OPINION OF ADVOCATE GENERAL ALBER

delivered on 3 February 2000 *

I — Introduction

1. This case has been referred to the Court of Justice for a preliminary ruling by the Cour Administrative d'Appel (Administrative Appeal Court), Nancy. The Appeal Court poses a question concerning the interpretation of Article 5(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. [1] The initial proceedings were between the company Roquette Frères SA (hereinafter 'the applicant') and, as defendant, the Office National Interprofessionnel des Céréales (hereinafter 'the ONIC'). The dispute between the parties to the initial proceedings concerns entitlement to export refunds in respect of deliveries of glucose syrup to Austria, where it was used, in particular, in the manufacture of penicillin. In this new form it was reintroduced — at least in part — into the European Community to which, at that time, Austria did not yet belong.

II — Facts

2. Between 1 and 7 March 1990 the applicant exported nine consignments of glucose syrup to Austria. On these exports the ONIC paid export refunds totalling FRF 254 179.82 in the form of an advance. The ONIC is the agency of the Member State responsible for applying the Community regulations. The applicant had lodged security by posting a bond for an amount equal to 115% of the refunds, that is FRF 292 306.79.

3. By letter of 16 March 1990 the ONIC informed the applicant that, at the instance of the European Guidance and Guarantee Fund, evidence of the glucose syrup exported to Austria having been released for consumption was required. Where export refunds had already been paid, evidence of release for consumption might be required later.

4. The applicant was unable to produce the evidence required since the glucose syrup at issue had been used as a raw material in the manufacture of other products under a

* Original language: German.

1 — OJ 1987 L 351, p. 1 (hereinafter also referred to as 'the Regulation').

customs procedure comparable to inward processing.[2] The customs formalities for releasing the goods into free circulation, which undoubtedly serve as evidence of importation,[3] were therefore not completed. That the glucose syrup deliveries in question were used, at least in the main, for manufacturing penicillin is undisputed. The end product was — at least in part — reintroduced into the Community.

5. Accordingly, as the applicant was unable to provide the evidence of 'consumption' of the goods on the Austrian market which the ONIC had requested, the latter refused to release the security.

6. In taking this decision the ONIC felt bound by the Commission's internal directives. As early as 26 January 1990, the agency of the Member State had been warned by telex to watch out for fraudulent practices in connection with the exportation of glucose syrup under the export refund procedure with the subsequent importation of an end product obtained by processing. In a telex from the competent Directorate-General dated 24 July 1990, the Commission took the view that under Article 5 of Regulation No 3665/87 evidence of the goods having been released for free circulation was a condition of entitlement to the payment of export refunds. The national offices were requested to recover refunds paid out on the basis of the abovementioned operations. However, this was to apply only in those cases in which the customs export formalities had been completed after 1 March 1990, since from that point on a prudent economic operator could no longer have been unaware of the uncertainty surrounding his entitlement to a refund as a result of the Commission's communication of 26 January 1990.

7. It follows from a Commission fax dated 12 July 1993 that the administrative authority of the Member State had been instructed by Commission telex dated 14 August 1990 — not included in the file — to make the payment of export refunds for deliveries of glucose syrup to Austria conditional upon the release of the goods for free circulation. In the abovementioned telex of 12 July 1993 the Commission also cancelled the previously imposed measures intended to tighten up the conditions for the payment of refunds on glucose syrup exported to Austria, while not omitting to mention that the exportation of glucose syrup to EFTA countries, where it was made into citric acid under the inward processing procedure and as such reintroduced into the Community at a zero rate of duty and accompanied by a EUR 1 certificate, *was perfectly legal.*

8. In its abovementioned letter dated 16 March 1990, the ONIC had already informed the applicant that evidence of

2 — The glucose syrup may also have been used for manufacturing citric acid and xanthan rubber, which does not affect the legal assessment of the economic process.

3 — See Article 17(3) of Regulation No 3665/87.

release for consumption was required to justify the request for payment of refunds on exports of glucose syrup to Austria. When release of the security for deliveries made prior to this communication was refused, the applicant instituted legal proceedings.

9. In the court of first instance, its action was partially successful. In the court that referred the case for a preliminary ruling the appeal proceedings have been stayed. In the view of the latter court, the outcome of the case depends on the interpretation of the substantive conditions which exports must satisfy in order to qualify for the refunds at issue. These, it believes, cannot be clearly inferred from the provisions in force at the material time, especially as they have been the subject of several successive and contradictory directives from the Commission.

10. The question referred to the Court of Justice by the national court reads as follows:

Did the provisions in force on 1 March 1990 and, in particular, Article 5(1) of Commission Regulation No 3665/87 of 27 November 1987, in so far as it provides that the export refund is to be paid only if '*the product has actually been placed on the market in the non-member country of import in the unaltered state*', permit the body responsible for supervision (in this instance, the ONIC) to challenge the supplier's entitlement to refunds on the sole ground that the goods delivered had been used by its foreign customer in the preparation of another product, which was itself liable to be re-exported to other Member States of the European Economic Community?

11. The applicant, the ONIC and the Commission participated in the written procedure. The applicant, the French Government and the Commission were represented at the hearing. I shall return to the submissions of the parties in the context of my legal analysis.

III — The relevant provisions

12. Among the relevant provisions of Regulation No 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products, Article 4 reads:

'1. Without prejudice to the provisions of Articles 5 and 16, the refund shall be paid only upon proof being furnished that the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state.

[2 to 4] ...'

13. In the preamble to the Regulation it is stated that certain export transactions can lead to abuses and that, in order to prevent such abuses, payment of the refund should be subject to the furnishing of proof that the product has not only *left the customs territory* of the Community, as required by Article 4, but has also been *imported* into a non-member country and, where applicable, *actually marketed* there. Under letters (a) and (b) Article 5(1) mentions two possible sets of suspicious circumstances. Article 5 reads:

'1. Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a non-member country within 12 months following the date of acceptance of the export declaration:

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

or

(b) where, by reason of the difference between the amount of the refund on the exported product and the amount of the import duties applicable to an identical product on the date of acceptance of the export declaration, it is possible that the product may be reintroduced into the Community.

However, that period may be extended under the conditions laid down in Article 47.

In the cases referred to in the first subparagraph, the provisions of Articles 17(3) and 18 shall apply.

In addition, the competent authorities of the Member States may require that additional evidence be provided such as to satisfy them that the product has actually been placed on the market in the non-member country of import in the unaltered state.

2. ...

Where there are serious doubts as to the real destination of products, the Commission may request Member States to apply the provisions of paragraph 1.

3. ...'

14. Article 16 forms part of Section 2 of the Regulation which is headed 'Differentiated refunds'. [4] This provision reads:

'1. Where the rate of refund varies according to destination, payment of the refund shall be dependent upon the additional conditions laid down under Articles 17 and 18.

2. Where a single rate of refund applies in respect of all destinations on the day of advance fixing and a compulsory destination is prescribed, the refund shall be treated as varying according to destination if the rate of refund applying on the day of acceptance of the export declaration is lower than the rate fixed in advance, as adjusted, where appropriate, on the date of acceptance of the export declaration.'

15. Article 17(3) reads:

'A product shall be considered to have been imported when it has been cleared through customs for release for consumption in the non-member country concerned.'

16. Article 18, which was amended by Commission Regulation (EEC) No 354/90 of 9 February 1990, [5] contains, both in the original version and in the version in force at the time when the events at issue took place, a list of means of furnishing proof of completion of the customs formalities for release for consumption.

IV — The submissions of the parties

1. *The applicant*

17. Referring to the relevant provisions, [6] the applicant submits that, in cases involving a non-differentiated export refund, entitlement to the refund depends on the goods having been exported, as laid down in Article 4(1) of the Regulation. On the other hand, in the circumstances described in Article 5(1)(a) and (b) of the Regulation, payment of the refund is also made conditional on the product having been imported into a non-member country. Accordingly, where a non-differentiated export refund is concerned, proof of release of the product

4 — Concerning the notion of a 'differentiated refund', see paragraphs 38 et seq. below.

5 — OJ 1990 L 38, p. 34.

6 — Article 1 of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organisation of the market in cereals (OJ 1975 L 281, p. 1), Article 6 of Regulation (EEC) No 2744/75 of the Council of 29 October 1975 on the import and export system for products processed from cereals and from rice (OJ 1975 L 281, p. 65) and Article 8 of Regulation (EEC) No 2746/75 of the Council of 29 October 1975 laying down general rules for granting export refunds on cereals and criteria for fixing the amount of such refunds (OJ 1975 L 281, p. 78).

for consumption in a non-member country, in accordance with the third and fourth subparagraphs of Article 5(1) of Regulation No 3665/87, should only be required if fraudulent practices of the kind referred to in the first subparagraph of Article 5(1) of Regulation 3665/87 are suspected, namely, if:

(a) there is doubt as to the true destination of the product, that is if there is doubt as to whether the product will be exported from the Community, or if

(b) by reason of the difference between the refund rates and the import duties — that is, due to circumstances beyond the exporter's control — there is a risk of fictitious exports followed by reimportation, for the sole purpose of obtaining the difference between the two amounts.

It should be borne in mind that this latter case concerns only refunds and duties in respect of identical products. The provision does not cover the importation of goods into the Community which results from the processing of products previously exported under the refund regime.

18. The applicant argues that the ONIC's refusal to release the security at issue is clearly prompted by the communications it received from the Commission which, however, do not in themselves constitute an appropriate legal basis for the decision at issue. Verification of the legality of the action taken by the ONIC should be based on direct reference to Article 5 of the Regulation. In so far as that article contains an exception to the rule that entitlement to a refund arises when the goods leave the customs territory of the Community, it should be interpreted narrowly, in accordance with the principle of proportionality, and the burden of proving special circumstances falls on the agency of the Member State.

19. According to the applicant, in the present case these conditions are not fulfilled. There was neither doubt as to the destination of the glucose nor a risk of an identical product being reintroduced. There was nothing in Article 5 of the Regulation to support the Commission's demand for proof of the goods having been released for consumption because of the risk of the processed products being imported into the Community from an EFTA State at a zero rate of duty. A close reading of Article 5 of the Regulation suffices to provide an answer to the question posed by the national court, namely that entitlement to an export refund cannot be challenged on the sole ground that the foreign buyer of the goods has manufactured a product which is itself liable to be exported to Member States of the Community.

20. This conclusion, based on a literal interpretation of Article 5 of the Regulation, is confirmed by the objective pursued by that provision. It is an anti-fraud measure intended to prevent the payment of refunds on goods that were not actually

exported or were reintroduced into the Community. From this standpoint, it is possible to argue for a broad interpretation of the notion 'identical product' within the meaning of Article 5(1)(b) of the Regulation that covers products which may have been only insufficiently or fraudulently processed. In this respect, the distinguishing criterion might be whether or not the processing was substantial or irreversible. To this extent, the customs regime — for instance inward processing — under which the goods were processed is also irrelevant.

21. If, however, contrary to the view taken by the applicant, Article 5 of the Regulation were to be applied, it would remain to be decided what constitutes appropriate evidence of substantial processing. Evidence of a measure such as inward processing should suffice in the same way as a customs entry certificate or one of the other documents specified in Article 18 of the Regulation. This interpretation is consistent with the Community refund regulations, which are intended to enable Community products to be offered on the world market at competitive prices.

22. The applicant also draws attention to the relevant provisions concerning amylaceous products [7] in order to illustrate the difference between substantial processing and reversible processing. There can thus be no doubt that the conversion of glucose syrup into penicillin, citric acid or xanthan gum is to be regarded as irreversible processing.

23. Finally, the applicant refers to the recodification of Regulation No 3665/87 in the form of Regulation (EC) No 800/99, [8] Article 20 of which replaces Article 5 of Regulation No 3665/87. It incorporates the provisions of the matters governed by the latter article but expressly extends them to the case of reintroduction into the Community of goods that have not undergone 'substantial processing or working'. [9] The applicant takes the view that the new regulation makes explicit what was already implicit in Article 5 of Regulation No 3665/87.

2. *The ONIC*

24. The ONIC argues that evidence of importation can be demanded at any time before the refund is paid and is furnished by proving release for consumption [10] in the non-member country of importation.

7 — See Regulation No 2169/86 (OJ 1986 L 189, p. 12) and Regulation No 3642/87 (OJ 1987 L 342, p. 10).

8 — OJ 1999 L 102, p. 11.

9 — See Article 20(4)(c).

10 — 'Mise à la consommation'. For an explanation of this concept see paragraph 59.

25. The ONIC formulates the question which, in its view, needs to be answered as follows:

Can entitlement to an export refund be called into question because the foreign customer has processed the goods delivered into a product which can be reimported into other Member States of the European Community? In the ONIC's submission, this question should be answered in the affirmative. Entitlement to a refund implies that the product must have left the customs territory of the Community. This condition is not fulfilled where the product, albeit in an altered state, is reintroduced into Community territory. The product exported from the Community and then reintroduced in fact totally escapes payment of customs duty.

26. Moreover, the relevant provisions require that the product leave Community territory in the unaltered state and be placed on the market in the non-member country in the unaltered state. This condition is not fulfilled if the product is reintroduced into the Community in the altered state, even if this is the result of processing. Placing on the market in the unaltered state should be understood as utilisation of the product in the non-member country of importation. Utilisation means that the product, even if processed, has been cleared for free circulation in the country of destination. This condition is not satisfied where the product finds its way back on to the European Community market in the altered state.

3. *The French Government*

27. The French Government did not submit any written observations, but it did make its views known at the hearing.

28. With respect to the nature of the refund, the representative of the French Government explained that, where non-differentiated export refunds are concerned, they are to be paid once it has been established that the product has been exported from the Community. Additional evidence is required only if abuse is present or suspected. It followed from the case-law of the Court [11] that the object of authorising Member States to demand additional evidence before paying out refunds is to prevent abuse.

29. In this connection, the French Government also referred to the replacement of Regulation No 3665/87 by Regulation No 800/99 — just as Article 15(2) of the Regulation had previously been introduced by Regulation (EC) No 313/97 [12] — and in particular to its Article 20 at the beginning of Section 3 on 'Specific measures of protection of the Community's financial

11 — See judgment of 9 August 1994 in Case C-347/93 *Boterlux* [1994] ECR I-3933, paragraph 25.

12 — OJ 1997 L 51, p. 31. The provision reads:
'2. Where it is found that the products exported are reimported into the Community:
— after undergoing working or processing in a third country without having attained the level of processing provided for in Article 24 of Regulation (EEC) No 2913/92, and
— attract a reduced or zero rate of import duty rather than the normal rate, no refund shall be paid or, if already paid, it shall be reimbursed by the exporter at the request of the Member State. ...'

interests'. The object of this provision is likewise to prevent abuse. It is more precise and comprehensive than Article 5 of Regulation No 3665/87. In view of these restrictions and the rationale for the provision, it has to be concluded that the mere fact that the exported goods have been used for preparing another product suitable for reimportation into Member States of the Community is not a sufficient ground for calling the export refunds into question.

30. The French Government also comments on the modalities of cooperation between the Commission and the agency of the Member State. Without being legally binding, the communications addressed by the Commission to the ONIC were perfectly capable of determining the ONIC's attitude since otherwise, when the expenditure accounts of the European Guidance and Guarantee Fund came to be settled, it would not have been in a position to justify the payment of the export refunds. Finally, it is a matter for the national court to review the precise circumstances of the specific business transaction. The French Government suggests that the question referred to the Court be answered in the negative in the manner already indicated, it being for the court of the Member State to decide in each case, in the light of the actual circumstances, whether all the conditions for establishing entitlement to export refunds have been satisfied.

4. *The Commission*

31. The Commission takes as its point of departure the fact that the French authorities had demanded additional evidence for the export of the goods to Austria on the basis of Article 5(1)(a) of the Regulation, read in conjunction with the fourth subparagraph of that provision, that is to say because of the risk of the product being reintroduced into the Community. The documents do not give rise to any serious doubt as to the true destination of the goods.

32. The Commission also notes that the fourth subparagraph of Article 5(1), according to which the competent authorities of the Member States 'may' 'in addition' require that additional evidence be provided, is applied only in exceptional cases when the grounds for suspicion are more compelling.

33. The provision is so structured as to imply a gradation, as between its third and fourth subparagraphs, in the degree of actual risk of fraud. This heightened risk is not present in the case under consideration, which should therefore be considered against the background of the third subparagraph of the provision, according to which proof of release for consumption is to be provided by producing the customs documents. [13]

34. Entitlement to an export refund depends on the fulfilment of the provisions

13 — The third subparagraph of Article 5(1) refers to Article 17(3) and Article 18, which determine the nature of the proof of completion of the customs formalities (see also paragraphs 15 and 16 above).

of Article 4(1) and Article 5(1) of Regulation No 3665/87. Whereas in the present case there is no doubt that the goods left the customs territory of the Community, it is uncertain whether the criterion of importation into a non-member State had been met, in so far as importation has to be understood as completion of the customs formalities. It is, however, impossible to provide this proof for goods subject to the special customs regime of inward processing. Proof that the goods have been imported into a non-member country is required when one of the sets of suspicious circumstances mentioned in letters (a) and (b) of the first subparagraph of Article 5(1) is present. The mere fact that the product has been processed cannot be sufficient to call the refund into question. A comparison of the refund rates in effect at the time suggested that the risk of the goods being reimported could be more or less ruled out in the light of the facts. [14] In any event, fraudulent reimportation was not commercially profitable in view of the transport costs. Moreover, the very feasibility of reimportation is highly doubtful since, in the Commission's view, the glucose syrup at issue had been substantially processed and no longer existed as such. The processed product 'penicillin' cannot be converted back into glucose.

35. In addition, the Commission also cites Article 20(1) of Regulation No 800/99, which expressly 'reserves' [15] the case of substantial processing or working. [16]

36. Finally, letter (b) of the first subparagraph of Article 5(1) of the Regulation, which is to be regarded as an anti-fraud provision, does not remove the need to examine the specific circumstances of the case. The object of the provision is not to make recourse to the inward processing procedure impossible or excessively difficult. The measures can only be justified to the extent that they are necessary to protect the financial interests of the Community, that is to say, to prevent fraud. It is therefore impossible to disregard the fact that the product exported no longer existed and therefore could not, in actual fact, be reintroduced into the Community.

37. The Commission proposes that the reply to the question referred for a preliminary ruling should be that entitlement to export refunds cannot be challenged on the grounds that proof of clearance through customs for release for consumption could not be produced, if it has been established that for the products in question the risk of their being reintroduced into the Community, after leaving its customs territory, could be ruled out in view of the specific circumstances surrounding the commercial operation.

14 — Production aids for glucose syrup reportedly amounted to 110.11 ECU/t. Export refunds amounted to 132.83 ECU/t in January 1990 (OJ L 375, p. 96), 142.70 ECU/t in February 1990 (OJ L 22, p. 31) and 149.18 ECU/t in March 1990 (OJ L 51, p. 20). Moreover, an equalisation rate based on the dry matter content is also said to have been applicable.

15 — 'Réserve'.

16 — Since the identification of importation into the Community of a Community product processed in a non-member country at a reduced or zero rate of duty as an independent set of circumstances giving grounds for suspicion, *substantial* processing or working has been equated to importation into a non-member country.

V — Opinion

38. As is already clear from the submissions of the parties, as far as the payment of export refunds is concerned, it makes a fundamental difference whether the refunds are 'differentiated' or 'non-differentiated'. [17] In the case of a non-differentiated refund, it is essentially a matter of whether the goods have left the customs territory of the Community, whereas in the case of a differentiated refund the main consideration is the destination of the goods. Therefore the Community control mechanisms for differentiated refunds are tighter and/or different in nature.

39. The Court has described the characteristics of the different kinds of refunds as follows:

> The differentiated refund system is intended 'to gain and maintain access for Community exports to the markets of the non-member countries concerned and the variation in the refund is based on the desire to take account of the particular characteristics of each import market in which the Community wishes to play a part.' [18]
>
> The *raison d'être* of the system of varying the refund would be disregarded 'if it sufficed, in order to qualify for payment of the refund at a higher rate, for the goods simply to be unloaded, without reaching the market of the territory of destination'. [19] That is the reason for which Community law 'makes payment of the variable refund subject to the completion of customs formalities for entry into free circulation in the non-member country, since the completion of those formalities is normally sufficient to ensure that the goods have actual access to the market of the territory of destination'. [20]
>
> '... in view of the objectives of the system of variable refunds, it is essential that products subsidised by such refunds should actually reach the market of destination and be marketed there'. [21]
>
> 'On the other hand, in the case of a non-differentiated refund granted in order to cover the difference between the price of products in the Community and their price in international trade, the amount of the refund is not fixed by reference to the import market for which the products are destined'. [22]

17 — In the terminology of Article 5 of the Regulation.

18 — See judgment of 11 July 1984 in Case 89/83 (*Hauptzollamt Hamburg-Jonas/Dimex* [1984] ECR 2815, paragraph 8), as well as the judgment in Case C-347/93 (cited in footnote 11), paragraph 18.

19 — See Case 89/83 (cited in footnote 18), paragraph 9.

20 — See Case 89/83 (cited in footnote 18), paragraph 10.

21 — See Case 89/83 (cited in footnote 18), paragraph 16; in this connection, see also the judgment of 31 March 1993 in Case C-27/92 (*Möllmann-Fleisch* [1993] ECR I-1701, paragraph 15).

22 — See Case C-347/93 (cited in footnote 11), paragraph 21.

'That is why ... only proof that the product has been exported from the Community' is required. [23] Nevertheless, 'additional evidence may thus be required where there is suspicion or proof that abuses have been committed'. [24]

40. From a comparison of the two methods of making refunds it follows that 'payment of a differential refund is in principle conditional on proof that the product has been released into free circulation in the non-member country of destination' and that 'Member States may also require such proof before granting a non-differentiated refund if there is suspicion or proof that abuses have been committed'. [25]

41. That the present case is concerned with 'non-differentiated refunds' is beyond dispute. At the material time, Austria was not yet a member of the European Community so that with respect to exports it is to be regarded as a non-member country. Nevertheless, at that time Austria, as a member of EFTA, enjoyed special status with respect to imports, which made the importation of processed products into the Community commercially attractive. Under Article 4(1) of the Regulation, entitlement to the payment of a refund arises if the products for which the export declaration was accepted have left the customs territory of the Community within 60 days from the date of such acceptance. In view of this express provision, which, moreover, is to be viewed in the light of the abovementioned case-law, in principle no further proof is required, unless there is suspicion of abuse of the export regulations. That would trigger the application of Article 5 of the Regulation, which defines the precise circumstances in which it is to be applied.

42. At the time of the events which gave rise to the litigation, as shown by the documents produced to the Court, the Commission obviously assumed that the additional proof mentioned in Article 5 of the Regulation could be demanded *at any time*. In the proceedings before the Court, however, the Commission took the view that there must at least be discernible grounds for suspecting [26] fraudulent practices for Article 5 of the Regulation to enter into effect. Thus, in accordance with the case-law cited, the parties to these proceedings assume that Article 5 of the Regulation will apply only where there is suspicion or proof that abuses have been committed.

43. The circumstances in which additional evidence may be required are described in the wording of the provision applicable to the dispute as 'serious doubt as to the true destination of the product' [27] or the possibility of the product being re-introduced into the Community 'by reason of the

23 — See judgment C-347/93 (cited in footnote 11), paragraph 22.

24 — See judgment C-347/93 (cited in footnote 11), paragraph 27.

25 — Case C-347/93 (cited in footnote 11), paragraph 30 and point 1 of the operative part.

26 — 'Degré de suspicion élevé'.

27 — See Article 5(1)(a) of Regulation No 3665/87.

difference between the amount of the refund on the exported product and the amount of the import duties applicable to an identical product on the date of acceptance of the export declaration'. [28]

44. In certain circumstances, in the context of the first alternative, the meaning of the words 'true destination' of the product might give rise to doubt. The applicant itself raised the question at the hearing by asking what 'true destination' might mean in a system in which the destination is, specifically, not binding and went on to point out that in the context of non-differentiated refunds the only possible destination is a non-member country.

45. It would be conceivable, for example, in relation to Article 4(2) of the Regulation, according to which 'for the purposes of this Regulation, products delivered as catering supplies to drilling or extraction rigs as defined by Article 42(1)(a) shall be deemed to have left the customs territory of the Community', to regard such circumstances — that is, not just importation into a non-member country — as the 'destination of the product' within the meaning of the provision. However, special control mechanisms are provided precisely for this particular case under Article 42 of Regulation No 3665/87.

46. It may therefore be assumed that, within the meaning of the provision, 'destination' is to be understood as the delivery of the goods outside the Community, provided they are delivered to a non-member country. Nevertheless, the following extract from the case-law of the Court should be borne in mind: 'In the case of a product whose price, and therefore rate of refund, depends on the qualitative nature of its use, abuses could also occur where its actual use, that is to say its true destination in functional terms, is not the same as the specific product use for which the refund is requested. It follows that the term "destination" in Article 5(1)(a) of Regulation No 3665/87 must be construed in not only a geographical but also a functional sense'. [29]

47. The same is true of the conditions of applicability of the second alternative, namely, reintroduction of the goods. It is the common purpose of both alternatives to ensure that the goods arrive in a non-member country and stay there, with the concomitant effect of relieving pressure on the Common Market.

28 — See Article 5(1)(b) of Regulation No 3665/87.

29 — See judgment of 21 January 1999 in Case C-54/95 *Germany* v *Commission* [1994] ECR I-35, paragraph 45.

48. If Article 5(1)(b) were interpreted literally, the provision would not be applicable in the present case, firstly, because — as the Commission has argued [30] — the refund rates were not such as to create a serious risk of identical goods being reimported and, secondly, because the raw material exported and the processed product imported were not 'identical products' [31] within the meaning of the provision.*

49. However, it should not be forgotten that the provision was adopted to provide protection against fraudulent practices. From this standpoint, it might perhaps, where appropriate, be given a broad interpretation. If the exportation of a Community product is encouraged through export refunds, in certain circumstances the market relief objective of the mechanism might be called into question if the product were returned to the Community in the altered state. At any rate, it is conceivable that the pressure on the Common Market would not be relieved as anticipated. Accordingly, in the context of the events that gave rise to the dispute, the Commission nevertheless assumed that there was a risk of fraud.

50. In the recodification of Regulation No 3665/87 through the adoption of Regulation No 800/99 this view of the problem is taken into account. Thus, Article 20(1)(c) of the Regulation reads:

'1. Where:

(a) ...

(b) ...

(c) there are definite suspicions that the product, in its unaltered state or after having been processed in a third country, will be reimported into the Community duty free or at a reduced rate of import duty,

the single-rate refund... shall be paid only if the product left the customs territory of the Community in accordance with Article 7, and,

(i) in the case of a non-differentiated refund, the product has been imported into a third country during the 12 months following the date of acceptance of the export declaration or has undergone substantial processing or working in this period within the

30 — See paragraph 32 above.

31 — The French text refers to 'produits identiques'.
*Translator's note: The Advocate General cites the German wording 'gleichartige Erzeugnisse' ('similar products') and observes in footnote 31 that the French wording is 'produits identiques' ('identical products' — the English wording).

meaning of Article 24 of Regulation (EEC) No 2913/92; [32]

(ii) ...'

51. Even though this provision did not enter into force until 1 July 1999, it provides a clue to the solution of the problem. The deciding factor is the degree of processing or working, as follows from the use of the adjective 'substantial' and the reference to Article 24 of Regulation No 2913/92.

52. Comparable criteria must apply to Article 5(1)(b) of the Regulation, which in any event encompasses cases of reimportation of processed products only if broadly interpreted. In cases of substantial processing or working of the product, even assuming a very generous interpretation, it can no longer be a question of 'identical products'. * In such cases, moreover, it may be assumed that, functionally, the product reached its destination.

53. In the present case, all the parties are agreed that during the processing operation, in which penicillin was manufactured using glucose syrup, the glucose syrup disappeared. Thus, the processing of the starting product, namely glucose syrup, was irreversible and hence substantial, so that there can be no question of its being reintroduced into the Community in the guise of the drug penicillin.

54. Even the Commission, in the abovementioned fax [33] dated 12 July 1993 requesting that the previously ordered measures be withdrawn, expressly maintained that the exportation [34] of glucose syrup to non-member countries belonging to EFTA for processing, under the inward processing procedure, into citric acid which, for its part, could be introduced into the Community at a zero rate of duty, *was perfectly legal.*

55. Finally, since there is no case for applying Article 5 of the Regulation, it does not matter that the importation of the Community products into the non-member State cannot be proved through the completion of the customs formalities for release into free circulation. However, behind this lies a general problem relating to the provision of proof, since when Community products are exported into a non-member country and processed there under a special customs regime, evidence of

32 — The provision reads: 'Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture'.

* See translator's note following footnote 31.

33 — See paragraph 7 above.

34 — In this respect, it can only be a question of syrup exported under the refund system.

importation in conformity with the regulations cannot be produced.

56. The applicant has rightly pointed out that the Community legislature did not wish to prevent the export of Community products for processing or working in a non-member country of importation. This is all the more compelling in that in these cases the purpose of the regulations, that is, relieving the Common Market of the product exported under the export refund system, enters into play.

57. Against this background, it is useful to refer to the fourth subparagraph of Article 5(1) of the Regulation, which allows the competent authorities of Member States to require additional evidence such as to satisfy them 'that the product has actually been placed on the market in the non-member country of import in the unaltered state'. Moreover, under the second subparagraph of Article 5(2) of the Regulation the Commission may request Member States to apply the provision. The request made in the present case for the applicant to provide proof of the release of the goods for consumption must be viewed within this legal context.

58. Irrespective of whether it is applicable only if there are strong grounds for suspicion, [35] the provision implies that evidence other than customs documents certifying release into free circulation can be used to prove that the product has reached its destination, in both the geographical and the functional sense of the word. [36]

59. The 'proof of release for consumption' [37] required in the present proceedings, which as such is not mentioned in the Regulation, shows that it is a question of the product being utilised in the non-member country. No matter whether this process is described as 'consumption', [38] 'utilisation' [39] or 'actually ... placed on the market ... in the unaltered state', [40] the intention is clear. Substantial processing or working of the product satisfies the utilisation requirements and the customs regime under which the processing takes place should be of no consequence. Therefore, in the case in question evidence of substantial processing or working should satisfy the requirements of Article 5 of the Regulation.

60. Finally, certain observations concerning the appropriate time of notification of the evidence to be provided under Article 5 of Regulation No 3665/87 are called for. It should be borne in mind that the economic operator claiming the export refund must be informed in good time of the evidence

35 — As argued by the Commission.

36 — Case C-54/95 (cited in footnote 29).

37 — 'Preuve de la mise à la consommation'.

38 — 'Consommation'.

39 — 'Exploitation'.

40 — '... a été effectivement mis en état sur le marché'.

required, especially where documents other than those expressly mentioned in the Regulation are concerned, since, firstly, his entitlement to a refund depends on this evidence and, secondly, he has only a limited influence [41] on how and for what purpose the foreign importer uses the goods. The exporter must be placed in a position to assess whether he can effect the export operation without running the risk of subsequently being deprived of his entitlement to an export refund as a result of events beyond his control. [42]

61. This requirement is based on the general principle of legitimate expectations. In the present factual context, this means that an exporter who meets all the regular requirements for an export transaction can rely on being entitled to a refund.

62. This idea also finds expression in Regulation No 800/99. For example, according to recital 66 of the preamble:

'Whereas, in order to ensure uniform application throughout the Community of the principle of legitimate expectation where amounts over-paid are recovered, the conditions under which that principle may be invoked should be laid down ...'

63. The first sentence of Article 20(4) of Regulation No 800/99 reads:

'Paragraph 1 shall apply *before* the refund has been paid.' [43]

64. In the present case, the economic operator could not have known anything about the requirement of additional evidence prior to the ONIC's letter of 16 March 1990. The Commission's letter to the ONIC dated 26 January 1990 was expressly designated confidential. Moreover, in accordance with settled case-law, such exchanges of official correspondence between the Commission and Member State administrations have no direct legal consequences for the economic operator. [44] It is therefore necessary to proceed on the basis that, even if Article 5 of Regulation No 3665/87 could have fallen to be applied — which, on the basis of the solution I have prepared, should not be assumed — the applicant was not informed in good time of the evidence it would be required to provide.

41 — Possibly as a result of a contractual commitment, see Case C-347/93 (cited in footnote 11), paragraph 35.

42 — Other than the case of *force majeure*.

43 — Emphasis added.

44 — See judgment of 27 March 1980 in Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299, paragraph 16.

VI — Conclusion

65. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the question referred for a preliminary ruling as follows:

The provisions in force on 1 March 1990 and, in particular, Article 5(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987, in so far as it provides that the export refund is to be paid only if 'the product has actually been placed on the market in the non-member country of import in the unaltered state', do not permit the body responsible for supervision (in this instance, the ONIC) to challenge the supplier's entitlement to refunds on the sole ground that the goods delivered were used by its foreign customer for the manufacture of another product, which itself might be re-exported to other Member States of the European Economic Community.