JUDGMENT OF THE COURT (Fifth Chamber)
8 April 1992 *

In Case C-256/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by Pretore di Perugia (Magistrate, Perugia) (Italy) for a preliminary ruling in the proceedings pending before that court between

Mignini SpA

and

Azienda di Stato per gli Interventi sul Mercato Agricolo (AIMA),

on the validity of Article 2(1)(b) of Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special provisions for soya beans (Official Journal 1989 L 245, p. 8), as supplemented by Commission Regulation (EEC) No 150/90 of 19 January 1990 (Official Journal 1990 L 18, p. 10),

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of the Chamber, F. Grévisse, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— Mignini SpA, by Emilio Cappelli, of the Rome Bar,

— the Italian Government, by Professor Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato,

— the Commission of the European Communities, by its Legal Adviser, Eugenio de March, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mignini SpA, the Italian Government, represented by Professor Luigi Ferrari Bravo, assisted by Marcello Conti, Avvocato dello Stato, and the Commission at the hearing on 24 January 1992,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1992,

gives the following

Judgment

1 By order of 6 August 1990, lodged at the Court on 22 August 1990, the Pretura Circondariale di Perugia (District Magistrate's Court, Perugia, Italy) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the validity of Article 2(1)(b) of Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans (Official Journal 1989 L 245, p. 8), as amended by Commission Regulation (EEC) No 150/90 of 19 January 1990 (Official Journal 1990 L 18, p. 10, hereinafter referred to as 'the contested provisions').

2 That question was raised in the course of proceedings between Mignini SpA (hereinafter referred to as 'Mignini'), a manufacturer of animal feedingstuffs based on soya beans, and the Azienda di Stato per gli Interventi sul Mercato Agricolo (the Italian intervention agency, hereinafter referred to as 'AIMA') concerning the refusal to pay Mignini the aid payable to a 'first purchaser' as provided for in Article 2(2) of Council Regulation (EEC) No 1491/85 of 23 May 1985 laying down special measures in respect of soya beans (Official Journal 1985 L 151, p. 15), last amended by Council Regulation (EEC) No 2217/88 of 19 July 1988 (Official Journal 1988 L 197, p. 11).

3 AIMA refused to pay the aid for which Mignini applied in respect of the purchase of a quantity of 3 770 kilograms of soya beans on the ground that those beans had not been identified on the premises of the production establishment, as required by the contested provisions.

4 Mignini then brought proceedings before the Pretura Circondariale di Perugia, inviting that court, first, to declare, after first obtaining a preliminary ruling from the Court of Justice, that the contested provisions were invalid and, secondly, to order AIMA to pay Mignini the amount of LIT 1 650 000 by way of aid to the first purchaser.

5 It was in those circumstances that the Pretura Circondariale di Perugia stayed the proceedings so that the Court might 'give a preliminary ruling on the validity of Article 2(1)(b) of Commission Regulation (EEC) No 2537/89 of 8 August 1989, as supplemented by Regulation (EEC) No 150/90 of 19 January 1990'.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the Community provisions in issue, 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.

7 It should be pointed out *in limine* that, in order to promote the development of soya bean production in the Community, Council Regulation No 1491/85, as amended by Regulation No 2217/88, applicable in the main proceedings, provided that aid was to be granted to any processor of soya beans who had concluded with individual or associated soya bean producers a contract providing for payment of a price at least equal to the minimum price fixed each year by the Community authorities (hereinafter referred to as a 'contract to purchase the crops'). That minimum price guarantees sales for producers of soya beans at a price as close as possible to the guide price, taking account of market fluctuations and the cost of transporting the beans from the areas where they are produced to the areas where they are used. The aid, equal to the difference between the guide price and the world market price when the latter is lower, is to be granted for beans harvested and processed in the Community. It is to be granted once proof of processing has been provided.

8 Moreover, Article 2(2) of that regulation provided that 'until 31 December 1992, in Member States where the marketing of soya beans is subject to national rules ensuring adequate organization and controls, the aid may be granted to a first purchaser who is not the processor'.

9 Article 4(1) and (2) of Council Regulation (EEC) No 2194/85 of 25 July 1985 adopting general rules concerning special measures for soya beans (Official Journal 1985 L 204, p. 1), as amended by Council Regulation (EEC) No 1231/89 of 3 May 1989 (Official Journal 1989 L 128, p. 24), applicable in the main proceedings, provides that:

'1. For the purposes of this Regulation, "identification' shall mean the act whereby the competent agency of the Member States certifies, on application by the interested party, that the aid to be granted for the quantity of soya beans covered by the application shall be that applicable on the day when the application was lodged.

...

Identification of the beans shall be carried out once they enter into the processing undertaking but before they are processed.

2. On request by the interested party, the Member State shall identify the beans.'

10 For the application of that system of aid, "undertaking' must, according to Article 2(1) of Commission Regulation No 2537/89, as amended by Regulation No 150/90, be understood as follows:

'(a) an oil mill, including:

— any building or other place within the precincts of the establishment where production takes place,

— any warehousing unit outside such precincts located in the customs territory of the Member State where the production establishment is located in which the stored products can be properly controlled and which has been approved in advance by the authority responsible for that control;

(b) an establishment manufacturing feedingstuffs or foodstuffs intended for use by the final consumer without further processing; it must have, on the premises, storage facilities which are of a capacity determined by the authority responsible for control and which meet the requirements of this Regulation as regards the identification of the beans and the verification of their presence and their use by the undertaking;

(c) any establishment managed by a first purchaser who is not a processor, which is approved within the meaning of Article 2(2) of Regulation (EEC) No 2194/85, including storage installations in which the stored products can be properly controlled and which has been approved in advance by the authority responsible for that control.'

11 Mignini and the Italian Government claim that the obligation imposed on manufacturers of animal feedingstuffs and not on oil mills to have storage facilities within the precincts of the establishment where production takes place is contrary to the principle of non-discrimination laid down in Article 40(3) of the Treaty and also to the principle of proportionality. The Commission disputes that claim.

12 Mignini and the Italian Government claim, in essence, that, from the point of view of the controls, manufacturers of feedingstuffs or foodstuffs (hereinafter referred to as 'incorporators') are in a situation comparable to that of producers of oil. In particular, a control of the quantities of soya beans used in the manufacture of those products could be carried out on the finished product, with a level of reliability comparable to that achieved in relation to the control of the manufacture of oil. The contested measure is therefore unnecessary for the purposes of control, while being very expensive, and indeed dissuasive, for the undertakings concerned.

13 The Commission, for its part, claims that incorporators are in a different situation from that of the other processors, because the number entitled to benefit from the aid is much higher and because it is much more difficult to control the processing of the beans in their case since it does not produce standard yields. It also claims that, in view of the quantities of soya produced and imported into the Community and the number and difficulty of the controls to be carried out in the sector in question, the contested provisions are necessary to prevent the aid from being diverted from its purpose.

14 It is apparent both from the nature of the contested provisions and from the arguments put forward by Mignini and the Italian Government on the one hand and by the Commission on the other hand that, for the purpose of examining those provisions, the infringement of the principle of non-discrimination cannot be dissociated from the infringement of the principle of proportionality. The validity of the contested provisions must therefore be assessed with regard to both the principle of non-discrimination and the principle of proportionality.

15 As the Court has consistently held (see, in particular, the judgment in Case 300/86 *Van Landschoot* v *Mera* [1988] ECR 3443, paragraph 9), the prohibition on discrimination laid down in the second subparagraph of Article 40(3) of the Treaty, which is a specific expression of the general principle of equal treatment, prevents comparable situations from being treated differently, unless such difference of treatment is objectively justified.

16 The Court has also held (see, in particular, the judgment in Joined Cases 279, 280, 285 and 286/84 *Rau* v *Commission* [1987] ECR 1069, paragraph 34) that in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it. Furthermore, whilst a measure's patent unsuitability for achieving the objective which the competent institution seeks to pursue may affect its legality, the Community institutions must, nonetheless be recognized as having a broad discretionary power in regard to the common agricultural policy which reflects the responsibilities which the Treaty imposes on them.

17 It is apparent from both the twentieth recital in the preamble to Commission Regulation No 2537/89 and the first recital in the preamble to Regulation No 150/90 that the contested provisions are intended to alleviate the difficulties

encountered in the control of the aids designed to promote the growing of soya beans in the Community but paid to manufacturers of feedingstuffs or foodstuffs.

18 The objectives of the control of the aid paid to first purchasers and the general rules relating thereto are set out in Article 6 of Council Regulation No 2194/85, which provides, in the version as amended by Council Regulation (EEC) No 2218/88 of 19 July 1988 (Official Journal 1988 L 197, p. 12), applicable in the main proceedings, that:

'1. Producer Member States shall set up a control system ensuring that only the products entitled to aid receive it. This system shall include, in particular, sample checking on the areas cultivated and on the stock records and, where appropriate, on the financial records of applicants for aid.

The Member State shall carry out suitable checks:

— each time the quantity delivered by a producer to a first purchaser exceeds that which may be reasonably produced on the area concerned, or

— in doubtful cases.

2. Member States shall assist one another'.

19 Article 3 of Commission Regulation No 2537/89 provides that that control must, in particular, make it possible to check that the quantity of beans which entered the undertaking corresponds to the quantity of 'identified' beans and the quantity of beans used in animal feed.

20 Paragraphs (2) and (3) of that article provide that:

'2. For the purposes of this control, every undertaking shall keep separate stock records for soya beans harvested in the Community and for imported beans. These shall contain at least the following information:

— the quantities in weight of beans received as such and in the case of beans harvested in the Community, moisture content and impurity content,

— the movements between the various stores of the undertaking,

— the quantities of beans processed and the type and quantity of the products obtained where the first purchaser is also the processor; at the request of the competent agency the percentage of soya beans used in the processed mixture obtained must be specified,

— the quantity of beans or of the processed products leaving the undertaking and their destinations,

— a regular inventory of stocks, carried out at least on a quarterly basis,

— references to the contracts, delivery declarations and invoices or equivalent documents for both products bought and products sold and, in the case where the first purchaser is not the processor, references to the relevant documents relating to the delivery to the processor.

3. The undertaking shall also make its financial accounts available to the authority responsible for control.'

21 Article 3(4) provides that every first purchaser is to allow officials of the authority responsible for control to have access to its premises, to keep all the documents relating to the transactions carried out, together with its financial accounts, and to facilitate inspection operations.

22 Pursuant to Article 2(1)(b) of Regulation No 2194/85, each first purchaser is also required to submit to the competent agency of the Member State in which the beans were harvested the contracts to purchase their crops which it has concluded with the Community producers and also the declarations corresponding to each delivery of beans which he receives from the producers.

23 The contracts are required to include the information set out in Article 6(2) of Commission Regulation No 2537/89, which includes information relating to the identification of the areas sown and relating to the yields obtained by the producer concerned. Pursuant to Article 8(4) of that regulation, delivery declarations are to include, in particular, the references to the contract to purchase the crops and the date and weight of the delivery.

24 The agencies responsible for the control thus have at their disposal various means of control, in particular regarding the origin of the beans processed. They may, in particular, cross-check the information in order to verify that it corresponds and to detect any possible fraud.

25 The Commission contends, first of all, that an inquiry carried out in Italy in 1988 confirmed, with regard to subsidies paid to incorporators, the inadequacy of the system in force at the time, which laid down no requirement for storage facilities within the precincts of the establishment where production takes place.

26 The report drawn up following that inquiry, which was produced at the Court's request, highlights the weaknesses of the control carried out by the Italian authorities, but reveals no difficulty in applying the control rules then in force, especially with regard to the incorporators.

27 The Commission maintains further that only physical controls on the finished products can ensure the reliability of the checks carried out elsewhere. Such controls are possible where the manufacture of oil is concerned but not where the manufacture of animal feedingstuffs is concerned.

28 That argument cannot be upheld. It is apparent from the documents and the argument before the Court that the yield in oil from soya beans of a given quality is subject to fluctuations and that the risk of fraud in that sector cannot be completely avoided in spite of the physical checks carried out on the finished product. Moreover, it appears, as Mignini claimed without contradion, that the composition of animal feedingstuffs conforms to precise formulae which are difficult to alter and which make it possible for the quantity of beans processed to be determined from the finished product. That quantity may also be determined by microscopic analyses of the final product, a point which the Commission has not disputed.

29 The Commission also claims that since incorporators are potentially much more numerous than manufacturers of oil, the control of movements of goods between the establishments where production takes place and the storage facilities could, if they were outside the latter, prove more difficult where incorporators are concerned. The contested provision is necessary to prevent quantities of beans from benefiting several times from Community aid.

30 That argument cannot be upheld either. As Mignini claims, movements of products may be limited by methods less restrictive than that adopted, such as the approval of storage facilities, the solution adopted for the other first purchasers, which

makes it possible to limit the number of storage facilities and to ensure that they comply with the control requirements. It should further be pointed out that the cost of applying the contested measures could be high for the undertakings in question since they will, where necessary, be required to construct new storage facilities within the precincts of their production establishments and to bear additional storage charges. Such measures could prove sufficiently deterrent to cause some producers not to take advantage of the aid.

31 Finally, the Commission, although requested to do so both during the written procedure and during the oral procedure, was unable to produce any arguments, other than those which have just been examined and rejected, to prove either that the difference of treatment between producers of oil and incorporators laid down in the contested provisions is necessary or that those provisions are appropriate to the aim in view.

32 It follows that the contested provisions, which treat incorporators differently from producers of oil for the purposes of controlling the Community aid for soya and which clearly exceed the differences which might be appropriate and necessary to achieve the aim in view, infringe both the principle of equality and the principle of proportionality.

33 Accordingly, the reply to be given to the national court is that Article 2(1)(b) of Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans, as supplemented by Article 1(1) of Commission Regulation (EEC) No 150/90 of 19 January 1990, is not valid.

Costs

34 The costs incurred by the Italian Government and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Pretura Circondariale di Perugia (Italy) by order of 6 August 1990, hereby rules:

Article 2(1)(b) of Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans, as supplemented by Article 1(1) of Commission Regulation (EEC) No 150/90 of 19 January 1990, is not valid.

Joliet Grévisse

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 8 April 1992.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber