JUDGMENT OF THE COURT
9 MARCH 1976 [1]

Effem GmbH
v Hauptzollamt Lüneburg
(preliminary ruling requested by the Finanzgericht Hamburg)

Case 95/75

Summary

Agriculture — Common organization of the market — Cereals — Compound feedingstuffs for cattle — Quantity of cereals included — Taking into account — Standard export levy — Fixing — Unacceptability
(Regulation EEC No 120/67, Article 1)

The fixing of a standard export levy applicable irrespective of the quantity, whether negligible or substantial, of cereals contained in the compound feedingstuffs for cattle listed under heading 23.07 of the Common Customs Tariff does not comply with the provisions of Community law.

In Case 95/75

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg for a preliminary ruling in the action pending in that court between

FIRMA EFFEM GMBH

and

HAUPTZOLLAMT LÜNEBURG (Principal Customs Office at Lüneburg)

on the validity of Regulations (EEC) Nos 311/74 of 6 February 1974 (OJ L 34, 1974, p. 19), 317/74 of 7 February 1974 (OJ L 35, 1974, p. 8), 381/74 of 14 February 1974 (OJ L 43, 1974, p. 9), 410/74 of 18 February 1974 (OJ L 46, 1974, p. 5) and 427/74 of 20 February 1974 (OJ L 49, 1974, p. 15) of the Commission fixing the export levies on cereals,

1 — Language of the Case: German.

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keeffe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, M. Sørensen and Lord Mackenzie Stuart, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities may be summarized as follows:

I — Facts and procedure

Article 19 of Regulation No 120/67/EEC of the Council (OJ English Special Edition 1967, p. 33), provides that when the world market price (cif price) is appreciably higher than the Community market price (threshold price), the necessary measures may be taken.

These measures were laid down in the form of general rules by Regulation (EEC) No 1968/73 of the Council, of 19 July 1973 (OJ L 201, 1973, p. 10) as amended by Regulation (EEC) No 2632/73 of the Council, of 28 September 1973 (OJ L 272, 1973, p. 18).

During the 1973/74 marketing year, in view of the increase in the price of cereals on the world market, which threatened to create a situation of shortage within the Community, export levies on cereals were introduced.

Compound feedingstuffs for cattle containing cereals and coming under tariff heading 23.07 of the Common Customs Tariff which had not originally been affected were made subject to a levy for the first time by Regulation (EEC) No 311/74 of the Commission of 6 February 1974, fixing uniform rates of levy of 26·25 u.a. per metric ton for all the preparations referred to under tariff heading 23.07 and this was done without account being taken of their starch content. These rules were retained in Regulations (EEC) Nos 317/74 of 7 February 1974, 381/74 of 14 February 1974, 410/74 of 18 February 1974 and 427/74 of 20 February 1974. These regulations likewise do not show whether the starch content of the sweetened forage is determined on the basis of the cereals which they contain, within the meaning of Annex A to Article 1 of Regulation No 120/67/EEC, or whether that content is defined in relation to other ingredients containing starch but which do not come within the common organization of the market in cereals.

By Regulation (EEC) No 433/74 of 21 February 1974, the Commission then laid down rules concerning levies, applicable as from the following 25 February, which on the one hand draw a distinction between the preparations which are the subject of the dispute according to their cereal products content, and on the other hand state that the levy applies only to products within Chapter 10 and tariff headings 11.01 and 11.02 (to the exclusion of subheading 11.02G). At the same time the amounts of the levies are differentiated on the basis of the percentage of cereals products.

During the period from 7 to 22 February 1974, the plaintiff in the main action, which has its registered office in Germany, exported to Austria, Sweden and Switzerland 405 537 kg of preparations used for feeding domestic animals, coming under heading 23.07 B I a 1 of the Common Customs Tariff, and 188 048 kg of preparations coming under heading 23.07 B I b 1. On the basis of these exports, the customs office at Verden by an assessment of 29 April 1974 charged the sum of DM 57 028·60 by way of levy.

On 27 May 1974, the plaintiff in the main action brought a direct action against that assessment, alleging that the flat-rate tariff fixed by the regulations applicable in the present case was unlawful and that only products under heading 23.07 B I a 1 contained cereal constituents, whereas those under heading 23.07 B I b 1 certainly contain starch, wheat red dog, wheat germ, maize swelling starch and maize gluten, but no cereals within the meaning of Chapter 10 or of headings 11.01 and 11.02. If the amount of the disputed levy had been calculated on the basis of Regulation No 433/74, it would have amounted to a sum of DM 4 864·12, which the plaintiff states it is ready to pay.

By an order of 5 August 1975, received at the Court Registry on the following 3 September, the Finanzgericht Hamburg, in accordance with Article 177 of the EEC Treaty, stayed the proceedings and requested the Court to give a preliminary ruling on the following question:

Are Regulations (EEC) Nos 311/74 of 6 February 1974, 317/74 of 7 February 1974, 381/74 of 14 February 1974, 410/74 of 18 February 1974 and 427/74 of 20 February 1974 of the Commission valid in so far as a uniform rate of levy of 26·25 u. a. per metric ton was fixed for the products listed in the annex to these regulations under tariff heading 23.07 without regard to the level of starch or should varying rates of levy have been fixed for products under this tariff heading as was done in the annex to Regulation (EEC) 433/74 of 21 February 1974?

The court making the reference wonders whether in the present case it may be accepted that the Commission has the power, which the Council is acknowledged as having by the judgments of the Court of 24 October 1973 (Balkan, 5/73 [1973] ECR 1091 and Schlüter, 9/73, [1973] ECR 1135), of making an overall evaluation of the advantages and disadvantages of the system to be established in a situation developing constantly and more or less unpredictably. Here the Commission had known since July 1973 that world price levels were liable to lead to exports from the Community, and had the time to improve the levy machinery.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 24 October 1975 by the Commission of the European Communities, and on 13 November 1975 by the plaintiff in the main action.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

II — Written observations lodged with the Court

The *plaintiff in the main action* claims that its products contain only a relatively small proportion of starch which, especially in the case of the product FROLIC, does not come essentially from a percentage of cereals under Chapter 10 and under headings 11.01 and 11.02 of the Common Customs Tariff. They do not constitute sweetened forage in the sense of mixtures of different types of cereals or cereal products, but are composed rather of different types of meat and tripe. The disturbances occurring in the cereals sector could therefore only have affected them to a small extent.

The fact of not having taken account of this situation amounts to an infringement of the system of the common organizations of the markets and consequently of Articles 39 and 40 of the EEC Treaty, of Article 19 of Regulation No 120/67/EEC and of Regulations (EEC) Nos 1968/73 and 2632/73.

In applying the lawful and differentiated tariff of Regulation (EEC) No 433/73, the plaintiff in the main action should have paid a levy of only DM 4 864·21 instead of DM 57 028·60. A number of ingredients giving rise to the levy in accordance with Regulation (EEC) No 311/74 and later regulations, exported separately, were not made subject to the levy: rice-meal, flour, broken rice, maize swelling starch and maize gluten. Certainly other ingredients, exported separately, were made subject to the levy, but because of the small proportion which they comprised in the total product, the uniform rate of 26·25 u.a. per metric ton amounted to an excessive charge several times in excess of the value of these products and not merely the difference between their price on the world market and within the Community. Among these products appeared flour of common wheat, barley groats, wheat red dog, and probably starch of whole wheat germ. On the contrary according to Regulation (EEC) No 433/74 only certain products are subject to levy, and because of their low weight content in cereals, at a rate lower than 1/7 of that taken as a basis by Regulation No 311/74.

The Commission had known the situation since the summer of 1973. It could not confuse the products in dispute with those which might be manufactured in order to evade the rules and the levy. It knew that, for forage under tariff heading 23.07, gradations were necessary, within the framework of the organization of the market in cereals, on the basis either of the starch content or of the cereals content. That follows from the differentiations existing in the Common Customs Tariff, but above all from those contained in the Annex to Regulation (EEC) No 311/74 and in the later regulations. In fact the differentiations on the basis of the starch content are set out therein, but they were not given concrete expression in the rates of levy. It is incomprehensible that in spite of the haste with which the regulations had to be adopted, such a differentiation could not have been effected as was the case shortly afterwards.

The judgments of the Court of Justice in Cases 5/73 and 9/73 quoted above cannot be relied upon, for they concern a completely different situation.

The *Commission* is of opinion that there is no legal prohibition on fixing one and the same rate of levy for several products when the situation of the market demands it or permits it.

The very wording of Article 3 (2) (b) of Regulation (EEC) No 1968/73, according to which the Commission must take into account the quantities of cereals necessary for the manufacture of the products concerned and, according to the circumstances, of the value of the

secondary products, does not necessarily allow it to be concluded that there is any such duty to differentiate. The requirement thus laid down is satisfied when the Commission adopts rules differentiated in accordance with the tariff headings, without making other distinctions within a single tariff heading.

Such a requirement would be contrary to the spirit of Regulation No 1968/73, the provisions of which are characterized not by obligations and rigid criteria but by the wide power of discretion and of decision which they grant to the Commission within a framework defined by directives which are very general in scope, especially in relation to the policy of the organization of the market. The Commission could for example fix the amount as low as possible, and base itself on average values when the different products and ingredients cannot be identified and differentiated with precision because of their large number. In order that the tariff of levies should remain practicable, it is impossible to make infinite differentiations. And why are uniform rates of levy permissible for several products gathered under a tariff subheading, but not in respect of a whole tariff heading? Thus the levies fixed in the disputed regulations are all subject to judicial supervision from the point of view of a misuse of powers.

As regards the accusation of misuse of powers, the measures taken by the disputed regulations can be explained only by taking account of the serious crisis on the cereals market culminating at the end of January and at the beginning of February 1974. The situation on the cereals market at the time was analysed in detail in Cases 78/74 ([1975] ECR 421) and 5/75 ([1975] ECR 759). All the basic cereals and then all the products derived from them by general processing, to the exclusion of compound feedingstuffs for cattle, were subject to the levies. It is incorrect that cereal products used by the plaintiff in the main action, such as wheat red dog, wheat germ, rice-meal and barley groats were exempted from it.

As the crisis became more acute, the amounts of the levies were raised, in the same way as it became increasingly necessary to take preventive steps in respect of the difficulties which might occur also in the sector of compound feedingstuffs for cattle containing cereals. Further, experience has shown that every strengthening of safeguard measures in external trade led to attempts to avoid these with the assistance of substitute products of the same value coming under tariff headings exempted from duties or subject to lower duties.

Having regard to the increase in quantities of compound feedingstuffs for cattle which were the subject of export licences: September 1973: 7 505 metric tons, October 1973: 14 686 metric tons, November 1973: 16 322 metric tons, December 1973: 18 459 metric tons, and January 1974: 19 790 metric tons, the Commission believed that this showed an increase in these exports which displayed striking analogies with the trends in world market prices and with the variations in export levies.

Having regard to the number of products coming under tariff heading 23.07 liable to contain any percentage of any cereal product in any combination, it was extremely difficult to ascertain with the necessary precision which compound ingredients for cattle constituted the major proportion of these exports.

In that situation the Commission could give up preventive measures and fix export levies only for 'cattle fodder', on the exportation of which problems had appeared and the character and composition of which were known. But then it would not be able to keep control of the transactions in that way and could only react to events as they occurred. Further, to the extent that it was impossible to say with sufficient certainty that there were difficulties only for cattle

feedingstuffs containing cereals, but not for products rich in starch or conversely, the Commission could not know whether the action it took was adequate and well directed if it differentiated products subject to the levy according to these contents. That is why it decided to resort to an overall preventive solution by way of levies in order to be able immediately to exempt products if that were justified in case of an improvement in the situation or of a fuller knowledge of market and export trends.

Although the formal basis adopted in this matter was a nomenclature differentiated in relation to the starch content, that was due in particular to the fact that commercial circles and the authorities of the organization of the market had become familiar with that nomenclature through the import levies.

Thanks to the development of market trends and to obtaining more accurate information, it was possible to limit the levies by Regulation No 433/74 to a small number of products capable of being supplied on the basis of their content in cereal products of a particular type.

In these circumstances the Commission chose an amount based on 75 % of the levy imposed on maize, processed mostly as feedingstuffs for cattle; this amount came to approximately half the levy imposed on bran and starch and almost a third of the levy imposed on wheat.

If matters are considered in retrospect, it might appear that the Commission should already, in Regulation (EEC) No 311/74, have laid down provisions corresponding to those in Regulation (EEC) No 433/74.

In fact at the time when the Commission had to act, the only decisive factor from the point of view of evaluating the exercise of its powers, the conditions necessary for adopting provisions in accordance with those adopted in Regulation (EEC) No 433/74 had not yet come into existence.

The plaintiff in the main action, represented by Mr Paetow, Advocate at the Hamburg Bar, and the Commission of the European Communities, represented by Mr Kalbe, its Legal Adviser acting as Agent, presented oral argument at the hearing on 28 January 1976.

The Advocate-General delivered his opinion at the hearing on 17 February 1976.

Law

1 By an order dated 5 August 1975, received at the Court on the following 3 September, the Finanzgericht Hamburg referred, pursuant to Article 177 of the EEC Treaty, a question for a preliminary ruling on the validity of Regulations (EEC) Nos 311/74 of 6 February 1974 (OJ L 34, 1974, p. 19), 317/74 of 7 February 1974 (OJ L 35, 1974, p. 8), 381/74 of 14 February 1974 (OJ L 43, 1974, p. 9), 410/74 of 18 February 1974 (OJ L 46, 1974, p. 5) and 427/74 of 20 February 1974 (OJ L 49, 1974, p. 15) of the Commission fixing the export levies on cereals. That question was raised within the framework of an action against an assessment amounting to DM 57 028·60 addressed to the plaintiff in the main action by the customs administration by way of levies on

the export to third countries of preparations used in the feeding of domestic animals, under headings 23.07 B I a 1 and 23.07 B I b 1 of the Common Customs Tariff.

