view of the Bundesfinanzhof, merely offering certain additional observations. It submits that, inasmuch as the penalty at issue is an administrative one, the *nulla poena sine culpa* principle does not apply and, moreover, the penalty does not infringe the principle of the rule of law as the exporter is liable irrespective of fault.

2. Analysis

26. The plaintiff's arguments call for an examination of the legal nature of the sanction in question (a). If it is not a penal sanction, then it will be necessary to establish whether the fault principle is applicable at all (b).

(a) Legal nature of the sanction in question

A penal sanction?

27. Article 11(1) of Regulation No 3665/87 essentially provides for a reduction of the refund — and in certain circumstances the payment of a sum of money — proportional to the difference between the refund requested and the refund actually applicable. This rule applies irrespective of any claim for recovery and does not take into consideration the degree of any damage suffered as a result of the refund application being incorrect. As the plaintiff points out, the purpose of the rule is not to restore legality, compensate for damage or eliminate the consequences of an unlawful act; on the contrary, the rule merely seeks to impose a financial disadvantage on the importer if the refund application proves to be incorrect.

28. It is also true that the rule does not constitute compensation for free credit, as might be the case where security has been provided.[9] Under the export refund regu-

9 — See judgment in Case 288/85 *Plange Kraftfutterwerke* [1987] ECR 611, paragraphs 14 ff.

lations, it is the exporter who prefinances the export refund until the refund office makes payment.

29. However, it still does not follow that the sanction for which Article 11(1) of Regulation No 3665/87 provides is penal in nature.

30. First of all, generally speaking, the Community is not, in principle, competent to impose criminal sanctions. Where appropriate, it is for the Member States to impose such sanctions if obligations under Community law are not fulfilled. [10]

31. In terms of its specific purpose, the rule in question can, in principle, be described as a sanction in so far as it associates the incorrectness of the application particulars with a financial disadvantage. However, from the first recital of Regulation No 2945/94 it follows that this sanction is essentially deterrent in nature. Thus, it is intended '... to encourage exporters to comply with Community rules'. The punitive aspect, if any, is comparatively unimportant.

32. Article 5(1) of Regulation No 2988/95 also establishes a clear connection between the — administrative — penalties it lists, especially the 'payment of an amount greater than the amounts wrongly received or evaded' (subparagraph (b)), and their preventive nature. Thus, the sanctions 'may not exceed the level strictly necessary to constitute a deterrent'.

33. With respect to the notion of a penal sanction, the national court rightly points out that, as Advocate General Jacobs observed in his Opinion in Case C-240/90, it cannot be deduced from the deterrent function of penal sanctions that every sanction with a deterrent purpose constitutes a penal sanction, since the purpose of a penal sanction extends beyond mere deterrence and also includes social disapproval. [11]

34. The sanction at issue here does not express any such social disapproval. Therefore it is only logical that its level should depend on the reprehendsibility of the act only in so far as a distinction is made between an intentional infringement and other cases. Moreover, the fact that the German text of the third recital of Regulation No 2945/94 employs the word 'bestrafen' [to punish] is immaterial since it is obviously being used in a non-technical

10 — See judgment in Case 203/80 *Casati* [1981] ECR 2595, paragraph 27.

11 — Opinion in Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 11.

sense, as is apparent from the other language versions. [12]

35. Finally, it should also be noted that the sanction in question, unlike a penal sanction, is not dependent on personal fault, since the exporter is at liberty to pass on the burden of the sanction under a corresponding agreement with interested third parties such as the manufacturer, as for example in the main proceedings, by way of recovery.

36. Thus, inasmuch as the sanction in question is primarily intended to have a deterrent effect and does not give expression to social or ethical disapproval, it cannot be considered to be penal in nature.

An administrative sanction?

37. As Advocate General Saggio has noted, '... the Court of Justice has never found it necessary to define the precise legal nature of the European Communities' power to impose sanctions, thereby avoiding having to concern itself with the distinction between administrative and penal sanctions'. [13]

38. As the administrative penalties are listed in Article 5 of Regulation No 2988/95, there is no need for administrative penalties to be defined positively in the case-law. It should merely be noted that although the penalty in question essentially corresponds to that in Article 5(1)(b) of the Regulation, it differs from the latter inasmuch as it may take the form of either a reduction of the refund or an obligation to make a payment. [14]

39. Contrary to the view expressed by the plaintiff, the level of the penalty in question has no effect on its legal nature. Nor does, the plaintiff's view find any support in the case-law of the European Court of Human Rights, according to which '... The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and *degree of severity of the penalty* that the person concerned risked incurring must be examined, having regard to the

12 — French: 'infliger... une sanction', English: 'to sanction', Spanish: 'sancionar', Italian: 'applicare... una sancione', Dutch: 'een sanctie op te leggen'.

13 — Opinion in Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461, paragraph 49. This idea is developed in footnote 33: 'In the few cases in which the Court of Justice has been requested to express a view on the question of the penal nature of Community sanctions, it has never proposed a positive definition but has confined itself to ruling out the penal nature of the sanction at issue'.

14 — See, in particular, the fourth subparagraph of Article 11(1) of Regulation No 3665/87 as amended by Regulation No 2945/94.

object and purpose of Article 6, to the ordinary meaning of [its] terms, and to the laws of the Contracting States' (emphasis added). [15] Obviously, the examination of the 'degree of severity' is aimed at determining whether the penalty is severe, its level being of only secondary interest. This approach is attributable to the need to give Article 6 of the European Convention on Human Rights a protective purpose that extends beyond the limits of the national legal systems.

40. The Court of Justice is called upon, amongst other things, to assess the fundamental validity of a penalty rule in its overall context. Thus, the legal nature of a penalty associated with the common agricultural policy cannot depend on its level. As the Commission aptly points out, what really matters is the purpose of the penalty [16] and the overall context within which it fits. [17]

41. Within the overall context, rather than being viewed as a legal subject who, should his refund application be incorrect, will incur disapproval for his misconduct, the exporter should be regarded as a partner in the administration of benefits who has to be induced to fulfil his special obligations in relation to the granting of export refunds under threat of penalty. [18] Seen against this background, the penalty rule in question is the legal consequence of his status as guarantor of the correctness of the refund application, which would appear to be more akin to the civil law institution of a contractual penalty than to a penal sanction. In this connection, the national court rightly draws attention to the voluntary nature of participation in the export refund system. [19]

42. Finding a sanction to be non-criminal in nature does not have the effect of leaving the person subject to the regulation without legal protection. According to settled case-law, 'a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis. Moreover, the Court has always emphasised that fundamental rights are an integral part of the general principles of Community law which it is called upon to enforce. Finally, it is settled law... that the provisions of Community law must comply with the principle of proportionality...'. [20]

43. In the light of the above, and particularly in view of its primarily deterrent purpose, the rule in question should indeed

15 — ECHR, *Öztürk* judgment of 21 February 1984, Series A No 73, p. 9, paragraph 50 with reference to the judgment in *Engel and Others* of 8 June 1976, Series A No 22, pp. 34-35, paragraph 82.

16 — See paragraphs 16 and 31 ff. above.

17 — Judgments in Cases 137/85 *Maizena* [1987] ECR 4587, paragraph 13 and C-240/90 (cited in footnote 11, paragraph 25 ff.).

18 — In characterising a regulation as a criminal sanction the ECHR also distinguishes between provisions that cover all citizens equally and those that apply only to a given group with a particular status. See ECHR, *Bendenoun* judgment of 24 February 1994, Series A No 284, paragraph 47.

19 — With reference to the judgment of the Court of Justice in Case 137/85 (cited in footnote 17, paragraph 13).

20 — Judgment in Case 137/85 (cited in footnote 19, paragraph 13). See also the Opinion of Advocate General Léger in Case C-63/00 *Schilling and Nehring* [2002] ECR I-4483, paragraphs 40 ff.

be characterised as an administrative penalty. The question is whether the fault principle should be applied to such penalties.

(b) The fault principle as a general principle of Community law?

44. Irrespective of the legal nature of the penalty rule in question, the plaintiff argues that the applicability of the fault principle to administrative penalties is a general principle of Community law. This is said to follow both from the common legal tradition of the Member States and from the fundamental rights which the Court is called upon to enforce.

