JUDGMENT OF THE COURT (Fifth Chamber)
16 July 1998 *

In Case C-287/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Kyritzer Stärke GmbH

and

Hauptzollamt Potsdam,

on the interpretation of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products (OJ 1985 L 205, p. 5) in conjunction with Commission Regulation (EEC) No 1722/93 of 30 June 1993 laying down detailed rules for the application of Council Regulations (EEC) No 1766/92 and (EEC) No 1418/76 concerning production refunds in the cereals and rice sectors respectively (OJ 1993 L 159, p. 112),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, D. A. O. Edward, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Kyritzer Stärke GmbH, by Barbara Festge, Rechtsanwältin, Hamburg,

— the Commission of the European Communities, by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Kyritzer Stärke GmbH and of the Commission at the hearing on 22 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 19 March 1998,

gives the following

Judgment

1 By order of 4 July 1996, received at the Court on 26 August 1996, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling

under Article 177 of the EC Treaty two questions on the interpretation of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products (OJ 1985 L 205, p. 5) in conjunction with Commission Regulation (EEC) No 1722/93 of 30 June 1993 laying down detailed rules for the application of Council Regulations (EEC) No 1766/92 and (EEC) No 1418/76 concerning production refunds in the cereals and rice sectors respectively (OJ 1993 L 159, p. 112).

2 Those questions were raised in proceedings between Kyritzer Stärke GmbH ('Kyritzer') and the Hauptzollamt Potsdam (Principal Customs Office, Potsdam, hereinafter 'the Hauptzollamt') concerning the release of securities provided in the context of applications for production refunds in respect of starch.

The Community legislation

Regulation No 2220/85

3 According to Article 1 of Regulation No 2220/85, that regulation lays down the rules governing securities to be given under, *inter alia*, regulations laying down the common organisation of the markets in cereals and rice respectively and under the implementing regulations.

4 Article 20 defines and classifies, in terms of their importance, the various types of requirements which may be included in the obligations for the fulfilment of which

those regulations require security to be given. Article 20(1) to (5) provides as follows:

'1. An obligation may include primary, secondary or subordinate requirements.

2. A primary requirement is a requirement, basic to the purposes of the regulation imposing it, to perform, or to refrain from performing, an act.

3. A secondary requirement is a requirement to respect the time-limit for fulfilling a primary requirement.

4. A subordinate requirement is any other requirement imposed by a regulation.

5. This Title shall not apply where the relevant specific regulation has not defined the primary requirements.'

5 Article 21 defines, in the following terms, the conditions governing release of the security:

'Once the evidence laid down by the specific regulation has been furnished that all primary, secondary and subordinate requirements have been fulfilled, the security shall be released.'

Articles 22 and 24 specify what is to happen to the security in the event of breach of a primary or subordinate requirement. As regards primary requirements, Article 22(1) and (2) provides:

'1. A security shall be forfeited in full for the quantity for which a primary requirement has been breached.

2. A primary requirement shall be considered to have been breached if the relevant evidence is not produced within the time-limit set for the production of that evidence ...'

6 As regards subordinate requirements, Article 24(1) provides:

'Breach of one or more subordinate requirements shall lead to forfeiture of 15% of the relevant part of the sum secured.'

7 With regard to the time-limits for producing evidence, Article 28 provides:

'1. Where no period is laid down for producing the evidence needed to release a sum secured, such period shall be:

(a) 12 months from the time-limit specified for respecting all primary requirements, or

(b) where no such time-limit is specified, 12 months from the date by which all primary requirements have been met.

2. The period laid down in paragraph 1 shall not exceed three years from the time the security was assigned to a particular obligation, except in cases of force majeure.'

Regulation No 2169/86

8 Commission Regulation (EEC) No 2169/86 of 10 July 1986 laying down detailed rules for the control and payment of the production refunds in the cereals and rice sectors (OJ 1986 L 189, p. 12), adopted pursuant to the regulations on the common organisation of the markets in those sectors, provides in Article 7(1) that the issue of a refund certificate is to be subject to the lodging of a security by the manufacturer with the competent authority, equal to ECU 25 per tonne of basic starch, where appropriate multiplied by the coefficient relating to the type of starch to be used, as shown in the annex. Commission Regulation (EEC) No 3642/87 of 2 December 1987 amending Regulation (EEC) No 2169/86 (OJ 1987 L 342, p. 10) added a new subparagraph to that provision, in the following terms: 'However, where the product indicated on the certificate falls within Common Customs Tariff subheading No 39.06 B I (CN 3505 10 50), the security shall equal 105% of the production refund to be granted for the manufacture of the product in question.'

9 The first sentence of Article 7(2) of Regulation No 2169/86 provides:

'The primary requirement within the meaning of Article 20 of Regulation (EEC) No 2220/85 shall be the processing of the quantity of starch stated on the application into the approved products so stated within the period of validity of the certificate.'

10 Under Article 7(4) of Regulation No 2169/86, in the version resulting from Commission Regulation (EEC) No 165/89 of 24 January 1989 amending Regulation (EEC) No 2169/86 (OJ 1989 L 20, p. 14), the release of the security is subject to an additional requirement where the product concerned falls within CN code 3505 10 50:

'Without prejudice to paragraph 2, the security referred to in paragraph 1, second subparagraph, shall only be released if the competent authority has received proof that the product under CN code 3505 10 50 is:

(a) used to manufacture products other than those listed in Annex I; or

(b) exported to third countries.'

Regulation No 1722/93

11 Regulation No 1722/93, likewise adopted pursuant to the regulations on the common organisation of the markets in the cereals and rice sectors, reproduces, as the 13th recital in its preamble indicates, the provisions of Regulation No 2169/86, adapting them to the current market situation and repealing that regulation.

12 Article 8(1) provides that the issue of a refund certificate is to be subject to the lodging of a security by the manufacturer with the competent authority, equal to ECU 15 per tonne of basic starch, where appropriate multiplied by the coefficient corresponding to the type of starch to be used, as shown in Annex II.

13 Under Article 8(2), that security is to be released in accordance with Regulation No 2220/85. The primary requirement within the meaning of Article 20 of that regulation is 'the processing of the quantity of starch stated on the application into approved products (as defined) within the period of validity of the certificate'.

14 Article 9(2) provides that, where the product in question falls within CN code 3505 10 50, an additional, separate sum is to be lodged by way of security, equal to the refund payable on the manufacture of the product in question.

15 Under Article 10(1), the release of that security is conditional on production of proof that the product in question has been:

'(a) used within the customs territory of the Community to manufacture products other than those listed at Annex II;

or

(b) exported to third countries. In the case of direct export to third countries, the security shall be released only once the competent authority has received proof that the product in question has left the customs territory of the Community.'

16 Regulation No 1722/93 entered into force on 1 July 1993. The second paragraph of Article 14 provides, as a transitional measure:

'For the purpose of releasing the security pursuant to Article 7 of Regulation (EEC) No 2169/86, Article 10 shall also apply in the case of files which are still open at the time of the entry into force of this Regulation.'

The main proceedings

17 Kyritzer processes natural starch into approved products within the meaning of the regulations concerning production refunds in the cereals and rice sectors and, in particular, into esterified starch. In that connection, it receives production refunds.

18 In December 1991 and January 1992 Kyritzer procured the issue of refund certificates concerning the production of esterified starch falling within CN code 3505 10 50, for which it lodged security pursuant to Article 7(1) of Regulation No 2169/86.

19 In January and February 1992 Kyritzer gave notice of production of certain quantities of esterified starch.

20 However, since proof that that product had been put to proper use — that is to say, that it had either been subsequently turned into a processed product other than starch or exported to a third country (hereinafter 'proper use') — was provided in relation to part only of those quantities, the Hauptzollamt declared, during the course of May 1995, that the security lodged by Kyritzer was partially forfeit.

21 Kyritzer brought an action contesting those decisions, which was dismissed by the Finanzgericht (Finance Court). It appealed on a point of law to the Bundesfinanzhof, which considered that Regulation No 2220/85 was applicable. However, since the Bundesfinanzhof was uncertain regarding the provisions of that regu-

lation which govern the security in question, it decided to stay proceedings and to refer the following questions to the Court:

'(1) Does the use prescribed in Article 10(1) in conjunction with Article 14(2) of Regulation No 1722/93 for processed goods falling within CN code 3505 10 50 constitute a primary requirement within the meaning of Article 20(1) and (2) of Regulation No 2220/85, evidence of the fulfilment of which is to be produced within the period prescribed by Article 28(2) of Regulation No 2220/85, so that, in any other case, security provided pursuant to Article 22(1) and (2) of that regulation becomes forfeit?

