Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

26 July 2017*

[Text rectified by order of 14 September 2017]

(Reference for a preliminary ruling — Approximation of laws — Regulation (EC) No 882/2004 — Official controls of feed and food — Funding of official controls — Articles 26 and 27 — General taxation — Fees or charges — Charge on retail food outlets)

In Case C-519/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court, Portugal), made by decision of 5 September 2016, received at the Court on 5 October 2016, in the proceedings

Superfoz – Supermercados Lda

v

Fazenda Pública,

THE COURT (Ninth Chamber),

composed of E. Juhász, President of the Chamber, C. Vajda and K. Jürimäe (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Superfoz – Supermercados Lda, by R. China Carvalheira, advogado,

– [As rectified by order of 14 September 2017] the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and A. Gameiro, acting as Agents,

– the European Commission, by P. Němečková, M. Afonso and K. Skelly, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Portuguese.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 26 and 27 of Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1, and corrigendum OJ 2004 L 191, p. 1), as amended by Regulation (EU) No 652/2014 of the European Parliament and of the Council of 15 May 2014 (OJ 2014 L 189, p. 1) ('Regulation No 882/2004'), and Articles 107 and 108 TFEU and the principles of equal treatment, non-discrimination, free competition and freedom to conduct business.

2 The request has been made in proceedings between Superfoz – Supermercados Lda ('Superfoz') and the Fazenda Pública (Tax Authority, Portugal) concerning the payment of a charge intended to fund the costs of carrying out official controls in the area of food safety and the protection of animal and plant health.

Legal context

EU law

Regulation (EC) No 178/2002

3 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1), as amended by Regulation No 652/2014 ('Regulation No 178/2002'), provides the basis for ensuring a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food.

4 As is apparent from Article 1(1), the purpose of that regulation is to establish common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.

Regulation No 882/2004

5 Recitals 11 and 32 of Regulation No 882/2004 state:

'(11) The competent authorities for performing official controls should meet a number of operational criteria so as to ensure their impartiality and effectiveness. They should have a sufficient number of suitably qualified and experienced staff and possess adequate facilities and equipment to carry out their duties properly.

…

(32) Adequate financial resources should be available for organising official controls. Hence, the competent authorities of the Member States should be able to levy the fees or charges to cover the costs incurred through official controls. In the process, the competent authorities of the Member States will be at liberty to establish the fees and charges as flat-rate amounts based on the costs incurred and taking the specific situation of the establishments into account. …'

6 Article 1 of that regulation, entitled ‘Subject matter and scope’, provides in paragraphs (1) and (4):

‘1. This Regulation lays down general rules for the performance of official controls to verify compliance with rules aiming, in particular, at:

(a) preventing, eliminating or reducing to acceptable levels risks to humans and animals, either directly or through the environment;

and

(b) guaranteeing fair practices in feed and food trade and protecting consumer interests, including feed and food labelling and other forms of consumer information.

…

4. The performance of official controls pursuant to this Regulation shall be without prejudice to feed and food business operators’ primary legal responsibility for ensuring feed and food safety, as laid down in [Regulation No 178/2002], and any civil or criminal liability arising from the breach of their obligations.’

7 Article 2(1) of Regulation No 882/2004 defines ‘official control’ as ‘any form of control that the competent authority or the Community performs for the verification of compliance with feed and food law, animal health and animal welfare rules’.

8 Article 3 of that regulation is entitled ‘General obligations with regard to the organisation of official controls’. Article 3(3) provides:

‘Official controls shall be carried out at any of the stages of production, processing and distribution of feed or food and of animals and animal products. They shall include controls on feed and food businesses, on the use of feed and food, on the storage of feed and food, on any process, material, substance, activity or operation including transport applied to feed or food and on live animals, required to achieve the objectives of this Regulation.’

9 Regulation No 882/2004 contains a Chapter VI, entitled ‘Financing of official controls’, which includes, inter alia, Articles 26 and 27 of that Regulation. Article 26 of that regulation, entitled ‘General principle’, states:

‘Member States shall ensure that adequate financial resources are available to provide the necessary staff and other resources for official controls by whatever means considered appropriate, including through general taxation or by establishing fees or charges.’

10 Article 27 of the regulation, entitled ‘Fees or charges’, provides, in paragraphs 1 to 4 and 10:

‘1. Member States may collect fees or charges to cover the costs occasioned by official controls.

2. However, as regards the activities referred to in Annex IV, section A, and Annex V, section A, Member States shall ensure the collection of a fee.

3. Without prejudice to paragraphs 4 and 6, fees collected as regards the specific activities mentioned in Annex IV, section A and Annex V, section A shall not be lower than the minimum rates specified in Annex IV, section B and Annex V, section B …

…

4. Fees collected for the purposes of official controls in accordance with paragraph 1 or 2:

(a) shall not be higher than the costs borne by the responsible competent authorities in relation to the items listed in Annex VI;

and

(b) may be fixed at a flat-rate on the basis of the costs borne by the competent authorities over a given period of time or, where applicable, at the amounts fixed in Annex IV, section B or in Annex V, section B.

…

10. Without prejudice to the costs deriving from the expenses referred to in Article 28, Member States shall not collect any fees other than those referred to in this Article for the implementation of this Regulation.'

Portuguese law

11 The 'More' Food Safety Charge (Taxa de Segurança Alimentar Mais, 'TSAM') was introduced by Decree-Law No 119/2012 of 15 June 2012.

12 That decree-law states, in its preamble, that EU legislation enshrines the 'obligation to finance the costs of carrying out official controls by the Member States and to confer on them the possibility of obtaining adequate financial resources through general taxation or the introduction of special charges payable by operators' and that '[u]nder those rules, various charges intended to provide financial support for verification and control measures have already been introduced, with reference to costs and expenses relating to staff, namely remuneration, facilities, tools, equipment, training, missions and related costs, including the costs of taking and sending samples and of laboratory analyses.'

13 Article 9 of that decree-law provides:

'1. In consideration for ensuring food safety and quality, retail outlets for food products of animal and vegetable origin, whether fresh or frozen, processed or raw, without packaging or pre-packed, shall be liable to pay an annual charge, the amount of which shall be between EUR 5 and EUR 8 per square meter of sales area of the outlet, to be determined by order of the government ministers responsible for finance and agriculture.

2. Outlets with a sales area of less than 2 000 m^2 or belonging to microenterprises shall be exempt from payment of the charge provided for in the preceding paragraph where (a) they do not belong to an undertaking which uses one or more ensigns and that has, at national level, a cumulative sales area of 6 000 m^2 or more, and (b) they are not part of a group that has, at national level, a cumulative sales area of 6 000 m^2 or more.

3. For the purposes of this legislation, "retail outlet" means the place where a retail food business is carried on, including mixed retail outlets, as defined in Article 4(1) of Decree-Law No 21/2009 of 19 January [2009].'

14 Order No 215/2012 of 17 July 2012 regulates TSAM. Article 3(3)(b) of that order provides that the exemptions from payment of that charge provided for by national law are not applicable to outlets which are 'part of a group that has, at national level, a cumulative sales area of 6 000 m^2 or more'. Article 3(5) of that order states that 'for the purposes of Article 3(3)(b), a "group" means the group of

undertakings that, despite having distinct legal personality, have a relationship of interdependence or subordination arising from the use of the same ensign or rights or powers, in accordance with Article 4(o) of Decree-Law No 21/2009 of 19 January 2009.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Superfoz is a company engaged in the commercial operation of supermarkets, the distribution of food and non-food goods, as well as the operation of service stations and the management of shopping centres.

16 Superfoz uses the ensign 'Intermarché'. The decision to refer states, however, that that company is a legal entity which is distinct from, on the one hand, its franchiser, ITMI Portugal — Sociedade de Desenvolvimento e Investimento SA and, on the other, the other franchised companies which use the same ensign. It is also stated that that franchisor does not own a share in the capital of Superfoz conferring on it a power of management, direction or administration.

17 By letter of 1 July 2014, the Direção Geral de Alimentação e Veterinária (Food and Veterinary Office, Portugal) informed Superfoz that it was liable to pay TSAM, for 2014, in the amount of EUR 10274.25. That Office stated that, in accordance with the provisions of national law, that amount was calculated by applying the charge, set at EUR 7 per square metre, to the sales area of Superfoz's outlet, namely 1467.75 square meters.

18 Superfoz contests, before the referring court, the legality of the opinions which led to it being liable for TSAM.

19 As regards TSAM, that court notes that that charge comes within a policy to protect the food chain and consumer health, based on the principle of the accountability of the economic actors involved in food safety and quality. That charge is intended to finance the 'More' Health and Food Safety Fund (Fundo Sanitário and de Segurança Alimentar Mais), established by Decree Law No 119/2012. That fund, it is claimed, is not competent to carry out any controls other than those set out in Regulation No 882/2004.

20 It provides, moreover, that TSAM is an annual charge paid in consideration for ensuring food safety and quality. That charge is levied on the owners of retail outlets for food products of animal and vegetable origin, and is calculated by applying a unit value of between EUR 5 and EUR 8 per square metre of sales area of the outlet.

21 The referring court points out that national law provides, however, a derogation from payment of that charge for outlets with a sales area of less than 2 000 m^2 or which belong to microenterprises, on condition that those outlets do not belong to an undertaking which uses one or more ensigns and that has, at national level, a cumulative sales area of 6 000 m^2 or more and that they are not part of a group that has, at national level, a cumulative sales area of 6 000 m^2 or more. In that regard, the Tribunal Constitucional (Constitutional Court, Portugal) held that that derogation was not contrary to the constitutional concept of equality.

22 The referring court asks whether TSAM complies with the provisions of Regulation No 882/2004 and with the principles of EU law and, in particular, with the principles of equal treatment, non-discrimination and free competition.

23 In the first place, that court asks whether that charge complies with Article 27(10) of Regulation No 882/2004 in so far as, first, the costs associated with the controls provided for by that regulation are covered by other charges and, secondly, TSAM covers retail food outlets only, which are already subject to the responsibilities and duties set out in the provisions of Regulation No 178/2002 and Regulation No 882/2004.

24 In the second place, that court has doubts as to the compatibility of TSAM with the principle of equal treatment, since that charge applies to certain retail food outlets only.

25 In the third place, that court considers that the principle of equivalence provided for in Regulation No 882/2004 requires that a charge, such as TSAM, should be used to fund the administrative services caused by, or for the benefit of, the chargeable persons, which, it is claimed, is not the case with regard to TSAM. The operative event for TSAM, it is claimed, relates to ownership of retail food outlets which are not exempt.

26 In the fourth place, the referring court has doubts as to whether TSAM infringes the freedom to conduct business and the corresponding duty of economic neutrality incumbent on Member States, to the extent that that charge may distort competition in the sector of food retailing, inter alia, by fiscally favouring undertakings that are not subject to that charge.

27 In those circumstances, the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court, Portugal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Can Article 27(10) of Regulation (EC) No 882/2004, or any other rule of law or general principle of the Union that the Court deems applicable, be interpreted as meaning that it precludes a national provision that establishes a charge to finance official controls related to food safety, to be paid by the owners of food or mixed retail outlets only, where that charge does not correspond to any specific official control that has been caused by, or that is for the benefit of, those chargeable persons?

(2) Would the answer be different if, instead of a charge, a financial contribution was established in favour of a public body, to be collected from the same chargeable persons, intended to cover the costs of food quality controls, although with the sole aim of extending the responsibility for financing such controls to all operators in the food chain?

(3) Does the exemption of certain economic operators from [TSAM], which is levied on certain food or mixed retail outlets only (namely large retail food undertakings) and which is intended to finance the costs of carrying out official controls in the area of food safety, animal protection and animal health, plant protection and plant health, constitute State aid incompatible with the internal market, in so far as it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods within the meaning of Article 107(1) of the TFEU or, at least, does that charge exemption constitute an integral part of a State aid that is subject to notification to the [European] Commission within the meaning of Article 108(3) of the TFEU?

(4) Do the principles of EU law, notably the principles of equality, non-discrimination, competition (including the prohibition of reverse discrimination) and freedom to conduct business preclude a national provision that:
   (a) imposes the obligation to pay the charge on large retail food undertakings only?
   (b) excludes from the scope of the charge outlets or microenterprises with a sales area of less than 2 000 m^2 and which are not integrated in a group, or which do not belong to an undertaking that uses one or more ensigns and which has, at national level, a cumulative sales area of 6 000 m^2 or more?’

Consideration of the questions referred

The first and second questions

28 It should be recalled at the outset that the Court has consistently held that the fact that a question submitted by the referring court refers only to certain provisions of EU law does not mean that the Court may not provide it with all the guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its questions. It is, in that regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the decision to refer, the points of EU law which require interpretation in view of the subject matter of the dispute (see, inter alia, judgment of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173, paragraph 39 and the case-law cited).

29 In those circumstances, it must be understood that, by its first and second questions, which it is appropriate to consider together, the referring court essentially asks whether Articles 26 and 27 of Regulation No 882/2004 must be interpreted as precluding the imposition of a charge, such as that at issue in the main proceedings, on retail food outlets only, where the revenue from that charge is not used specifically to fund official controls that have been caused by, or that are for the benefit of, those chargeable persons.

30 Article 3(3) of Regulation No 882/2004 provides that those official controls are to be carried out at any of the stages of production, processing and distribution of the feed or food concerned. They therefore include, inter alia, controls on feed and food businesses, required to achieve the objectives of that regulation.

31 It follows from recitals 11 and 32 of that regulation that the competent authorities of the Member States must have a sufficient number of suitably qualified and experienced staff and appropriate facilities and equipment to ensure that they can discharge their duties correctly. To that end, Member States must be able to avail of adequate financial resources for the organisation of controls.

32 Thus, under Article 26 of Regulation No 882/2004, Member States shall ensure that adequate financial resources are available to provide the necessary staff and other resources for official controls by whatever means considered appropriate, including through general taxation or by establishing fees or charges.

33 Article 27 of that regulation specifically concerns fees and charges. Under paragraph 1 thereof, Member States may collect fees or charges solely in order to 'cover the costs occasioned by official controls'. Thus, the fees or charges referred to in that article may be intended to cover only the costs which the Member States actually incur in performing controls in food establishments (see, to that effect, judgment of 17 March 2016, *Kødbranchens Fællesråd*, C-112/15, EU:C:2016:185, paragraph 39).

34 In accordance with the wording of Article 26 of Regulation No 882/2004, read in the light of recital 32 of that regulation, Member States have a broad discretion to make available, in particular in the context of their general taxation, adequate financial resources to provide the necessary staff and other resources for official controls. On the other hand, that discretion is governed by the harmonised rules laid down in Article 27 of Regulation No 882/2004, where Member States decide to impose the fees or charges referred to in that article on operators (see, to that effect, judgment of 17 March 2016, *Kødbranchens Fællesråd*, C-112/15, EU:C:2016:185, paragraphs 31 and 32).

35 As regards the classification of TSAM, in the light of Articles 26 and 27 of Regulation No 882/2004, it is clear from the evidence provided to the Court that, subject to the findings of the referring court, that charge was not established as a fee or charge in the context of the application of Article 27 of that Regulation, but falls within the scope of other financial resources which Member States are free to make available pursuant to Article 26 of that regulation.

36 As the Commission pointed out in its observations, the operative event for that charge is ownership of a retail outlet with a certain sales area and not, as would be the operative event for a fee or charge within the meaning of Article 27 of Regulation No 882/2004, the performance of official controls which are specifically carried out at the food retail outlets which are liable for that charge.

37 In that regard, Article 9 of Decree-Law No 119/2012 provides that TSAM is a 'consideration for ensuring food safety and quality'. It is apparent, moreover, from the evidence provided by the referring court that the purpose of that charge is to impose on retail food outlets the general costs associated with the organisation of official controls, in so far as those outlets benefit from the controls carried out upstream in the food production chain.

38 Furthermore, the revenue from TSAM is intended to finance the 'More' Health and Food Safety Fund, which encompasses all the revenue intended to fund the costs of carrying out official controls on food safety. There is therefore no direct connection between that charge and the costs which it is intended to cover.

39 In the light of the foregoing, Regulation No 882/2004 does not preclude a Member State from establishing, in accordance with Article 26 of that regulation, a charge, such as TSAM, to cover general costs associated with the organisation of official controls and not the costs actually incurred as a result of official controls carried in respect of, or for the benefit of, the retail food outlets that are liable to pay that charge.

40 That conclusion is not called into question by the argument that food business operators are subject to self-monitoring obligations under Regulation No 178/2002.

41 Article 1(4) of Regulation No 882/2004 provides that the performance of official controls pursuant to that regulation is to be without prejudice to feed and food business operators' primary legal responsibility for ensuring feed and food safety, as laid down in Regulation (EC) No 178/2002, and any civil or criminal liability arising from the breach of that operator's obligations.

42 It follows that the EU legislature considered that, in addition to the controls resulting from the responsibility of the operators, official controls are necessary in order to achieve the objectives of Regulation No 882/2004.

43 In the light of all of the foregoing considerations, the answer to the first and second questions referred is that Articles 26 and 27 of Regulation No 882/2004 must be interpreted as not precluding the imposition of a charge, such as that at issue in the main proceedings, on retail food outlets only, where the revenue from that charge is not used specifically to fund official controls that have been caused by, or that are for the benefit of, those chargeable persons.

The third and fourth questions

44 According to the settled case-law of the Court, in the context of the cooperation between the Court of Justice and national courts, instituted by Article 267 TFEU, the need to provide an interpretation of EU law which can be of use to the referring court makes it necessary for that court to define the factual and legislative context of the questions referred or, at the very least, to explain the factual circumstances on which those questions are based. The Court of Justice is empowered to rule on the

interpretation or validity of EU provisions only on the basis of the facts which the national court puts before it (order of 4 May 2017, *Svobodová*, C-653/16, not published, EU:C:2017:371, paragraph 18 and the case-law cited).

45 Those requirements in regard to the content of a request for a preliminary ruling appear expressly in Article 94 of the Rules of Procedure of the Court, according to which a request for a preliminary ruling contains, inter alia, 'a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based' and 'a statement of the reasons which prompted the referring court to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the case before the referring court'.

46 In the first place, by its third question, the referring court asks essentially whether Article 107(1) TFEU and Article 108(3) TFEU must be interpreted as precluding the collection of a charge, such as TSAM, in respect of which small retail food outlets are exempt.

47 Even assuming that a tax exemption for certain undertakings constitutes an aid measure within the meaning of Article 107(1) TFEU, the possible unlawfulness of the aid is not such as to affect the legality of the charge in respect of which those undertakings are exempt. In that regard, the Court has held that businesses liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax (see, to that effect, judgment of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraphs 42 and 43 and the case-law cited).

48 Furthermore, the decision to refer contains no information from which it could be inferred that, despite it being impossible for Superfoz to draw any benefit from a possible breach of Articles 107 and 108(3) TFEU, the answer to the third question would nonetheless be necessary for the referring court in order for it to resolve the dispute before it.

49 In those circumstances, it does not appear that the third question is relevant to the subject matter of the dispute in the main proceedings.

50 In the second place, the fourth question concerns the principles of equal treatment, non-discrimination, free competition and freedom to conduct business.

51 The referring court merely points out that there could be doubt as to whether TSAM complies with those principles without providing the reasons on which it bases such doubts. In particular, the decision to refer does not provide any information that would allow an assessment as to whether operators who are liable for TSAM and those who are exempt from that charge are in a comparable situation. Furthermore, any difference in treatment may be justified by appropriate reasons recognised in the case-law of the Court, but, in that regard also, the decision to refer contains no information. It must therefore be held that the decision to refer clearly does not meet the requirements set out in paragraph 45 of the present judgment.

52 Therefore, the third and fourth questions are inadmissible.

Costs

53 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Articles 26 and 27 of Regulation No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, as amended by Regulation (EU) No 652/2014 of the European Parliament and of the Council of 15 May 2014, must be interpreted as not precluding the imposition of a charge, such as that at issue in the main proceedings, on retail food outlets only, where the revenue from that charge is not used specifically to finance official controls that have been caused by, or that are for the benefit of, those chargeable persons.

[Signatures]