45. Accordingly, the next step must be to examine whether the applicability of the fault principle follows from a possible common legal tradition of the Member States, from the incorporation of the rights guaranteed by the ECHR in accordance with Article 6(2) EU or directly from Community law.

A common legal tradition of the Member States concerning the applicability of the fault principle?

46. Firstly, a comparison of the legal systems of the Member States, as made by the plaintiff in its written observations, reveals, in particular, that the boundary between criminal and administrative penalties is a fluid one.

47. Thus, in the legal systems of the Member States the principles of criminal law, to which the fault principle undisputedly belongs, are variously applied. The narrower the range of purely administrative penalties — and hence the broader the range of criminal penalties — the clearer the distinction between criminal and administrative sanctions with respect to their legal treatment.

48. The scope of the fault principle also appears to vary. In the case of criminal penalties which give expression to minor social disapproval, the behavioural obligation may be so conceived that individual reprehendsibility is induced merely by its not being fulfilled. Moreover, in its written observations the plaintiff itself acknowledges that where a sanction is based on objective criteria the possibilities of exemption could lead to more or less the same results as liability based on fault with reversal of the burden of proof.

49. It therefore appears that the general applicability of the fault principle to pen-

alties of an administrative nature cannot be derived from the legal traditions of the Member States.

An infringement of Article 6(2) of the ECHR?

50. There can be no doubt about the applicability of the guarantees of Article 6 of the European Convention on Human Rights — and in particular the presumption of innocence in paragraph 2 — to criminal charges. It follows directly from the protective purpose of this provision that the notion of a criminal act must be construed autonomously, without taking into account the categories of national law.

51. Accordingly, it cannot be deduced from the abovementioned case-law of the ECHR [21] concerning the treatment of a surcharge as a sanction that the fault principle must be applied to all administrative penalties. In so far as the ECHR treated tax surcharges for false information as a criminal charge within the meaning of Article 6(1) of the ECHR, it did so on the grounds that the sanction was imposed for both preventive *and* repressive purposes. [22]

52. Finally, it should be pointed out that the case-law of the European Court of Human Rights concerning Article (6)2 of the ECHR does not absolutely exclude the formulation of criminal offences in terms of objective liability but merely limits it with a view to maintaining the rights of the defence. [23]

53. Thus, in the case of sanctions of an administrative nature, recognition of the fault principle as a general principle of Community law cannot be deduced from the combined application of Article (6)2 EU and the ECHR.

The fault principle as a general principle under Regulation No 2988/95?

54. According to Article 5(1) of Regulation No 2988/95, irregularities can lead to administrative penalties only if they are intentional or caused by negligence. In this, too, the plaintiff sees an acknowledgement of the fault principle in Community law in relation to penalties, whether repressive or preventive in nature.

21 — See footnote 15 above.

22 — ECHR, *Bendenoun* judgment of 24 February 1994 (cited in footnote 18).

23 — ECHR, *Salabiaku* judgment of 7 October 1988, Series A, No 141A, paragraph 28.

55. According to Article 5(2) of Regulation No 2988/95, sectoral penalty rules that existed before the Regulation entered into force remain unaffected by the principle laid down in Article 5(1). The plaintiff considers this derogation to have no bearing on the applicability of the fault principle on the grounds that it obviously concerns only the legal consequences, that is to say the content of the penalty to be imposed, not the actual requirements for the imposition of a penalty.

56. That argument fails to convince. The very text of Article 5(2), which employs the words 'sectoral rules', leaves no room for any distinction between the actual requirements and the legal consequences of the penalty rule.

57. Moreover, according to the wording of Article 5 of Regulation No 2988/95, a distinction must be made between irregularities caused intentionally or by negligence (paragraph 1) and other irregularities (paragraph 2), that is to say those not attributable to culpable conduct. The suggestion that Article 5 of Regulation No 2988/95 is an acknowledgement of the general applicability of the fault principle therefore seems questionable, to say the least.

58. Consequently, the unlimited applicability of the fault principle cannot be deduced from Regulation No 2988/95 either.

59. All this leads to the conclusion that, fundamentally, in so far as it provides for a penalty with an — at least predominantly — deterrent purpose, Article 11(1) of Regulation No 3665/87 is not subject to the fault principle.

B — *The principles of proportionality and non-discrimination*

60. The assessment of the validity of the penalty rule in question in a case such as that before the national court therefore depends on the observance of the principle of proportionality.

61. The plaintiff's argument concerning the principle of non-discrimination needs to be dealt with at the same time since by nature it overlaps with the argument concerning the alleged unreasonableness of the penalty rule.

1. Arguments of the parties

62. The plaintiff contends that the penalty laid down by Article 11(1) of Regulation No 3665/87 is inappropriate for achieving the intended purpose, is unnecessary and fails the test of reasonableness which must be applied in determining proportionality. Since its arguments relating to the appropriateness, necessity and reasonableness of the penalty rule in question partially overlap, they will be reproduced in summary form.

63. The plaintiff begins by pointing out that export refunds are not a benefit reserved for the exporter which the latter seeks of his own accord. The export refund returns to the exporter the sum which — by paying the purchase price of the refund goods — he has laid out to finance the agricultural price support system. To this extent, for the exporter, having to claim an export refund actually represents a financial loss.

64. The plaintiff also notes that refund products have to be declared in accordance with customs procedures. The declaration involves uncertainties since, in particular, the exporter has to make legal judgments. At the same time, the Court's decisions in customs cases have recognised that the exporter will have fulfilled his obligation to lodge a valid customs declaration even if, in good faith, he has furnished the customs administration with incorrect or incomplete information, provided that he could not reasonably have known or procured any other. [24]

65. The plaintiff believes that from this it can be deduced that the penalty specified in Article 11(1) is neither appropriate nor necessary to achieve the intended purpose, that is to say, the protection of the Community's financial interests. Recovery of the export refund would be sufficient. Moreover, the rule does not take into account the fact that the obligation to lodge a materially correct declaration is not absolute. Alternatively, with respect to necessity the exporter argues that it can be gathered from Regulation No 2988/85 that the financial interests of the Community would be adequately protected by sanctions based on fault, especially as national sanctions are also available.

66. In addition, with respect to reasonableness, the plaintiff points out that a penalty under Article 11(1) can be imposed irrespective of whether any damage has been

24 — Judgment in Case 378/87 *Top Hit Holzvertrieb* [1989] ECR 1359.

caused or whether the exporter could have avoided the error. The plaintiff would also deduce an infringement of the principle of non-discrimination from the failure to differentiate between blameless and negligent — and hence culpable — behaviour.

67. From all this the plaintiff concludes that the penalty is incompatible with the principles of proportionality and non-discrimination.

68. The Commission, on the other hand, considers that the mere repayment of the export refund in the event of an irregularity would not be a sufficient deterrent. It notes that the level of the penalty is calculated in terms of the relief wrongly granted to the exporter. Finally, it recalls the broad discretion enjoyed by the Community legislature in matters concerning the common agricultural policy. In its opinion, in the case at issue there can be no question of the rule being obviously inappropriate or of the limits being obviously overstepped.

2. Analysis

69. According to settled case-law, 'in order to establish, in particular in the sector of the common organisation of the agricultural markets, whether a provision of Community law complies with the principle of proportionality, it is necessary to ascertain whether the penalty exceeds what is appropriate and necessary to attain the objective pursued by the rules which have been breached'. [25]

70. More particularly, it is necessary to ascertain 'whether the penalty laid down by the provision in question to achieve the aim in view corresponds with the importance of that aim and whether the disadvantages caused are not disproportionate to the aims pursued'. [26]

Appropriateness of the penalty rule

71. With respect to the appropriateness of the penalty rule in question it should first be recalled that the Community legislature is allowed a large measure of discretion in deciding what means to use to attain its objective. On the subject of compliance with the principle of proportionality, the Court has stated that in matters concerning

25 — See the judgment in Case C-356/97 (cited in footnote 13, paragraph 35), which refers to the judgments in Cases C-118/89 *Lingenfelser* [1990] ECR I-2637, paragraph 12; 319/90 *Pressler* [1992] ECR I-203, paragraph 12; and C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 49.

26 — Cited in footnote 25, paragraph 36 and referring to the judgments in Case C-8/89 *Zardi and Others* [1990] ECR I-2515, paragraph 10; *Pressler*, cited in footnote 25, paragraph 12; and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41.

the common agricultural policy the Community legislature has a discretion power which corresponds to the political responsibilities imposed by Articles 40 (now Article 34 EU) and 43 of the EC Treaty. Consequently, the legality of a measure adopted in this sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution intends to pursue. [27]

72. The protection of the Community's financial interests [28] is a legitimate objective which the Commission is pursuing by applying the penalty rule in question. The imposition of a financial penalty for submitting an incorrect refund application is an appropriate means not only of deterring the applicant from making intentionally false statements but also of encouraging him to exercise the utmost care.

73. The plaintiff has not succeeded in showing a manifest error of judgment on the part of the Commission in its choice of penalty in relation to the intended purpose of protecting the financial interests of the Community.

27 — Judgments in Cases 265/87 *Schräder* [1989] ECR 2237, paragraph 22; C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraphs 13 and 14; and C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 97.

28 — See the first recital of Regulation No 2945/94.

Necessity of the penalty rule

74. In ascertaining necessity, the crux of the matter is whether the aim pursued could not equally well have been achieved by adopting a milder measure with the same effect.

75. The plaintiff is in any case wrong in assuming that the mere recovery of refunds unduly granted would be sufficient. Admittedly, the plaintiff is correct in pointing out that export refunds cannot be compared with direct aid, as it is the farmer — and not the exporter — who in the last analysis receives the benefit of them. However, this does not mean that the recovery of an export refund would have the same deterrent effect as the penalty rule in question. Firstly, the recovery of an unduly granted export refund does not mean that no refund will be paid at all; if this were so, then in the case of an incorrectly made out refund application recovery would often have a more drastic effect than the penalty rule itself. Secondly, it should be noted that, as the Commission rightly points out, recovery fails to exert a deterrent effect inasmuch as it is limited to reducing the amount of the refund to the amount due. Finally, although in the event of recovery the exporter may lose interest because of the pre-financing effect, it may be assumed that this loss will be less than the potential gain from an inflated refund application that passes undetected, so that the mere possibility of losing interest is

unlikely to deter anyone from lodging an incorrect application.

76. The reference to Article 5 of Regulation No 2988/95 is also mistaken. As already explained, [29] it cannot be deduced from this provision that the Community's financial interests can be adequately protected by sanctions based on fault.

77. Nor is the penalty rule in question made any less necessary by the fact that it does not address the damage actually caused. In fact, the aim of the sanction is to deter rather than to punish financial injury. It is therefore only logical that reference should be made solely to the threat to the Community's financial interests.

78. Thus, it appears that the penalty rule at issue is also necessary to attain the objective pursued.

Reasonableness of the penalty rule

79. It remains to determine whether the penalty rule accurately reflects the importance of the abovementioned protective purpose and whether the disadvantages caused are proportionate to the aims pursued. [30]

80. In general, the Community financial interests to be protected may be jeopardised by incorrect export refund applications regardless of whether or not the applicant is personally at fault. It therefore seems appropriate to seek to protect the Community's financial interests by stipulating strict liability. Accordingly, at first glance, it seems not unreasonable not to distinguish between inadvertent and negligent error.

81. With regard to the main proceedings, it is obvious that, in principle, the Community's financial interests are equally jeopardised by actions not attributable to the exporter and the resulting incorrectness of his refund application regardless of whether the goods in question were manufactured by the exporter himself or by a supplier.

29 — See paragraphs 53 ff. above.

30 — It remains, however, an open question whether the exporter's freedom to conduct a business under Article 16 of the Charter of Fundamental Rights (OJ 2000 C 364, p. 1) is affected, since the events in the main proceedings took place before it was proclaimed.

82. The distinction between intent and other cases in terms of the legal consequences (level of the penalty) seems to be objectively justified, in view of the correspondingly different sense of justice of the exporter in these two cases. From this it follows immediately that an infringement of the principle of non-discrimination can be ruled out.

83. Nor, in a case such as that considered in the main proceedings, is the validity of the penalty rule called into question by the fact that the conditions of application of the penalty are relaxed, inasmuch as the requirement of fault and proof of fault is waived. The effective protection of the Community's financial interests may demand a lightening of the burden of proof extending even to the waiver of the requirement of fault.

84. Doubts as to the reasonableness of the penalty rule in question could only arise if it were so framed as no longer to be compatible with the basic concept of strict liability. In particular, this would be the case if the penalty had also to be imposed where the exporter could no longer reasonably be held responsible for the jeopardising of the Community's financial interests.

85. In this connection, the plaintiff is doubtless right to point out that in the case of an incorrect refund application the imposition of a penalty not based on fault leads to the obligation to lodge a correct declaration being formulated objectively, although the declaration involves various uncertainties beyond the exporter's control. [31]

86. This aspect is reflected in the Opinion of Advocate General Léger in *Oelmühle und Schmidt Söhne*, albeit in connection with the recovery of unduly granted subsidies under national law: [32]

'... in balancing against each other the interests involved, which is tantamount to assessing compliance with the principle of effectiveness of Community law, it would seem, to say the least, unfair to impose on the *bona fide* recipient alone the burden of something akin to strict liability, even though he, in accordance with the established system, has passed on to his suppliers the aid received without benefit from it directly, and without having been able to check the origin of the goods in question, which determines whether the aid was properly granted...' and later: 'Likewise, it is first and foremost for the national authorities responsible for ensuring, by means of appropriate checks, that the product in respect of which the aid is granted conforms to the Community requirements, so

31 — See paragraph 64 above.

32 — Opinion of Advocate General Léger in Case C-298/96 (cited in footnote 8), paragraph 44.

as to make certain that Community aid is not paid for products which do not qualify for it, to decide on the controls necessary for that purpose'.

87. In the case of the recovery of unduly paid subsidies under national law it is, however, mainly a question of the beneficiary's grounds of defence, such as loss of enrichment or good faith, which are assessed in the light of his legal position. In export refund law, account should be taken of the fact that the exporter himself does not personally benefit when he passes on the refund to the manufacturer by paying a price in excess of the world market price. On the other hand, this consideration has no bearing on the imposition of a sanction in the case of an incorrect export refund application.

88. It should be borne in mind that a sanction of the kind in question would be unreasonable if it had also to be imposed where the refund applicant was not responsible for the threat to the Community's financial interests. [33] This, however, would certainly not be the case if — as in the present instance — he had voluntarily, within the context of his economic activity, used a third party to manufacture the goods at issue. The fact that the inaccuracy of the data in the refund application could not be established or could be established only by means of checks at the undertaking in which the goods were manufactured would then be inmaterial.

89. In the light of the above, it may be concluded in answer to the first question that the validity of the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 as amended by Regulation No 2945/94 is not impaired by the fact that it provides for a penalty even where, through no fault of his own, an exporter has applied for an export refund exceeding that applicable.

V — Second question: interpretation of the concept of *force majeure*

90. The second question, which presupposes that the penalty rule is valid, mainly turns on whether *force majeure* may be assumed where the refund applicant could not establish that his data were false or could do so only by means of checks on the premises of a third party.

33 — With respect to such cases it should be noted that any doubt as to the reasonableness of the penalty rule in question could be countered by a broad interpretation of the concept of *force majeure* in the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87.

A — *Arguments of the parties*

91. According to the plaintiff, the situation in which it found itself was one of *force majeure* within the meaning of the case-law of the Court, that is to say that the circumstances were abnormal, unforeseeable and outside its control and, moreover, their consequences could not have been avoided even by exercising all due care. In the present case, the false information in the refund application was based on inaccurate data supplied by the manufacturer, a company with a good reputation in Germany. The addition of vegetable fat to the cheese spread by one of the manufacturer's production line managers had been unusual and totally unexpected. It could not have been detected by the usual checks, which the exporter himself had, in fact, carried out.

