ORDER OF THE COURT (First Chamber)
29 January 2004 *

In Case C-381/02,

REFERENCE to the Court under Article 234 EC by the Cour d'appel de Caen (France) for a preliminary ruling in the proceedings pending before that court between

Association comité économique régional agricole fruits et légumes de Bretagne (Cerafel)

and

François Faou,

GAEC de Kerlidou,

on the interpretation of Article 15b(8) of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437), as amended by Council Regulation (EEC) No 3284/83 of 14 November 1983 (OJ 1983 L 325, p. 1),

* Language of the case: French.

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. Rosas, A. La Pergola, S. von Bahr and K. Lenaerts, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by way of a reasoned order in accordance with Article 104(3) of the Rules of Procedure,

the persons referred to in Article 23 of the Statute of the Court of Justice having been invited to submit any observations which they might wish to make in this regard,

makes the following

Order

1 By judgment of 17 October 2002, received at the Court on 23 October 2002, the Cour d'appel de Caen (Court of Appeal, Caen) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 15b(8) of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437), as amended by Council Regulation (EEC) No 3284/83 of 14 November 1983 (OJ 1983 L 325, p. 1), (hereinafter 'Regulation No 1035/72').

2 That question was raised in proceedings between the Association comité économique régional agricole fruits et légumes de Bretagne ('Cerafel') and Mr Faou and GAEC de Kerlidou concerning payment of membership fees allegedly owed by them to the association for the years 1992 and 1993 for organic cauliflower production.

Legal background

Community legislation

3 In the common organisation of the market in fruit and vegetables, Article 15b(1) of Regulation No 1035/72 provides:

'In cases where

— a producers' organisation

or

— an association of producers' organisations having adopted the same rules,

operating in a specific economic area, is considered [for a given product] to be representative of production and producers in that area, the Member State concerned may, at the request of the organisation or association and, during the first three years of application, after consultation with the producers in the area, make the following rules binding on producers established in the area who do not belong to one of the organisations referred to above:

(a) the rules on notifying production referred to in the third indent of Article 13(1)(b);

(b) the rules on production referred to in the second indent of Article 13(1)(b);

(c) the rules on marketing referred to in the second indent of Article 13(1)(b);

(d) for products listed in Annex II, the rules adopted by the organisation or association with regard to market withdrawals...

on condition that these rules have been in force for at least one year.'

4 Cauliflower is among the products referred to in Annex II to Regulation No 1035/72, to which Article 15b(1)(d) thereof refers.

5 Article 15b(8) of Regulation No 1035/72 provides:

'Where paragraph 1 is applied, the Member State concerned may decide that non-member producers are liable to the organisation, or where appropriate the association, for all or part of the membership fees paid by the producer members in so far as these are used to cover:

— administrative costs resulting from application of the scheme referred to in paragraph 1,

— the cost of research, market research and sales promotion measures undertaken by the organisation or association and benefiting all producers in the area.'

6 Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1), which applies inter alia to unprocessed

agricultural crop products, states in Article 3 that it 'shall apply without prejudice to other Community provisions governing the production, preparation, marketing, labelling and inspection of the products specified in Article 1'.

Community legislation

7 Article 15b of Regulation No 1035/72 was implemented in France by, inter alia, the Ministerial Decree of 18 June 1992 extending the rules laid down by the Comité économique régional agricole fruits et légumes de Bretagne (JORF (Official Journal of the French Republic) of 28 June 1992, p. 8469).

8 Article 1 of that decree extends to all cauliflower producers established in certain departments the rules on notifying production and those on production and marketing, together with the obligation to comply with the detailed arrangements for intervention and withdrawal prices laid down by Cerafel.

9 Article 3 of that decree authorises Cerafel to collect membership fees from producers who are not members of producer groups, the amount of those fees being determined subsequently by decree. Those fees are intended, on the one hand, for the administrative management fund established by Cerafel to ensure its administrative operation and, on the other, for the promotion, study and research fund established by Cerafel to cover, where appropriate, general operations benefiting overall production in the region.

10 On that basis, decrees are enacted every year fixing the conditions for collection of the fees which may be claimed by Cerafel from cauliflower producers who are not members of that association.

Main proceedings and the question referred for a preliminary ruling

11 Cerafel has brought proceedings against Mr Faou and the GAEC de Kerlidou, who produce organic cauliflower, seeking payment of fees in respect of their production for 1992 and 1993.

12 By judgment of 9 January 1995, the Tribunal d'instance de Morlaix (Morlaix District Court) (France) dismissed Cerafel's action on the ground that there were no provisions making it mandatory for agricultural producers applying the rules of organic production to pay fees to that association.

13 By judgment of 17 March 1998, the Cour d'appel de Rennes (Rennes Court of Appeal) (France) overturned that judgment and upheld Cerafel's claims inter alia on the ground that under Article 3 of Regulation No 2092/91 the Community provisions governing the production of unprocessed agricultural products apply to organically produced products.

14 By judgment of 22 May 2001, the Cour de cassation (Court of Cassation) (France) quashed the judgment of the Cour d'appel de Rennes for lack of legal basis and referred the case back to the Cour d'appel de Caen. The Cour de

cassation criticised the Cour d'appel de Rennes for not having considered whether the production of vegetables by organic methods was subject to production and marketing rules different from those decreed by Cerafel, whereas in Case C-117/99 *Unilet and Le Bars* [2000] ECR I-6077 the Court of Justice held that where the rules on production and marketing laid down by a producers' organisation for certain products and made mandatory for non-member producers apply only partially, or indeed not at all, to products which are the object of different production and marketing methods, a Member State is entitled, on the basis of Article 15b(8) of Regulation No 1035/72, to exempt some of those producers from the payment of those fees.

15 Against that background, the Cour d'appel de Caen decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Can a Member State, without infringing the principle of non-discrimination, apply Article 15b(8) of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 by making certain production and marketing rules mandatory for producers who are established in the district of a Board and who are not members of it and by making them liable for all or part of the fees paid by member producers, without distinguishing according to whether or not those non-member producers are part of a production sector regulated by law, which, as in the case of the organic production sector, would make the Board's measures irrelevant or of merely occasional and marginal interest for them?'

The question referred for a preliminary ruling

16 Since it considered that the answer to the question referred could be clearly deduced from its case-law, the Court, in accordance with Article 104(3) of its

Rules of Procedure, informed the referring court that it proposed to give its decision by reasoned order and invited the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations they might have on that proposal.

17 Mr Faou, the GAEC de Kerlidou, the French Government and the Commission did not voice any objections to the Court's proposal to give its decision by reasoned order. Cerfael stated that the answer to the question referred for a preliminary ruling, concerning whether certain producers should be required to pay agricultural fees, could not be deduced from *Unilet and Le Bars*, cited above, as that case concerned a total exemption from payment of such fees.

18 On the substance, the GAEC de Kerlidou, the French Government and the Commission agree that *Unilet and Le Bars* should be interpreted as meaning that Article 15b of Regulation No 1035/72 gives the Member States a discretion which must be exercised in accordance with the principle of non-discrimination, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same manner, as between producers.

19 Opinions differ on whether organic producers are in a situation comparable or different to that of other producers. The GAEC de Kerlidou maintains that the situation is different. The French Government submits that organic producers benefit, at least partially, from Cerafel's actions. The Commission considers that the assessment must have regard to both direct and indirect benefits and is to be made by the national judge.

20 The Court notes as a preliminary point that, as stated in Article 3 of Regulation No 2092/91, the provisions concerning organic products apply without prejudice

to other Community provisions governing the production, preparation, marketing, labelling and inspection of the products specified in Article 1 of that regulation. It follows that Regulation No 1035/72 applies to products obtained through organic production.

21 Article 15b of Regulation No 1035/72 confers on Member States an enabling power in the form of an option. Under Article 15b(1), the Member State in question may make certain rules adopted by a producers' organisation or an association of producers' organisations binding on non-member producers. Article 15b(8) provides that, where paragraph (1) is applied, the Member State may decide that non-member producers are liable to the organisation or association for all or part of the membership fees paid by member producers (*Unilet and Le Bars*, cited above, paragraph 19).

22 Therefore, subject to the conditions laid down in Article 15b of Regulation No 1035/72, Member States enjoy a discretion which they may exercise within the limits imposed by Community law (*Unilet and Le Bars*, paragraph 20).

23 Those limits include the principle that all discrimination between Community producers is prohibited, as provided for in Article 40(3) of the EC Treaty (now, after amendment, Article 34(2) EC). According to settled case-law of the Court, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see inter alia Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61, and *Unilet and Le Bars*, paragraph 23).

24 Applying that principle, the Court held in paragraph 28 of *Unilet and Le Bars* that where a Member State has applied Article 15b(1) of that regulation, that is to say where it has made certain rules on production and marketing adopted by a producers' organisation binding on producers established in that organisation's district who do not belong to that organisation, it is entitled to exempt certain non-member producers from the payment of those fees, in respect of a given product, in so far as the goods produced by them are intended for industrial processing rather than for the fresh-product market.

25 The Court stated, in support of its interpretation, that since the situations in issue are objectively different, the fact that they are treated differently does not infringe the general principle of non-discrimination (*Unilet and Le Bars*, paragraph 27).

26 In the main proceedings, the question referred concerns the possibility, under Article 15b(8) of Regulation No 1035/72, for a Member State who has applied Article 15b(1) of that regulation to make certain non-member producers subject to the obligation to pay fees for a product which is indeed of the same type, but which has special characteristics.

27 It follows clearly from the reasons of judgment in *Unilet and Le Bars* that the principle of non-discrimination precludes the power of assessment conferred on the Member States by Article 15b of Regulation No 1035/72 from being used to treat different situations in the same manner.

28 It should be borne in mind that, according to Article 15b(8) of Regulation No 1035/72, the possibility for a Member State to decide that non-member producers are to be liable to a producers' organisation or an association of

producers' organisations for all or part of the fees paid by the member producers relates only to the fees intended to cover certain costs, namely administrative costs resulting from the extension of the rules adopted by that organisation or association and those resulting from research, market research and sales promotion measures undertaken by the organisation or association (*Unilet and Le Bars*, paragraph 24).

29 Accordingly, it is for the national courts to consider, having regard to all of the evidence submitted to them, whether and to what extent certain producers who are not members of a producers' organisation the production and marketing rules of which have been made mandatory for all producers established in its economic district are in a situation objectively different from that of the member producers, particularly in so far as the rules adopted by that organisation do not apply or apply only marginally to the products of those non-members and the actions undertaken by the organisation are, directly or indirectly, of only occasional and marginal interest as regards those products.

30 Accordingly, the question referred must be answered as follows: Article 15b(1) and (8) of Regulation No 1035/72 is to be interpreted in the following manner:

— a Member State which has applied Article 15b(1), by making certain production and marketing rules laid down by a producers' organisation mandatory for producers who are established in the district of that organisation and who are not members of it, may not, without infringing the principle of non-discrimination, apply Article 15b(8) by making them liable for all or part of the fees paid by member producers, without determining whether those non-member producers are in a situation objectively different from that of the member producers;

— non-member producers are in a situation objectively different from that of the member producers when the rules adopted by that organisation do not apply or apply only marginally to their products and the actions undertaken by the organisation are of no benefit or only of marginal benefit to those products;

— it is for the national courts to assess the evidence presented on this point.

Costs

31 The costs incurred by the French Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Cour d'appel de Caen by judgment of 17 October 2002, hereby rules:

Article 15b(1) and (8) of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organisation of the market in fruit and vegetables, as amended by Council Regulation (EEC) No 3284/83 of 14 November 1983, is to be interpreted in the following manner:

— a Member State which has applied Article 15b(1), by making certain production and marketing rules laid down by a producers' organisation mandatory for producers who are established in the district of that organisation and who are not members of it, may not, without infringing the principle of non-discrimination, apply Article 15b(8) by making them liable for all or part of the fees paid by member producers, without determining whether those non-member producers are in a situation objectively different from that of the member producers;

— non-member producers are in a situation objectively different from that of the member producers when the rules adopted by that organisation do not apply or apply only marginally to their products and the actions undertaken by the organisation are of no benefit or only of marginal benefit to those products;

— it is for the national courts to assess the evidence presented on this point.

Luxembourg, 29 January 2004.

R. Grass

Registrar

P. Jann

President of the First Chamber