(2) If the answer to question (1) is in the negative: is some other prescribed period to be inferred from the applicable Community legislation, within which evidence of use is to be produced in accordance with Article 10(1) of Regulation No 1722/93, so that the security becomes wholly or partially (to what extent?) forfeit if the evidence is not produced within the prescribed period?'

The first question

22 By its first question, the national court is essentially seeking to ascertain what type of requirement the proper-use obligation governing products within CN code 3505 10 50 constitutes, and what is the time-limit within which proof of compliance with that obligation must be produced; on those factors depends the determination of the question as to what is to happen to the security lodged.

Categorisation of the requirement in issue

23 Kyritzer points out that the sixth recital in the preamble to Regulation No 2169/86 and the 12th recital in the preamble to Regulation No 1722/93 expressly state that it is necessary, in those two regulations, to define the primary requirements incumbent on manufacturers and guaranteed by the lodging of security. Despite having set up a special system for products falling within CN code 3505 10 50, the Community legislature has nowhere indicated that the additional requirement of proper use of those products constitutes a primary requirement. That categorisation is expressly reserved for the processing of goods into approved products, which is brought about by the manufacture of those products.

24 The Commission states that the system pertaining to products falling within CN code 3505 10 50 is designed to prevent fraud and is dictated by the particular nature of those products, which may be reprocessed into basic products, thereby enabling the manufacturer improperly to obtain more than one production refund for the same product. The proper use prescribed for the products in question by Article 7 of Regulation No 2169/86 must be regarded as the carrying-out of the processing operation, and must therefore be seen as forming an integral part of such processing. Although a distinction is drawn in Regulation No 1722/93 between the processing referred to in Article 8 and the proper use referred to in Article 10, that distinction does not affect the classification of the proper-use requirement as a primary requirement, which is justified by the objective pursued.

25 It must be observed, as a preliminary point, that, although the security in issue was lodged pursuant to Article 7 of Regulation No 2169/86, its release is subject, in accordance with Article 14 of Regulation No 1722/93, to the conditions laid down by Article 10 of the latter regulation. This, combined with the similarities between the two regulations, justifies their being considered together.

26 Article 7(2) of Regulation No 2169/86 and Article 8(2) of Regulation No 1722/93 expressly classify the processing of goods into approved products as a primary requirement. Moreover, it is clear from the first recital in the preamble to Regulation No 3642/87 and the first recital in the preamble to Regulation No 165/89, which introduced into Regulation No 2169/86 specific provisions, reproduced in essence in Regulation No 1722/93, relating to products falling within CN code 3505 10 50, that the proper-use requirement is designed to take account of the consequences arising from the particular nature of esterified starch, which can be reprocessed into a raw material the use of which may prompt a fresh application for a production refund.

27 Thus it is clear that the processing of goods into approved products constitutes the essential operation aimed at by the Community legislature, and that the special system applicable to products falling within CN code 3505 10 50 is intended to ensure that that operation is irreversible. It follows that the proper-use requirement introduced in Article 7(4) of Regulation No 2169/86 and reproduced in Article 10(1) of Regulation No 1722/93 must be regarded, irrespective of the position which it occupies in the specific rules applying, as a component part of the processing obligation. Consequently, the express categorisation by the Community legislature of the latter obligation as a primary requirement must be construed as covering, by extension, the proper-use requirement.

28 That interpretation is borne out by the importance of the role of the proper-use requirement in the attainment of the objectives of the regulations imposing it. As the Advocate General observes in point 59 of his Opinion, there can be no doubt that the combating of fraud in the sphere of the processing of starch into esterified starch has since 1987 been amongst the objectives pursued by the Community legislature in the applicable regulations. The proper use of processed products, being the means chosen to attain that objective, therefore satisfies the definition of a primary requirement contained in Article 20(2) of Regulation No 2220/85, namely a requirement which is basic to the purposes of the regulation imposing it.

