

OPINION OF MR ADVOCATE GENERAL
VERLOREN VAN THEMMAAT
DELIVERED ON 16 DECEMBER 1982 ¹

*Mr President,
Members of the Court,*

1. Introduction

The material facts in this case are the same as those in Case 217/81 in which the Court, in its judgment of 10 June 1982 ([1982] ECR 2233), declared that an action for damages brought by Compagnie Interagra SA against the Commission was inadmissible. For a summary of those facts I can therefore refer to that judgment of the Court and my prior Opinion, besides referring to the Report for the Hearing in the proceedings for a preliminary ruling.

I will merely remind the Court that these proceedings also arise from the fact that on 28 November 1980 the competent French intervention agency, the Fonds d'Orientation et de Régularisation des Marchés Agricoles [Agricultural Markets Guidance and Stabilization Fund, to which I shall refer as the "Fund"], refused an application (on the ground that it was devoid of purpose) for an export certificate fixing in advance the export refunds on the export of 25 000 tonnes of butter to the Soviet Union lodged by Interagra on 17 November 1980 pursuant to Regulation No 2943/80 of 13 November 1980 (Official Journal 1980, L 305, p. 27) in connection with an invitation to tender. The application was refused because on 19 November 1980 the Commission, by

Regulation No 2993/80 (Official Journal 1980, L 310, p. 18), had again suspended the advance fixing of export refunds on butter and butter-oil made possible just a few days earlier. Interagra appealed from that refusal to the Tribunal Administratif [Administrative Court], Paris, which was then faced, amongst other things, with questions concerning the interpretation of Regulation No 2044/75 (Official Journal L 213, p. 15). That regulation contains "special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products". So far as is here material Article 3 (3) of that regulation provides that "export certificates" for certain defined milk products, which include butter and butter-oil, "shall be issued on the fifth working day following that on which the application is lodged, *unless special measures are taken in the intervening period*" (emphasis added). Special measures, within the meaning of the words I have put in italics, were adopted in Regulation No 2993/80 which I cited earlier. Article 1 of that regulation provides that, in the case of butter and butter-oil, "advance fixing of the export refund for the products falling within heading 04.03 of the Common Customs Tariff is suspended during the period 20 to 27 November 1980". Regulation No 2044/74 contains, however, yet another "special detailed rule", namely Article 6, which also plays a decisive part in these proceedings. So far as is here material that provision reads as follows: "In the case of exports in connection with an invitation to tender opened in a non-member country . . ., the export certificate shall be valid from

¹ — Translated from the Dutch

its day of issue within the meaning of Article 9 (1) of Regulation (EEC) No 193/75 until the date by which the obligations under the contract in question must be fulfilled."

According to the judgment making the reference to the Court, Interagra argued before the Tribunal Administratif, Paris, that in view of Article 6 of Regulation No 2044/75 the suspension of advance fixing cannot affect its application lodged on 17 November 1980 in connection with an invitation to tender and that in particular Article 6 derogates from Article 3 (3), cited above, of the same regulation. The Fund contested Interagra's interpretation before the Tribunal Administratif, which then submitted the following question to the Court for a preliminary ruling:

"What was the respective scope, on 17 November 1980, of Articles 3 (3) and 6 of Regulation No 2044/75 of the Commission of 25 July? In particular:

- (1) Does Article 6 lay down, in respect of all exports to non-member countries in connection with invitations to tender, a general rule which is nevertheless subject to an exception in the case of the products referred to in Article 3 (3) and which is not capable of preventing the application of the 'special measures' referred to in that paragraph?
- (2) Or, on the contrary, does Article 6 lay down for those transactions special provisions which may be regarded as constituting an exception to the general rules contained in Article 3 (3), so as to prevent the application of the 'special measures' referred to in the latter provision?"

That question therefore seeks to determine, first, the scope of Articles 3 (3) and 6 of Regulation No 2044/75 and secondly their relationship to one another on 17 November 1980.

For a proper understanding of the scope of Article 6 it is also important to know the contents of Article 9 (1) of Regulation No 193/75 of 17 January 1975 (Official Journal 1975, L 25, p. 10) to which, as I have said, Article 6 refers. Article 9 (1) reads as follows: "For the purpose of determining their period of validity, licences or certificates shall be considered to have been issued on the day on which the application for them was lodged, that day being included in the calculation of such period of validity." As the Court will recall, the significance of that reference came under discussion primarily at the hearing.

2. Closer analysis of the points in question

2.1. Provisional conclusion

As is shown more clearly in the written observations of the French Government in particular, the answer to the question summarized in my introductory remarks is *prima facie* simple.

Both of the articles referred to in the question are "special detailed rules" within the meaning of the title of Regulation No 2044/75. Article 3 (3) of that regulation governs the *issue* of export certificates for butter, butter-oil and skimmed-milk powder and Article 6 (as well as Article 4 in cases other than those referred to in Article 6) the *period of validity* of certificates, once they are issued, in connection with an invitation

to tender. That character of Article 6 is particularly clear from Article 9 (1) of Regulation No 193/75, cited above, to which Article 6 refers. Furthermore, the various rules governing export certificates show that as far as their scope is concerned they are, as a rule, related solely to the products referred to therein. For this purpose reference may be made *inter alia* to Article 3 (3) of Regulation No 804/68, Article 2 of Regulation No 2044/75 and Regulation No 445/77. That rule is departed from only in so far as expressly stipulated in the regulations, as, for example, in the case of the period of validity of certificates issued in connection with an invitation to tender to which Annex III to Regulation No 2044/75 applies. In my view it follows that, apart from such special rules for specific types of transactions, the provisions apply, in the framework of the relevant regulations, in principle to *all* types of transactions concerning the products governed by them.

In any case the two provisions at issue relate to two wholly different matters and complement one another. To that extent, in asking the Court which article should be regarded as the general rule and which as an exception to the general rule, the national court has also suggested an alternative which is not quite exact. In its written observations *Interagra* bases its argument on the same inexact formulation of the question. Since Article 6 is concerned only with the period of validity of *issued* export certificates, it cannot, as regards the *actual issue* of those certificates, derogate from Article 3 (3) which deals with that matter.

2.2 Complications

At this point I could end my Opinion, referring for further details to the written

observations of *inter alios* the French Government, were it not for the fact that a closer scrutiny of the relevant provisions and the written and oral observations reveal a number of complications which I ought also to consider.

First, it may be said, and this is shown in particular by the way in which the national court's questions are framed, that the scheme of Regulation No 2044/75 is not a model of clarity and can thus easily lead to misunderstandings. For example, as the French Government also observes in its written observations, the period of validity of an issued certificate is dealt with in general in Article 4 of the regulation whereupon Article 5 goes on to deal with the detailed rules for the actual issue of the certificates. Then comes Article 6 and at first sight it might in fact be thought that, in the scheme followed, it relates to both issue as well as the period of validity so far as exports in connection with an invitation to tender are concerned. As *Interagra* observes in its written observations, Articles 6, 8 and 10 of the regulation *prima facie* form a closed system for all matters relating to export certificates issued in connection with invitations to tender. Nevertheless, I think that for the reasons stated the wording of Article 6, at least as it stood before the adoption of amending Regulation No 3137/80 on 4 December 1980 (Official Journal, 1980, L 329, p. 20), was sufficiently clear to resist such an argument derived from the scheme of the regulation.

The regulation which I have just mentioned, Regulation No 3137/80 of 4 December 1980, and which also figured prominently in the proceedings, positively increased the obscurity of Regulation No 2044/75 by adding to Article 4 (2) of that regulation, and not to Article 6, a third subparagraph, which, like Article 6, relates only to export certificates (fixing the refund in advance) issued in connection with an invitation to tender. The new subparagraph reads as follows: "In the case of an export certificate issued under an invitation to tender within the meaning of Article 6, the fifth working day following the day on which the application is lodged shall be considered as the actual date of issue, for the purposes of the preceding subparagraph, instead of the day of issue referred to in Article 6 (1)."

The preceding subparagraph to which it refers reads as follows: "The term of validity of export certificates issued in accordance with the first subparagraph of Article 3 (3) shall be calculated from the actual date of issue."

If the first subparagraph of Article 3 (3) does in fact also apply in the case of export certificates issued in connection with an invitation to tender, it is not immediately clear what the new third subparagraph of Article 4 (2) actually adds to the second subparagraph of that article. For it is quite clear from that second subparagraph read together with the first subparagraph of Article 3 (3) that export certificates are issued on the fifth day following the day on which the application is lodged. Since, moreover, the relevant amending regulation of 4 December 1980 was made retroactive to the middle of the relevant period of suspension, it is understandable that Interagra took the view that the

amending regulation was partly, if not primarily, intended to incorporate the Commission's interpretation in a regulation as well.

In explaining on page 19 of its written observations that, in the case of invitations to tender, actual issue cannot in fact physically take place on the day stipulated in the first subparagraph of Article 3 (3) and that this necessitated clarification as to the day of issue stipulated in the *amending* regulation, the Commission has thereby created a fresh argument supporting Interagra's proposition that Article 3 (3) is not applicable and indeed *cannot* be applicable to applications lodged in connection with invitations to tender. Since the amending regulation, like Article 4 — which it supplements — of the regulation in question, relates, as I have explained, solely to the period of validity of issued certificates, it cannot in addition, even after its entry into force, disturb that argument, to which the Commission has itself referred.

On closer analysis the second objective of the 18th amending regulation of 4 December 1980, which the Commission describes on page 20 of its observations, also appears to furnish an argument against the Commission's view. By the 17th amending regulation (Regulation No 3015/80, Official Journal, 1980, L 312, p. 24) of 20 November 1980 the period of validity of export certificates applied for in connection with invitations to tender for the supply of butter, butter-oil and skimmed-milk powder was shortened to five months. Article 2 states that the regulation applies to export certificates which are actually issued, within the meaning of the last (i.e. the second) subparagraph of Article 4 (2) of Regulation (EEC) No 2044/75, as from the date of entry into force of the regu-

lation, namely 22 November 1980.¹ Now according to the Commission, the purpose of the 18th amending regulation of 4 December 1980 was to make clear that applications which were still being processed, but for which the five-day waiting period had already expired on the day on which Regulation No 3015/80 entered into force and for which (in the absence of suspensory measures) a right to the issue of the export certificate was therefore acquired under Regulation No 2044/75, were also not affected by the shortening of the period of validity of export certificates. Since Regulation No 3015/80 also applied to butter and butter-oil, was adopted a day after the regulation suspending advance fixing and entered into force two days later, Interagra could definitely conclude in all good faith from that regulation as well that the regulation suspending advance fixing did not apply to applications submitted in connection with an invitation to tender. Admittedly the regulation presupposes, too, that in principle Article 3 (3) of Regulation No 2044/75 is also applicable to applications submitted in connection with invitations to tender, but of course that later clarification cannot in any way alter the legal situation at the time of Interagra's application (made on 17. 11. 1980 and declared to be devoid of purpose by the Fund on 20 November by virtue of Article 3 (3)) and so is not relevant *per se* to the question of law before the Court.

I do not myself believe that the Commission's hectic legislative activity after the regulation suspending advance fixing was adopted or the arguments just discussed put forward by the Commission on pages 19 and 20 of its written observations can alter the conclusions to be drawn from the other arguments advanced, quite rightly, by the Commission, the French Government and also by the Fund on the wording and scope of Article 3 (3) and 6 of Regulation No 2044/75. Therefore, despite the complications caused by the Commission, my provisional view that Article 3 (3) relates to the issue of certificates and Article 6 to the period of validity of certificates once they are issued, is, I believe, still correct. It is true that Interagra could in all good faith obtain the impression from the obscurities and imperfections existing on 17 November 1980 (particularly as regards the wording of Article 3 (3)), which the Commission itself acknowledged in its written observations and its regulation of 4 December 1980, and, after 20 November, from the 17th amending regulation of that date, that Article 3 (3) did not apply to applications made in connection with invitations to tender. But in my view an impression acquired in good faith is not relevant to the question asked by the national court. Nor does Interagra's contextual argument, to the effect that under the scheme of Regulation No 2044/75 Articles 6 to 10 relate solely to applications made in connection with invitations to tender and contain special rules on the issue of such certificates, upset the conclusion that Article 6 clearly only relates to the period of validity of issued certificates. Besides, Interagra's view that *none* of the first five articles of the regulation applies to applications made in connection with invitations to tender appears to me untenable in any case.

¹ — The Dutch text wrongly creates the impression that Article 4 (2) itself regulates the issue of certificates. As I have stated, this is not the case.

The final complication with which I have still to deal concerns the actual regulation suspending advance fixing, Regulation No 2993/80 of 19 November 1980 (Official Journal 1980, L 310, p. 18). The reasons given for the suspension in the recitals in the preamble to that regulation are these: "... the detailed rules governing the grant of the refund for butter and butter-oil must be reviewed; ... this situation could lead to speculative advance fixing of the refund, ... it is necessary to suspend temporarily advance fixing of the refund for the products in question."

On page 6 of its written observations Interagra argues, with reference to what the Commission itself said in Case 217/81, that the sole aim of Article 3 (3) is to counter speculation or the threat of speculation. But according to Interagra, speculation in the case of invitations to tender is not possible because the prices are irrevocably fixed from the day on which the tender is made and the quantities to be delivered are determined entirely by the organization inviting tenders and are specified by each tenderer in his irrevocable tender. That purpose of Article 3 (3) (which is borne out by the passage cited from the preamble to the regulation suspending advance fixing) also shows that Article 3 (3) cannot apply to invitations to tender.

In my opinion that argument is not tenable. In the first place the Commission pointed out at the hearing

that on the date on which the regulation suspending advance fixing was adopted such a quantity of butter had been tendered for pursuant to invitations to tender that if the certificates applied for had been issued the equilibrium of the market in butter would have been jeopardized. In my view a massive response to the possibility created by Regulation No 2943/80 of 13 November 1980 to obtain export refunds on milk and milk products with a view to making the profits arising from such exports can definitely be termed speculation. However, to me it seems more significant that the passage cited links the risk of speculation particularly to the then pending review of the detailed rules governing the grant of the refund in respect of butter and butter-oil, which included the shortening of the period of validity of export certificates issued in connection with invitations to tender discussed above. Speculating about being able to profit from the likely transitional period for applications already lodged can certainly be regarded as speculation. This argument of Interagra should therefore be rejected.

3. Final comment and conclusion

To sum up, then, the complications which I have discussed and which emerged during the proceedings cannot alter my original conclusion which was based on the wording, clear purpose and the scheme of Regulation No 2044/75.

My opinion is therefore that the question submitted to the Court, which I re-framed in my introductory remarks on account of the misunderstanding apparent in the question, should be answered as follows:

Article 3 (3) of Regulation No 2044/75, as in force on 17 November 1980, governs the conditions of issue of export certificates for milk products as defined therein, even where export certificates applied for in connection with invitations to tender are concerned, whereas Article 6 of that regulation is solely concerned with the period of validity of export certificates, once issued, in connection with invitations to tender and supplements Article 3 (3) on this other matter.