92. The plaintiff was aware that, in accordance with the customary interpretation of *force majeure*, an economic operator is responsible for the negligence of his contractual partner. However, it took the view that in accordance with the judgments of the Court in *Steff-Houlberg* and *Oelmühle Hamburg*, an exporter may rely on manufacturer's data whose accuracy he himself is unable to verify and should not be required to check the manufacturing process himself. Admittedly, these decisions concerned the recovery of Community subsidies under national law, but there was no reason why the same principles should not be applied to the sanctions laid down under the export refund system, which was entirely governed by Community law, nor why an unidentifiable and unverifiable error on the part of the supplier should not correspond to the concept of *force majeure*.

93. According to the plaintiff, only a broad interpretation of the concept of *force majeure* in the first indent of the third subparagraph of Article 11(1) of the Regulation can dispel the doubts hanging over that provision as a consequence of the principles of criminal law inherent in the notion of the rule of law. Such an interpretation would not only take the fault principle into account, albeit in a limited form, but would also tend to bring the special penalty rule in the first subparagraph of Article 11(1) of Regulation No 3665/87 into harmony with the general rule on administrative penalties in Article 5(1) of Regulation No 2988/95. *Force majeure* within the meaning of the provision at issue would then obtain if the exporter could show that he had acted as a responsible businessman. This would be the case where he had provided (objectively) false information in good faith because he had no reason to doubt the accuracy of the information received from his supplier.

94. The Commission shares the view of the Bundesfinanzhof, according to which false information provided in good faith by the exporter on the basis of inaccurate data supplied by the manufacturer cannot constitute a case of *force majeure* as defined in the case-law of the Court even if the

exporter could not establish that it was false or could do so only by means of checks at the undertaking where the goods were manufactured. The decisions of the Court of Justice cited by the national court could not lead to any other conclusion since the situations envisaged were not comparable.

B — *Analysis*

95. According to the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87, the sanction in question does not apply in the case of *force majeure*. As the Court has already established in *Kampffmeyer*, [34] the concept of *force majeure* does not have exactly the same scope in different areas of the law and in its various spheres of application, so that its precise meaning must be determined by reference to the legal context within which it is intended to operate.

96. The Court has consistently held that 'the concept of *force majeure* in the sphere of agricultural regulations must be construed as referring to abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided in spite of the exercise of all due care'. [35]

97. In applying this definition, in its settled case-law the Court has also accepted that *force majeure* does not obtain where non-compliance with a necessary condition can be traced back to non-performance by the other party to the contract. In *Theodorakis*, [36] the purchaser failed to take delivery of the goods sold for export, with the result that the goods were not exported during the period of validity of the export licence. The Court described this as an 'ordinary commercial risk' inherent in commercial transactions. It was 'for the holder of the licence, who is fully at liberty to select such trading partners as his interests in that respect may dictate, to take the appropriate precautions either by including the requisite clauses in the contract in question or by effecting appropriate insurance'. [37] Thus, in the view of the Court, the criterion of

34 — Judgment of 30 January 1974 in Case 158/73 [1974] ECR 101.

35 — Judgment of 9 August 1994 in Case C-347/93 (cited in footnote 6, paragraph 34) which refers to Case C-12/92 *Huygen and Others* [1993] ECR I-6381, paragraph 31. See also the judgment of 27 October 1987 in Case 109/86 (cited in footnote 6, paragraph 7): '... whilst that concept [of *force majeure*] does not presuppose absolute impossibility, it nevertheless requires the non-performance of the act in question to be due to circumstances beyond the control of the person claiming *force majeure* which are abnormal and unforeseeable and of which the consequences could not have been avoided despite the exercise of all due care'.

36 — Cited in footnote 6.

37 — Loc. cit., paragraph 8.

unforeseeability had not been met. In *Boterlux* [38] it was likewise held that the argument based on *force majeure* must fail because fraudulent re-importation into the Community was foreseeable.

98. In the present case, it is clear from the order for reference that the exporter had no knowledge of the true composition of the product and could have acquired such knowledge only by means of checks at the undertaking at which the goods were manufactured which, in the view of the Bundesfinanzhof, he could not, or at least could not be expected to, carry out.

