Case 275/84

Coöperative Melkproducentenbedrijven 'Noord-Nederland' BA (Frico)
v
Produktschap voor Zuivel

(reference for a preliminary ruling
from the College van Beroep voor het Bedrijfsleven)

'Grant of monetary compensatory amounts for butter supplied for sale during "butter-buying cruises"'

Summary

Agriculture — Monetary compensatory amounts — Grant — Butter supplied for sale during cruises at sea — Not eligible

(Commission Regulations No 2730/79, Art. 5 and No 1371/81, Arts 1 and 2)

Articles 1 and 2 of Commission Regulation No 1371/81 laying down detailed rules for the administrative application of monetary compensatory amounts and Article 5 of Commission Regulation No 2730/79 laying down common detailed rules for the application of the system of export refunds on agricultural products must be interpreted to mean that no monetary compensatory amount may be granted in respect of butter supplied for sale to passengers during short cruises at sea which start from, and return to, one and the same Member State.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 10 October 1985 *

Mr President,
Members of the Court,

1. The Coöperatieve Melkproducenten-bedrijven 'Noord-Nederland', trading under the name of 'Frico' (I shall refer to it as such) was requested early in 1983 to supply butter to an entrepreneur organizing 'Butter-fahrten' (butter-buying cruises) — that is to say, as the Netherlands court explains,

* Translated from the French.

'Short excursions by ship lasting only a few hours which start from and return to harbours of Member States of the European Community, in this case the Netherlands. During the trips the vessels sail for a short time outside territorial waters.'

The principal attraction of the cruises is that passengers can purchase a number of goods free of customs and excise duties and other charges.

Before accepting the offer, Frico sought assurances from the Netherlands agency in charge of the common organization of the market in milk and milk products — the Produktschap voor Zuivel [Dairy Board] — that monetary compensatory amounts would be paid to it in respect of the butter it supplied. The Produktschap gave an affirmative reply and duly paid monetary compensatory amounts during the first four months of 1983.

The Commission then informed the Netherlands Government that products sold on butter-buying cruises did not qualify for the grant of monetary compensatory amounts (which I shall refer to as 'MCAs'), and consequently the Produktschap, on instructions from the Ministry, thereafter ceased paying them to Frico and refused Frico's claim to be paid at least in respect of supplies already delivered.

The Produktschap's decision was challenged before the College van Beroep voor het Bedrijfsleven [Administrative Court of last instance in matters of trade and industry] by Frico, which alleged in particular that the decision was inconsistent with Community legislation. The College van Beroep decided to stay the proceedings and to refer the following question to the Court of Justice:

'Must Commission Regulation No 2730/79, and in particular Article 17 thereof, and Commission Regulation No 1371/81, read together with each other and with any other Community provisions, be interpreted as meaning that no monetary compensatory amounts may be granted in respect of the export of butter that is sold to passengers during "butter-buying cruises", as defined more precisely in the present judgment?'

2. For the purposes of this case, it should be added that Article 17 of Commission Regulation No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal L 317, p. 1) provides as follows:

'No refund shall be granted on products sold or distributed on board ship which are liable to be reintroduced into the Community free of duties under Regulation (EEC) No 1818/75.'

Regulation No 1818/75 grants relief from payment of compensatory amounts for agricultural products contained in the personal baggage of persons travelling from a Member State.

There is no provision equivalent to Article 17 in the legislation on MCAs — that is, in the basic regulation, Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257), and the implementing regulation, Commission Regulation (EEC) No 1371/81 of 19 May 1981 (Official Journal L 138, p. 1).

3. In Frico's view the prohibition contained in Article 17 of Regulation No 2730/79 is *constitutive* and not *declaratory* in character, since it was necessary to adopt an express provision to put a stop to the deflection of trade due to the reintroduction into the Community of tax-free products on which refunds had previously been granted.

Frico concludes that it is not possible to extend to MCAs, by analogy, a prohibition confined to refunds, and adds that such an extension would be in breach of the principle of legitimate expectation inasmuch as traders would have acted in good faith and in compliance with the explicit provisions of EEC legislation on MCAs.

4. The *Netherlands Government* admits that granting MCAs on the exportation of products which are to be reintroduced into the Community is contrary to the purpose of the compensatory system. Nevertheless, it takes the view that since payment of MCAs on exportation is compulsory under Article 2 of Regulation No 1371/81 and there is no condition in the regulation as to the destination of the goods exported (see Article 1 (2) (c)), the *powers* of the national authorities are *restricted.* In other words, it would require an *express* provision to restrain them from paying MCAs for goods sold for butter-buying cruises.

Lastly, Article 17 cannot be regarded as a merely declaratory measure because the Commission has, in the past, temporarily suspended its application (see Regulation No 2891/80 of 7 November 1980, Official Journal L 299, p. 10). According to the Netherlands Government it would have been advisable to insert into Regulation No 1371/81 a provision similar to Article 17.

5. Neither the arguments set forth by Frico nor those of the Netherlands Government carry conviction. Rather, it is the main arguments put forward by the Commission in its written observations which should be upheld.

The reason is that neither the purpose of the MCA system nor the actual terms of the legislation laying down its conditions of application justify their being granted for deliveries whose *'circular'* nature is undeniable, since the products, although supplied from a Member State, are intended to be reintroduced into it.

The payment of MCAs would run counter to the very purpose of the system set up by the basic regulation, Regulation No 974/71; under the last paragraph of Article 1 (2) thereof, payment of them is conditional on the presence of 'disturbances in trade in agricultural products' *caused by* currency fluctuations in the various Member States (Case 281/82 *Unifrex* [1984] ECR 1969, at paragraph 22 of the Decision). However, in the case of products dispatched from a Member State in order to be reintroduced into it, such deliveries have no effect on intra-Community trade.

As regards the *actual terms* of the implementing regulation, No 1371/81, it is quite unambiguous. Article 1 (2) (c) defines the term 'export', in respect of which monetary compensatory amounts may be granted, as:

'... the dispatch [of agricultural products] ...

— from one Member State to another; and

— from a Member State to places outside the territory of the Community.'

It is obvious that the dispatch of products intended to be reintroduced into the country of departure cannot be described as

'export'. Such 'export' has an artificial character which must preclude payment of MCAs.

Admittedly, Article 1 (2) (c) further provides that the supplies referred to in Article 5 of Regulation No 2730/79 shall also be treated as exports. This refers in particular to supplies for

'victualling within the Community:

— seagoing vessels . . . ' (Article 5 (1) (a)).

None the less, as is made clear in the seventh recital of the preamble to Regulation No 2730/79, Article 5 (1) (a) relates only to 'products taken on board ship . . . for consumption on board'. It cannot therefore affect supplies of products intended for sale but not for consumption during the voyage.

6. In the light of those considerations the *a contrario* argument derived from Article 17 of Regulation No 2730/79 seems to be irrelevant. It is not possible to override the purpose and the actual terms of the legislation governing MCAs by pleading the silence of that legislation on the supplies in question — in other words, by sheer formalism to infer meaning from the absence of any express provision equivalent to Article 17.

Moreover, leaving aside their distinctive features (see Case 38/79 *Nordmark*, [1980] ECR 643, at paragraphs 7 to 9 of the Decision), it should be noted that MCAs and refunds share a common logic. As Mr Advocate General Capotorti observed in *Nordmark*, there is a 'basic common feature' shared by MCAs and refunds, namely that, by removing the obstacles due to price differences on the various markets, they ensure the free movement of agricultural products between Member States and between the Community and non-member countries.

Thus, for every product under consideration, those mechanisms are designed to compensate for the divergence between the market price in the exporting country and that in the country to which the product is actually exported — that is to say, the country in which it is marketed. The Court has confirmed that interpretation in the case of 'accession' MCAs (see Case 250/80 *Töpfer* [1981] ECR 2465, at paragraphs 14 to 16 of the Decision). It is a condition which is expressly attached to refunds by Article 10 of Regulation No 2730/79, under which the payment of the refund is subject not only to the condition that the product shall have left the geographical territory of the Community but also, where appropriate, to evidence that it was indeed placed on the market in the non-member country of importation. In the same spirit Article 16 (2) of Regulation No 1371/81 specifies that the grant of MCAs is subject *inter alia* to proof

'that the products have:

(a) left the territory of the exporting Member State, ...'.

The general conclusion to be drawn is that MCAs, just like export refunds and exemptions from duty, may not be granted in respect of agricultural products purchased in the course of a 'butter-buying cruise' — that is, a short sea-trip involving no

disembarkation or only a token one -, when neither exporters nor passengers can show evidence of having purchased products actually marketed in another Member State or outside the territory of the Community (see in particular Case 325/82 *Federal Republic of Germany* [1984] ECR 777, at paragraphs 25 to 27 of the Decision.

7. In conclusion I propose that the Court should reply to the College van Beroep as follows:

Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States, and Commission Regulation (EEC) No 1371/81 of 19 May 1981 laying down detailed rules for the administrative application of monetary compensatory amounts, should be interpreted as meaning that no monetary compensatory amount may be granted for the supply of agricultural products sold to passengers during short cruises which start from and return to harbours of one and the same Member State.