Agriculture and Trade

Mixes and Muddles with Food Exports

*Malachy Cornwell-Kelly**

SOLICITOR*

Introduction

The Chernobyl accident has produced fallout in a number of senses beyond the nuclear, not least in connection with the rights of Customs administrations to refuse to take account of commercial reality and to play matters strictly by the rule book. A dispute in Greece over agricultural exports to Korea, which has found its way to the European Court, has in particular highlighted a new way in which business dealings can come to grief amidst the tangles of EC legislation.

The Facts

The case is *Elliniko Dimosio v Ellinika Dimitriaka AE.*[1] The facts are intriguing, though common enough in trading situations. The background to the case was furnished by the availability of export refunds payable to exporters from the Community of agricultural produce. Export refunds are designed to enable the Community goods to be placed on the world market at the lower prices prevailing there; the refunds thus payable are in effect the counterpart of the agricultural levies charged on import to the Community in order to bring the price of third country produce up to EC levels. Durum wheat is an agricultural product subject to this regime. Exporting 55,000 tonnes to South Korea in April and May 1988 the plaintiff company lodged the usual securities for export after obtaining an export licence, and later claimed the export refunds due to it and necessary to make the transaction a commercially viable one.

The total consignment of 55,000 tonnes was made up of 25,000 tonnes produced in Greece and 30,000 tonnes produced in France. The French wheat was virtually free of radioactive contamination but unfortunately that produced in Greece had the high radioactive contamination level of 1078 Bq/kg. The exporters knew that that level was too high and dealt with the problem by mixing the Greek and the French wheat on board ship; the result was one indivisible consignment of 55,000 tonnes of wheat with a radioactive level of 470 Bq/kg. The significance of that lower level of radiation will become apparent.

A basic prohibition applicable where agricultural produce is seeking an export refund is stated in Regulation 3665/87[2] as follows:

> "No refunds shall be granted on products which are not of sound and fair marketable quality, or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose."

In other words, no refund can be obtained on substandard goods.

The Law

The difficulty was that at the relevant time there was no Community legislation prescribing acceptable levels of radioactivity in goods for export, and this is where the first interesting point of Community law emerges. Precisely because of the absence of a legislative standard in this area, the Commission had at the material time sent a telex to the Member States reminding them of the test in Regulation 3665/87 and instructing them to apply for the purposes of export refunds the test which had been adopted by Community legislation (Regulation 1707/86) on *imports* of agricultural products. That Regulation had been made following the Chernobyl disaster in order to protect the Community from imports of radioactive food products, and it had fixed the maximum acceptable level at 600 Bq/kg for products such as wheat. (The instruction in the Commission's telex to apply by analogy a similar test to export refund applications was in due course reflected in legislation, but it took effect after the facts of the case under discussion had occurred.)

So the first question to be answered was: What force, if any, did the Commission's telex have? The answer to that question given by the European Court was "none at all". The Court, citing its own decision in *Sucrimex & Westzucker v Commission*[3] held that it was for the Member States to apply the legislation on export refunds and all the Commission could do was to offer advice. In the event, the Greek Customs themselves decided to apply the import levels of safe radioactivity by way of analogy when considering export refunds.

But the exporter's troubles were still not over, because Customs took the view that what mattered was not the cargo as it finally sailed – the mixture of French and Greek wheat with 470 Bq/kg radioactivity – but the original separate consignments, of which the French produce was satisfactory and the Greek produce well over the import safe limit of 600 Bq/kg. Refunds were thus only paid on the 30,000 tonnes of French origin, reflecting the export entries submitted when the wheat was first loaded on board ship.

It is important here to emphasise that the subsequent mixture of the French and Greek wheat was in no way improper or illicit and that, had the mixture been effected before loading, no difficulty would have arisen. The Commission, in fact, encouraged the Greek authorities to accept a corrected

**Trade and taxation specialist at Titmuss Sainer Dechert.*

[1]Case C-371/92 (not yet reported).
[2]As last amended by Regulation 2805/93.
[3]Case 133/79 [1980] ECR 1299.

Agriculture and Trade

export declaration which (under Directive 81/177) they were entitled to do.[4] Customs refused; the plaintiffs appealed to the administrative court and won; Customs then appealed to the administrative court of appeal, which referred the case to Luxembourg,[5] where it was decided by the full court.

The Main Questions

Two further questions remained to be resolved: first, could national administrations apply the import limits for radioactivity to export refund applications when no legislation entitled them in terms to do so? and, secondly, were the Greek Customs justified in refusing to allow a correction of the export declaration to show the mixed consignment instead of each separate component?

On the application of the import limits on radioactivity, the European Court held that the Greek authorities were justified in adopting the analogy. If goods with a radiation level above a certain limit were not fit to be imported to the Community, it followed that it was reasonable to judge them not to be of "fair marketable quality" as required by Regulation 3665/87 quoted above. More specifically, the Court was influenced by the fact that the principle of equal treatment of imports and exports had been recognised in an earlier Commission Recommendation on the treatment of Chernobyl-affected products and, of course, in the telex to Member States which it had held not to have legal force. The absence of any legal force attaching to the telex and the Recommendation did not therefore mean that they could safely be disregarded.

The exporter was finally, and rather surprisingly, unsuccessful in regard to the correction of the export declaration. On the face of it, Customs' refusal to accept a corrected declaration, even against the advice of the Commission, was unreasonable. The consignments of wheat had been mixed and did have an acceptable level of radiation and, as has been noted, there was no objection to the mixing as such. The European Court, however, considered that since the date of export for the purposes of refunds was defined (by Regulation 3665/87) as the date on which Customs accepted the export declaration, and that date determined the rate of refund, the facts had to be viewed as they were on that date. And on that date there were two consignments, of which only one was of merchantable quality.

Nor were Customs obliged to allow a correction to the declaration. Article 7 of Directive 81/177 only permitted that to be done after goods had left Customs control if the administration could check the changes "without the goods being present".[6] In this instance, the goods had physically left Customs control before the correction was proposed, so that Customs could no longer actually check them. But surely they could have verified the results of the mixing process by other means? The Commission certainly thought so, arguing that the use of a mathematical calculation would enable the Greeks to establish what the composition of the mixed shipment must have been. Indeed, the exporter had had samples taken from the ship and tested independently in order to prove its point. The Court's response was inflexible: unless Customs could check that the mixing had actually taken place, no one could be sure that it had been done adequately and that the consignment right through was of the required quality; officials had the exclusive right to check the facts, and any other interpretation of the law would not be proof against abuse.

General Conclusions

The decision is not out of line with others in similar situations, and there are three conclusions of more or less general application that can be drawn from this saga. The first is that the European Court is conscious of the subsidiarity debate and that although the role of the Commission as keeper of the Community's conscience is well established, and will influence the Court indirectly, the practical discretion of national administrations in implementing Community law will continue to be recognised. Secondly, the burden of proof is on an exporter seeking an export refund to show that everything has been done as required by law. No doubt this, to some extent, an unconscious reflex inspired by the high levels of concern about abuse of Community funds in connection with the Common Agricultural Policy; but it does mean that businesses whose margins depend on Community subsidies need to be quite scrupulous in dotting the "i"s and crossing the "t"s.

The third conclusion, which is unhappily supported by the overall drift of the Court's judgments in customs cases, is that the Court lacks sympathy for the commercial realities of trading life. That was particularly striking in the judgment given last year in *An Bord Bainne Cooperative v. Intervention Board for Agricultural Produce*.[7] Trading with Eastern Europe provided the Irish Dairy Boards trading company with burnt fingers when the Russian government unexpectedly and without notice changed its rules on the quality standards for butter oil. An Bord Bainne had successfully tendered to the UK Intervention Board for 11,000 tonnes of salted butter and undertook that it would be processed into butter oil and exported to Russia; to that end, a substantial

[4]The relevant provisions are now in Articles 65 and 66 of the Community Customs Code (Regulation 2913/93) and Article 204 of the Subsidiary Code (Regulation 2454/93).

[5]It is worth noting that in spite of needing a year longer than any other State to introduce an appeal procedure in customs matters (*ie* until 1.1.1995), the UK will still have no appeal procedure for dealing with export refunds beyond judicial review.

[6]The present wording of Article 66(2) of the Community Customs Code is more restrictive still, and no latitude appears to have been restored in the Subsidiary Code.

[7]Case 124/92, not yet reported.

performance security was lodged and commercial contracts made for the supply of the finished product to Russia. At that point, the salted butter met the Russian health standards for conversion into butter oil, which had been in force since 1955.

Subsequently, but before the butter oil could be imported to Russia, the Russian government changed the technical requirements applicable to the salted butter, and the import of the converted butter oil became prohibited. The EC legislation concerned – Regulation 765/86 – did allow the repayment of the security lodged with the Intervention Board where an undertaking given to it could not be complied with by reason of *force majeure*. In a hard judgment, the European Court held that there was no *force majeure* here: An Bord Bainne could not, indeed, have forseen the change which took place, but it could have protected itself against such an eventuality by an appropriate clause in its commercial sale contracts or by insuring against the risk, or both. In spite of the fact that the Russian requirements had remained since 1955, the Court considered that such changes were a "usual commercial risk" and the security should be forfeited on account of the failure to complete the export of the butter oil to Russia.

Conclusion

Given the importance of exports to the European economy, it is permissible to think that the Court has allowed its concern to support the tight administration of Community funds to take precedence over the doctrine of proportionality – which it has been so ready to establish in other areas. As is well known, that doctrine requires that steps taken by an administration should intrude no further than is reasonably necessary for the accomplishment of the objectives of the legislation which it is administering. Important though it is, the anti-fraud objective must be weighed against the need not to put excessive obstacles in the way of world trade; and none the less so because it is a question of reducing, otherwise than by destruction, the still embarrassing surpluses of Community produce in the agricultural field.