2 The question is raised whether Regulations (EEC) Nos 311/74 of 6 February 1974, 317/74 of 7 February 1974, 381/74 of 14 February 1974, 410/74 of 18 February 1974 and 427/74 of 20 February 1974 of the Commisson are valid in so far as they fix, in their annexes, a uniform rate of levy of 26·25 u.a. per metric ton for the products listed under tariff heading 23.07 without taking account in each case of the starch content or whether the rate of levy applied to the products under this tariff heading should have been differentiated as was done in the provisions contained in the annex to Regulation (EEC) No 433/74 of 21 February 1974 (OJ L 50, 1974, p. 10) which was made applicable to the same products as from 25 February 1974.

3/4 Under Article 19 of Regulation No 120/67/EEC of 13 June 1967 (OJ English Special Edition 1967, p. 33), the necessary measures may be taken if the cif price of one or more products is appreciably higher than the threshold price, if that situation is likely to continue and if, because of this, the Community market is distributed or threatened with disturbance. Regulation (EEC) No 1968/73 of the Council of 19 July 1973 (OJ L 201, 1973, p. 10) laying down general rules to be applied in the event of the cereals market being disturbed, as amended by Regulation (EEC) No 2632/73 of 28 September 1973 (OJ L 272, 1973, p. 18), provides in Article 1 (3) that 'The Community market shall be regarded as being disturbed or threatened with disturbance ... where international trade prices are so high as to impede importation of products mentioned in Article 2 of Regulation No 120/67/EEC into the Community, or provoke exportation of such products from the Community, either of which situations would jeopardize supplies within the Community'.

In case of disturbance of the market, the said regulations authorize the application of an export levy on one or more of the products appearing in Article 1 of Regulation 120/67/EEC, and especially on certain products coming under tariff heading 23.07 B.

For the fixing of the export levy on the said products, account is taken *inter alia* of the quantity of cereals necessary for the manufacture of the products under consideration, and of the opportunities for and conditions of sale of the products in question on the world market.

5 Consequently the fixing of a standard levy which is applicable irrespective of the quantity, whether negligible or considerable, of cereals included in the products concerned cannot comply with these provisions. An instance of this would be a levy of 26·25 u.a. per metric ton applicable to products containing only a small quantity of cereals, whilst, moreover, the standard amount of levy was several times in excess of the value of these products.

6 The graduation of the levy appears all the more possible since Regulation (EEC) No 433/74 fixes, *inter alia* for the same products, amounts differentiated in respect of five groups of preparations according to their content by weight in cereal products (that is to say: from 5 % to 15 %, from 15 % to 30 %, from 30 % to 50 %, from 50 % to 65 %, and exceeding 65 %) and fixes no amount for such preparations having a content by weight in cereal products equal to or less than 5 %. At the time when Regulation (EEC) No 433/74 was adopted the cereals market continued to be disturbed. In fixing a single standard amount for all the products coming under the abovementioned tariff heading, the contested regulations did not take account of the quantities of cereals necessary for their manufacture.

7 The deficit situation on the cereals market which the Commission had to meet at the time when the first disputed regulation was published had been known to it since August 1973 and had given rise as from that time to the application of export levies in respect of certain types of cereals.

On the other hand, whilst bearing in mind the discretion which the Commission has in respect of economic policy, it was in a position to introduce a differentiation in accordance with the tariff subheadings and to apply levies calculated on the basis of percentages of cereal products, as it did later by Regulation (EEC) No 433/74.

8 Consequently Regulations (EEC) Nos 311/74 of 6 February 1974, 317/74 of 7 February 1974, 371/74 of 14 February 1974, 410/74 of 18 February 1974, and 427/74 of 20 February 1974 of the Commission must be declared invalid to the extent to which they fix for the products listed under tariff heading 23.07 a standard levy applicable irrespective of the quantity, whether negligible or substantial, of cereals contained in these products.

Costs

9 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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,

in answer to the question referred to it by the Finanzgericht Hamburg hereby rules:

Regulations (EEC) Nos 311/74 of 6 February 1974, 317/74 of 7 February 1974, 381/74 of 14 February 1974, 410/74 of 18 February 1974, and 427/74 of 20 February 1974 of the Commission are invalid to the extent to which they fix for the products listed under tariff heading 23.07 a standard levy applicable irrespective of the quantity, whether negligible or substantial, of cereals contained in these products.

Lecourt Kutscher O'Keeffe

Donner Mertens de Wilmars Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 9 March 1976.

A. Van Houtte
Registrar

R. Lecourt
President