99. However, in the light of the abovementioned judgments, these facts should be seen as indicating that, although the behaviour of the refund applicant's trading partner may have been unusual, at any rate it could not have been entirely ruled out and was foreseeable inasmuch as it represented the materialisation of a normal business risk. Viewed from this standpoint, the argument in favour of assuming *force majeure* must be rejected.

100. This conclusion is unaffected by the case-law which the plaintiff has cited.

Admittedly, in *Oelmühle und Schmidt Söhne* [39] the Court ruled that Community law does not in principle preclude a national rule from allowing non-recovery of Community aid unduly paid, particularly if, *inter alia*, the recipient demonstrably acted in good faith. In this connection, the Court pointed out that '... if a trader draws up and submits a declaration with a view to obtaining a subsidy, the mere fact of having drawn up that document cannot deprive him of the right to plead his good faith when the declaration is based exclusively on information which was provided by third parties. It is, however, for the national court to consider whether certain factors should not, in the circumstances, have caused the trader to check the accuracy of this information'. [40]

101. In *Steff-Houlberg*, [41] the Court reaffirmed its view that Community law does not preclude a national rule from allowing non-recovery of Community aid unduly paid based, *inter alia*, on the good faith of the recipient. On that occasion, the Court expressly stated that '...if an exporter draws up and submits a declaration with a view to obtaining export refunds, the mere fact of having prepared that document cannot

38 — Cited in footnote 6, paragraph 35.

39 — Cited in footnote 8.

40 — Loc. cit., paragraph 30.

41 — Judgment of 12 May 1998 in Case C-366/95 (cited in footnote 8).

deprive him of the right to plead his good faith when the declaration is based exclusively on information which was provided by the other party to a contract and the accuracy of which he was unable to establish'. [42]

102. With respect to the scope of these two judgments, it should first be noted that they concern the national recovery of subsidies unduly paid. Before ruling on the question of good faith, the Court noted that 'there is no Community provision governing the recovery of refunds paid on the basis of documents subsequently shown to be inaccurate'. [43]

103. Concerning the applicability of the *Boterlux* decision, according to which the error [44] of a third party constitutes an ordinary commercial risk for the aid recipient, the Court held that 'when a balance must be struck between the interests of the Community and those of the trader, the national court must take into account the fact that fault on the part of the third party with whom the recipient of the aid has entered into a contract concerns more closely the sphere of the recipient of the aid than that of the Community'. [45] Accordingly, contrary to the view expressed by the plaintiff, it may not be assumed that in the judgments cited the Court's intention was to pave the way for a broadening of the concept of *force majeure*, in so far as the inaccuracy of the exporter's information can be attributed to an error on the part of his trading partner.

104. The answer to the second question referred for a preliminary ruling must therefore be that the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 cannot be interpreted as meaning that false information provided in good faith by the refund applicant on the basis of inaccurate data supplied by the manufacturer constitutes in principle a case of *force majeure* where the applicant could not establish that it was false or could do so only by means of checks at the undertaking where the goods were manufactured.

42 — Loc. cit., paragraph 22.

43 — The regulation in question (Regulation No 2945/94) did not apply *ratione temporis*. See the judgment cited in footnote 41, paragraph 22.

44 — In Boterlux, it was a question of fraudulent behaviour by a third party. If this constitutes an ordinary commercial risk, then, *a fortiori*, so does a mere error.

45 — Loc. cit., paragraph 28.

VI — Conclusion

105. In the light of the above, it is proposed that the questions referred for a preliminary ruling by the Bundesfinanzhof be answered as follows:

(1) The validity of the first indent of the third subparagraph of Article 11(1) of Regulation (EEC) No 3665/87 as amended by Regulation (EC) No 2945/94 is not impaired by the fact that it lays down a penalty even where, through no fault of his own, an exporter has applied for an export refund exceeding that applicable.

(2) False information provided in good faith by the refund applicant on the basis of inaccurate data supplied by the manufacturer does not in principle constitute a case of *force majeure* within the meaning of the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87 where the applicant could not establish that it was false or could do so only by means of checks at the undertaking where the goods were manufactured.