The time-limit for production of proof

29 As regards the time-limit within which proof of proper use must be provided, Kyritzer has argued that, since Article 28 of Regulation No 2220/85 does not lay down any penalty for exceeding the time-limits fixed by it, and since Article 24 provides for a penalty to be imposed only in the event of non-compliance with a subordinate requirement, proof of compliance with such a requirement may be provided at a later stage.

30 That argument is not relevant, since it has been held earlier in this judgment that the obligation in issue must be regarded as a primary requirement.

31 The Commission has submitted that the time-limit applicable to the production of proof of proper use should be that laid down for the processing of goods into approved products, which, at the time of lodgment of the security in issue, was defined by Article 7(2) of Regulation No 2169/86 and corresponded to the period of validity of the refund certificate.

32 That argument is based on an excessively restrictive reading of the second paragraph of Article 14 of Regulation No 1722/93, which clearly indicates that Article 10 of that regulation applies, as regards the release of security provided pursuant to Article 7 of Regulation No 2169/86, to all files which, like that at issue in the main proceedings, were still open on 1 July 1993.

33 Article 10 of Regulation No 1722/93 amends the detailed rules previously in force concerning compliance with the proper-use obligation. However, it does not lay down any specific time-limit for compliance with that obligation or for production of proof of such compliance. It is necessary, therefore, to apply the general provi-

sions of Article 28 of Regulation No 2220/85, which govern cases in which no time-limit is prescribed for production of the proof needed to procure the release of a security.

34 In accordance with Article 28(1)(b) and (2) of Regulation No 2220/85, proof of proper use must therefore be produced within 12 months from the date on which the obligation in that regard is fulfilled and, in any event, by no later than three years after the security was lodged, save in cases of force majeure. If those time-limits are not respected, the security becomes forfeit in its entirety pursuant to Article 22(1) and (2) of Regulation No 2220/85.

35 Kyritzer has also submitted that loss of the security in the event of non-compliance with the time-limits laid down for production of proof of proper use constitutes discrimination against manufacturers of products falling within CN code 3505 10 50 by comparison with manufacturers of other approved products.

36 It is sufficient in that regard to point out that the difference between the treatment afforded to manufacturers of products falling within CN code 3505 10 50 and the way in which manufacturers of other approved products are treated is justified by the risk of fraud inherent in the activities of the former group. Since the situations of the two groups are different, it is consistent with the principle of non-discrimination that they should not be treated on an equal footing.

37 Lastly, Kyritzer has claimed that forfeiture of the whole of the security in the event of non-production of proof of proper use within a given time-limit constitutes a breach of the principle of proportionality.

38 That argument must be rejected. First, it cannot be denied that such a penalty is capable of attaining the objective of combating fraud aimed at by the legislature. Second, it is necessary to fix a time-limit beyond which non-production of the proof required is regarded as tantamount to non-compliance with the obligation, in order to avoid the difficulties which would arise from the indefinite prolongation of a situation of uncertainty as to the status of the security lodged.

39 The answer to the first question must therefore be that Article 10(1) of Regulation No 1722/93 is to be interpreted as meaning that the use of a product falling within CN code 3505 10 50, as prescribed by that provision, constitutes a primary requirement within the meaning of Article 20(2) of Regulation No 2220/85, compliance with which must be proved within the time-limits laid down in Article 28 of that regulation, failing which the whole of the security becomes forfeit pursuant to Article 22(1) and (2) of that regulation.

The second question

40 In view of the answer given to the first question, there is no need to reply to the second question.

Costs

41 The costs incurred by the Commission, which has 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 (Fifth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 4 July 1996, hereby rules:

Article 10(1) of Commission Regulation (EEC) No 1722/93 of 30 June 1993 laying down detailed rules for the application of Council Regulations (EEC) No 1766/92 and (EEC) No 1418/76 concerning production refunds in the cereals and rice sectors respectively is to be interpreted as follows:

— the use of a product falling within CN code 3505 10 50, as prescribed by that provision, constitutes a primary requirement within the meaning of Article 20(2) of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products;

— compliance with that requirement must be proved within the time-limits laid down in Article 28 of that regulation, failing which the whole of the security becomes forfeit pursuant to Article 22(1) and (2) of that regulation.

Gulmann Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 16 July 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber