JUDGMENT OF THE COURT (Sixth Chamber)
27 June 1990 *

In Case C-118/89

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht (Administrative Court) Frankfurt am Main (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Firma Otto Lingenfelser, having its registered office at Achern-Großweier (Federal Republic of Germany),

and

Federal Republic of Germany, represented by the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry),

on the validity of the third subparagraph of Article 9(2) of Commission Regulation (EEC) No 2499/82 of 15 September 1982 laying down provisions concerning preventive distillation for the 1982/83 wine year (Official Journal 1982, L 267, p. 16),

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, F. A. Schockweiler, G. F. Mancini, T. F. O'Higgins and M. Diez de Velasco, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Principal Administrator

after considering the written observations submitted on behalf of

Firma Otto Lingenfelser, by Eugen Hezel and Rolf Hezel, Rechtsanwälte, Bühl (Baden);

* Language of the case: German.

the Bundesamt für Ernährung und Forstwirtschaft, by Ursula Holzhauser, Rechtsreferentin, acting as Agent;

the Commission, by Dierk Booss, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Firma Otto Lingenfelser, represented by Frank Montag, Rechtsanwalt, Cologne; of the Bundesamt für Ernährung und Forstwirtschaft, represented by Hannelore Lausch, Adviser to the Government; and of the Commission, at the hearing on 8 February 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 27 March 1990,

gives the following

Judgment

1 By an order of 16 March 1989, which was received at the Court on 10 April 1989, the Verwaltungsgericht (Administrative Court) Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the validity of the third subparagraph of Article 9(2) of Commission Regulation (EEC) No 2499/82 of 15 September 1982 laying down provisions concerning preventive distillation for the 1982/83 wine year (Official Journal 1982, L 267, p. 16).

2 That question was raised in proceedings between Firma Otto Lingenfelser (hereinafter referred to as 'Lingenfelser') and the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry), hereinafter referred to as 'the Federal Office', which is the German intervention agency for the purposes of the common agricultural policy, in respect of a request for repayment of aid granted for the preventive distillation of wine.

3 Article 9(1) of the aforementioned Regulation No 2499/82, adopted pursuant to Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine (Official Journal 1979, L 54, p. 1), as amended by Council Regulation (EEC) No 2144/82 of 27 July 1982 (Official Journal 1982, L 227, p. 1) provides that the minimum buying-in price fixed for each type of wine must be paid by the distiller to the producer not later than 90 days after the entry of the wine into the distillery.

4 Under the third subparagraph of Article 9(2) of that regulation, the distiller is required to supply the intervention agency with proof that he has paid the minimum buying-in price within the 90-day period; if such proof is not submitted within 120 days of the date of submission of the proof of distillation, the amounts paid are to be recovered by the intervention agency.

5 The Federal Office established that Lingenfelser had exceeded the 90-day period in respect of payment for three consignments of wine and it accordingly requested repayment in full of the aid which it had granted.

6 An administrative appeal against this decision of the Federal Office was brought before the Verwaltungsgericht Frankfurt am Main, which decided to stay the proceedings until the Court had given a preliminary ruling on the following question:

'Is the third subparagraph of Article 9(2) of Commission Regulation (EEC) No 2499/82 valid in so far as it provides that the aid is to be recovered if the distiller has not paid the minimum buying-in price specified therein to the producer within 90 days?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 Lingenfelser and the Federal Office, in their written observations submitted to the Court, essentially cast doubt on the validity of the third subparagraph of Article 9(2) of Regulation No 2499/82 on the ground that the total loss of aid in the case where the period for payment has been exceeded is contrary to the principle of proportionality. Lingenfelser, at the hearing, also stressed that the introduction of a 90-day period for payment of the buying-in price constitutes a rule which is not covered by the enabling powers granted by Regulation No 337/79, cited above.

9 In examining whether the fixing of a time-limit within which the distiller must pay the buying-in price to the producer is covered by the enabling powers conferred on the Commission by the Council under Regulation No 337/79, it is necessary to bear in mind that the latter regulation is designed, according to the third recital in its preamble, to stabilize markets in the wine sector and ensure a fair standard of living for the agricultural community concerned. With this aim in mind, the ninth recital in the preamble to the regulation states that provision is to be made under certain circumstances for preventive distillation at a buying-in price which is not such as to encourage production of wine of insufficient quality.

10 Paragraph (5) of Article 11 of that regulation, which lays down the conditions governing preventive distillation, provides that the decision to carry out distillation and the detailed rules governing the scheme are to be determined by the 'management committee' procedure.

11 Since the establishment by Article 9(1) of Regulation No 2499/82, adopted pursuant to Regulation No 337/79 and in particular to Articles 11(5) and 65 thereof, of a period within which the distiller is required to pay the minimum buying-in price to the producer is designed, as becomes clear from the 11th recital in the preamble to Regulation No 2499/82, to ensure that the producer can obtain a profit comparable to that which he would have obtained from a commercial sale, it constitutes a rule governing the scheme in question and, as such, is covered by the enabling powers granted by Regulation No 337/79.

12 With regard to the question whether the provision which is the subject of the question referred to the Court for a preliminary ruling complies with the principle of proportionality, it is necessary to consider, as the Court has consistently held,

whether the penalty exceeds what is appropriate and necessary to attain the objective pursued by the rules which have been breached (judgments of 20 February 1979 in Case 122/78 *Buitoni* v *Forma* [1979] ECR 677 and of 17 May 1984 in Case 15/83 *Denkavit* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171). More particularly, it is necessary to ascertain whether the means which that provision applies to achieve its aim correspond to the importance of that aim and whether they are necessary in order to achieve it (judgments of 23 February 1983 in Case 66/82 *Fromançais* v *Forma* [1983] ECR 395 and of 1 October 1985 in Case 125/83 *OBEA* v *Corman* [1985] ECR 3039).

13 It must be borne in mind, in this regard, that the purpose of prescribing a period for payment by the distiller of the buying-in price to the producer is, as outlined in the 11th recital in the preamble to Regulation No 2499/82, to ensure that the minimum price guaranteed to the producer is paid to him, as a general rule, within a period which will enable him to obtain a profit comparable to that which he would have obtained from a commercial sale. The fixing of a period within which the distiller must pay the buying-in price to the producer is therefore designed to encourage the latter to offer for distillation wines which may adversely affect the high qualitative level of wines placed on the market.

14 In those circumstances, any period by which the time-limit for payment is exceeded, which does not result in the transactions being carried out under conditions which are appreciably different from those of normal commercial transactions, to the extent of discouraging the producer from offering his wine for distillation, cannot be regarded as jeopardizing the very objective of the distillation scheme. At the hearing, moreover, it emerged that in normal commercial transactions in the Federal Republic of Germany periods for payment are often longer than that laid down in Article 9(1) of Regulation No 2499/82. A provision which penalizes with a total loss of aid any period, no matter how brief, by which the time-limit is exceeded must, therefore, be regarded as disproportionate to the objective pursued by the introduction of the time-limit.

15 It follows from the foregoing that the reply to the question put to the Court by the Verwaltungsgericht Frankfurt am Main should be that the third subparagraph of Article 9(2) of Regulation No 2499/82 is invalid in so far as it penalizes with total loss of aid any failure to meet the time-limit within which the distiller must pay the minimum buying-in price to the producer.

Costs

16 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Verwaltungsgericht Frankfurt am Main, by order of 16 March 1989, hereby rules:

The third subparagraph of Article 9(2) of Commission Regulation (EEC) No 2499/82 of 15 September 1982 laying down provisions concerning preventive distillation for the 1982/83 wine year is invalid in so far as it penalizes with total loss of aid any failure to meet the time-limit within which the distiller must pay the minimum buying-in price to the producer.

Kakouris Schockweiler

Mancini O'Higgins Díez de Velasco

Delivered in open court in Luxembourg on 27 June 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber