JUDGMENT OF THE COURT (THIRD CHAMBER)
29 APRIL 1982 [1]

Merkur Fleisch-Import GmbH v Hauptzollamt Hamburg-Ericus (reference for a preliminary ruling from the Finanzgericht Hamburg)

(Customs procedure — Security on imports for processing)

Case 147/81

Agriculture — Common organization of the market — Beef and veal — Frozen meat intended for processing — Importation subject to suspension of the levy — Time-limit for processing — Failure to observe — Forfeiture of security by way of levy — Breach of principle of proportionality — None

(Commission Regulation No 572/78, Art. 1 (3))

Whilst special arrangements for the importation, subject to suspension of the levy, of certain frozen meat intended for processing is intended to guarantee adequate supplies for the processing industries in the Community, that must not be at the expense of the fundamental principle of preference for Community-produced meat.

Since the Community market is capable of developing relatively swiftly, Community preference cannot be guaranteed if a time-limit for processing is not prescribed for undertakings qualifying for suspension of the levy on imports. Failure to carry out the processing within the period laid down thus directly jeopardizes the objectives pursued by the system and the penalty attached to it, namely forfeiture of the security by way of levy, is by no means disproportionate.

In Case 147/81

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

1 — Language of the Case: German.

MERKUR FLEISCH-IMPORT GMBH, Hamburg,

and

HAUPTZOLLAMT [Principal Customs Office] HAMBURG-ERICUS

on the validity of Article 1 (3) of Commission Regulation (EEC) No 572/78 of 21 March 1978 laying down detailed rules for the application of special import arrangements for certain types of frozen beef intended for processing, and repealing Regulation (EEC) No 597/77 (Official Journal, L 78, p. 17),

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: F. Capotorti
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the conclusions and arguments of the parties put forward during the written procedure may be summarized as follows:

I — Facts and written procedure

On 16 October 1978 the plaintiff in the main action imported into the Federal Republic of Germany 13 539.1 kg of frozen boned or boneless beef coming under tariff subheading 02.01 A II (b) 4 (bb) of the Common Customs Tariff. In accordance with Article 1 (1) (a) of Commission Regulation No 572/78 of 21 March 1978 laying down detailed rules for the application of special import arrangements for certain types of frozen beef intended for processing the plaintiff

made a written declaration at the time of importation that the frozen beef was intended for the manufacture of other products as referred to in Article 14 (1) (b) of Regulation No 805/68 of the Council. As a consequence of making that declaration the plaintiff was not required immediately to pay a levy on the goods but was required, pursuant to Article 1 (1) (b) of Regulation No 572/78, to lodge a security equal to the amount of the levy applicable on the day of importation, whilst the national authorities reserved the right to charge the levy subsequently if the plaintiff should be unable to prove at the proper time that it had processed the imported frozen beef within three months following the month of importation in the establishment specified for that purpose.

In the course of an inspection of the processing establishment the German customs administration found that only 5 150 kg of frozen beef had been processed within the period of three months. In accordance with the second and third subparagraphs of Article 1 (3) of Regulation No 572/78 the amount of the security proportionate to the beef processed too late was forfeited and, in accordance with Article 1 (8) of the said regulation, the additional sum to be paid in satisfaction of the levy was fixed at DM 42 044.49.

The plaintiff instituted proceedings before the Finanzgericht Hamburg for the annulment of that decision, claiming that the time-limit involving forfeiture laid down in Regulation No 572/78 was unlawful.

By an order of 7 May 1981 the Finanzgericht Hamburg decided to stay the proceedings pending before it and to refer to the Court of Justice for a preliminary ruling the question:

"Whether Article 1 (3) of Commission Regulation (EEC) No 572/78 of 21 March 1978 is invalid in so far as it provides that the security lodged by the importer shall be forfeit and retained as a levy if the period laid down in that provision for the due processing of frozen beef is exceeded, or whether the regulation is rather to be interpreted, in accordance with the Treaty, as allowing for the security not to be forfeit if the period has been exceeded by only 12 days."

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by Merkur Fleisch-Import GmbH, represented by Mr Landry, of Modest and Partners, Rechtsanwälte, Hamburg, and by the Commission of the European Communities, represented by J. Sack, a member of its Legal Department.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. By an order of 11 November 1981 the Court decided to assign the case to the Third Chamber.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations submitted by the plaintiff in the main action

According to the plaintiff in the main action Commission Regulation No 572/78 is based primarily on Article 14 (4) (c) of Regulation No 805/68 of the

Council, as amended by Regulation No 425/77, which authorizes the Commission to lay down detailed rules for the application of Article 14 of Regulation No 805/68 and particularly those concerning control of the end use of imported meat.

On the one hand, that authorization implies that the implementing provisions adopted by the Commission must relate to, and serve to attain, the objective of Article 14 of Regulation No 805/68, namely to preserve the competitive capacities of the Community processing industry in relation to competitors established outside the Community. That objective does not require the fixing of time-limits for processing or *a fortiori* the fixing of time-limits involving forfeiture.

On the other hand, such an authorization does not confer upon the Commission power to impose a basic restriction on the right to qualify for a suspension of the levy made available by the Council in Article 14 of Regulation No 805/68 by fixing a time-limit for processing, failure to observe which involves forfeiture. In order to confer such a power on the Commission an express, or at any rate a clear, authorization by the Council would have been necessary but, according to the plaintiff, there has been no such authorization. The need for an express authorization by the Council is furthermore established by comparison of Article 14 of Regulation No 805/68 with Article 15 of the same regulation in which the Council has expressly provided that the issue of licences for imports or exports is to be conditional on the lodging of a deposit guaranteeing that the importation or exportation will be effected during the period of validity of the licence and that the deposit will be forfeited if the importation or exportation is not effected, or is only partially effected, within that period.

The plaintiff in the main action also considers that the fixing of time-limits on pain of forfeiture is in breach of the principles of equality and of proportionality. In this connection it claims first of all that the provision in question is in breach of these principles since it prescribes an identical penalty for infringements of very different degrees of gravity, ranging from a slight, and indeed minimal, failure to observe the time-limits for processing to a total failure to carry out any processing. Furthermore, since the provision in question provides for the entire forfeiture of security unless proof of processing is furnished within six months of the month of importation it is in breach of the principle of proportionality, as the Court of Justice has already decided in Cases 122/78 and 240/78 ([1979] ECR 677 and 2137). Finally, the plaintiff considers that the penalties prescribed by the provision in question are excessively severe since the principal obligation provided for in Article 14 (4) (c) of Regulation No 805/68 is to process the goods, and the fixing of a time-limit merely constitutes a means of checking, failure to comply with which should not result in withdrawal from the undertaking in default of the right to the suspension of the levy.

The plaintiff in the main action concludes that, even if the Commission was entitled to prescribe time-limits for processing carrying penalties for failure to comply with them, there was no power to make such penalties entail the total loss of the right to the suspension of the levy and, in any case, they should have been graduated in accordance with

the extent to which the time-limit was exceeded. According to the plaintiff, Article 1 (3) of Regulation No 572/78 is thus invalid.

B — Observations of the Commission of the European Communities

The Commission of the European Communities is concerned first of all to establish that it is impossible to provide an interpretation of Article 1 (3) of Regulation No 572/78 which could justify a failure to charge the whole of the levy when the period prescribed for processing has been only minimally exceeded. Whilst the Commission recognizes that the Court of Justice has already had occasion, in reliance on an interpretation in accordance with the Treaty, to depart from the wording of similar provisions (judgment of 21 June 1979 in Case 240/78 [1979] ECR 2137 and the judgment of 3 June 1980 in Case 135/79 [1980] ECR 1713) it nevertheless considers that an interpretation 'in accordance with' the Treaty may be envisaged only if it corresponds to the objective of a provision and if the legislature did not clearly intend that another construction should take precedence. In this case the provision prescribing the subsequent charging of the levy, even where the period prescribed for processing is exceeded by a relatively slight margin, is in accordance with the clear intention of the Commission and the objective of the particular arrangements regarding imports laid down by Article 14 of Regulation No 805/68 of the Council. In such conditions the Court is not entitled, by means of an interpretation, to put itself in the place of the legislature. Furthermore, according to the Commission, it is impossible to determine by way of an interpretation the cases in which failure to observe the time-limit is merely slight and what the appropriate penalty accordingly is. That too is one of the prerogatives of the legislature.

The Commission next considers the question of the validity of Article 1 (3) and (8) of Commission Regulation no 572/78. With regard to the compatibility of the provision in question with the powers conferred by Regulation No 805/68 of the Council the Commission first of all claims that, in this case, it is not the arrangements regarding the security as such which adversely affect the plaintiff but the very fact that Regulation No 572/78 makes provision for a period of three months for processing and for the subsequent charging of the levy where that period is exceeded. It is irrelevant for the outcome of the case whether the system with regard to the security as such is lawful since, even if there is no security capable of being retained, an undertaking which has exceeded the prescribed period of three months remains bound to pay the levy. The Commission considers that the fixing of a time-limit for processing and the penalty attached to any failure to observe that limit fall entirely within the powers transferred by the Council to the Commission pursuant to Article 14 of Regulation No 805/68. In fact, in accordance with that provision the Commission is required to enact implementing provisions for the special arrangements for the importation of certain meat for processing provided for by Article 14 and in particular the provisions necessary for supervising the use of the meat. Supervision of the use of the meat inevitably entails fixing a time-limit for processing which the Commission was required to determine within the framework of an appropriate margin of discretion, which it did by fixing a period for processing amounting at the most to one day short of four months and at the least to three months and one day. In fact Article 14 of Regulation No 805/68 already provides for a

three-monthly allocation of requirements for imported meat for processing determined for one year in the Council's estimate and it is accordingly natural that the Commission should make provision for a regular allocation not only of imports but also of processing for the year as a whole. In any case, a short period is justified by the need to avoid storing unprocessed frozen meat with a view to speculation and to ensure effective control within the undertakings.

Finally, with regard to the observance of the principle of proportionality none of the provisions in question is in breach of it in any way. The Commission in fact considers it necessary to distinguish cases where forfeiture of the security takes the form of a genuine penalty from those in which, as in the present case, a trader merely loses a special advantage granted in advance provided that he complies with the conditions relating to the grant of that advantage. In cases of the latter kind, as soon as the conditions laid down are disregarded the right granted is forfeit without the authority's being required to examine in detail whether the disregard of the conditions was total or merely partial. Furthermore, the Commission considers that in Regulation No 572/78 it took sufficient account of the principle of proportionality by tolerating failure to observe the time-limit in cases of *force majeure* and by providing that any levy paid should be charged subsequently only on that part of the consignment of imported meat which was not processed within the prescribed period. Likewise, the judgments of the Court of Justice cited by the plaintiff are irrelevant since in the two cases referred to a slight failure to observe a mere procedural time-limit was punished by the forfeiture of a security in its entirety whilst in this case the purpose of the time-limit is a concern to ensure that the person concerned performs the main obligation binding him to the administration, which is necessitated by the objective of the system laid down. In cases of that type the Court has on the other hand held that forfeiture of a security as a penalty for exceeding the periods prescribed was in accordance with the principle of proportionality (judgment of 17 December 1970 in Case 11/70 [1970] ECR 1125, judgment of 30 January 1974 in Case 186/73 [1974] ECR 533 and judgment of 11 May 1977 in Joined Cases 99 and 100/76 [1977] ECR 861).

The Commission also considers that the reasoning of the Finanzgericht Hamburg, to the effect that the interest of consumers requires that the security should not be declared forfeit for failure to comply with a time-limit for processing which was already relatively short, is unfounded. In fact, that time-limit was fixed precisely in the interest of consumers, in order to prevent delays in processing for speculative purposes. Such an advantage easily counterbalances the disadvantage resulting for the consumer, in the relatively rare cases in which processing is not carried out within the prescribed period, namely that the processor will pass on in his selling price the additional charge represented by the levy. In conclusion, the Commission proposes that the Court of Justice should give the following reply to the question submitted for a preliminary ruling by the Finanzgericht Hamburg:

"Consideration of the question submitted to the Court has disclosed no factor of such a kind as to affect the validity of Article 1 (2), (3) and (8) of Regulation No 572/78 with regard to the subsequent imposition of the levy, for which

provision is made where the period prescribed for processing is exceeded, or with regard to the prior lodging of a security involved in this system."

III — Oral procedure

At the sitting on 14 January 1982 oral argument was presented by the following: Klaus Landry, of Modest and Partners, of the Hamburg Bar, for Merkur Fleisch-Import GmbH and by J. Sack, a member of the Commission's Legal Department, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 11 February 1982.

Decision

1 By an order of 7 May 1981 which was received at the Court on 10 June 1981 the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question as to the validity of Article 1 (3) of Commission Regulation (EEC) No 572/78 of 21 March 1978 laying down detailed rules for the application of special import arrangements for certain types of frozen beef intended for processing (Official Journal, L 78, p. 17).

2 The file shows that the plaintiff in the main action, by a customs declaration of 16 October 1978, asked the German customs administration for clearance for the release into free circulation of 13 539·1 kg of frozen boned beef intended for processing. Clearance was granted on the conditions laid down by Article 1 of Commission Regulation (EEC) No 572/78. The customs administration subsequently found that only 5 150 kg of frozen beef had been processed in the period between 25 and 31 January 1979, that is within the time-limit of three months laid down by Article 1 (3) of Regulation No 572/78, and that 8 389·1 kg was processed between 1 and 12 February 1979.

3 In view of that failure to observe the time-limit the customs administration, in accordance with the second and third subparagraphs of Article 1 (3) of Regulation No 572/78, considered as forfeit the amount of the security lodged by the plaintiff in proportion to the quantity of meat which was processed outside the time-limit and, pursuant to Article 1 (8) of the said regulation, fixed the additional sum payable as levy by the plaintiff at DM 42 044.49.

4 The plaintiff instituted proceedings before the Finanzgericht for the annulment of the decision thus fixing the amount of the levy, claiming that the charging of the tax on the ground that the time-limit for processing had been exceeded only by a very small margin was in breach of the principle of proportionality.

5 The Finanzgericht considered that there were grounds for doubting the validity of the provision of Community law at issue and requested the Court of Justice to deliver a preliminary ruling on the question whether Article 1 (3) of Commission Regulation (EEC) No 572/78 of 21 March 1978 is invalid in so far as it provides that the security lodged by the importer shall be forfeit and retained as a levy if the time-limit laid down in that provision for the proper processing of frozen beef is exceeded, or whether the regulation is rather to be interpreted, in accordance with the Treaty, as allowing for the security not to be forfeit if the period has been exceeded by merely 12 days.

6 According to the plaintiff in the main action Article 14 of Regulation No 805/68 of the Council on the common organization of the market in beef and veal, as amended by Regulation No 425/77 of 14 February 1977 (Official Journal 1977, L 61, p. 1), which forms the basis for Commission Regulation No 572/78, does not confer on the latter power to fix time-limits involving forfeiture.

7 Article 14 (4) (c) provides that the Commission must determine detailed rules for the application of the suspension of the levy on frozen meat intended for processing, and particularly those concerning control of the end use of imported meat. The conferment of that power, expressed in general terms, implies that the Commission has the right and the duty to take all appropriate measures in order to ensure that the rules laid down by the Council are implemented in such a way as to attain fully the objectives pursued by such rules.

8 The objectives pursued by the Council in establishing special arrangements for the importation of certain beef intended for processing were defined in the seventh recital in the preamble to the basic regulation, Regulation No 805/68 of the Council. That recital states that whilst the suspension of the levies is intended to guarantee adequate supplies for the processing industries in the Community that must not be at the expense of the fundamental

principle of preference for Community-produced meat. In other words the existence and extent of the right to the suspension of the levy in this field depends directly on the situation and development of the Community market.

9 Since that market is capable of developing relatively swiftly it is necessary to be able to adapt the special import arrangements to meet that development. For that purpose Regulation No 805/68 of the Council, as amended by Regulation No 425/77, in addition provides in Article 14 (4) (a) that the quantities which may be imported under suspension of the levy must be determined by the Commission on a quarterly basis. That provision would be rendered nugatory if it were possible for processing undertakings to build up stocks with a view to speculation so that they could nullify the effects of any restriction or indeed abolition by the Commission of the special import arrangements intended to ensure the protection of the Community market.

10 The protection of the objectives pursued by the Council in this field thus justified the Commission in providing in the implementing measures that the meat imported subject to suspension of the levy must be processed within a specified period.

11 The plaintiff in the main action also claims that the withdrawal of the suspension where the prescribed periods are exceeded is out of proportion to the gravity of the shortcoming, which does not jeopardize the objectives pursued by the arrangements.

12 Such an argument is based on a mistaken view of the objectives pursued by the arrangements in question inasmuch as it fails to take into consideration the need to preserve the role of Community preference which could not be guaranteed, for the reasons given above, if a time-limit for processing were not prescribed for undertakings qualifying for suspension of the levy on imports. Failure to carry out the processing within the period laid down thus directly jeopardizes the objectives pursued by the system and the penalty attached to it is by no means disproportionate.

13 Finally, the plaintiff company complains that the Commission has made the charging of the levy an automatic consequence of failure to observe the time-limit regardless of the extent of such failure and is thereby in breach of the principle of equality of treatment. However, such a complaint cannot be upheld in relation to Commission Regulation (EEC) No 572/78 since the regulation excludes the application of the contested provision in case of *force majeure* and limits, in Article 1 (1) (c), the basis for the calculation of the levy to be charged exclusively to products which are not processed within the prescribed period.

14 Since consideration of the question submitted has disclosed no factor of such a kind as to affect the validity of the provision in question the reply to be given to the Finanzgericht Hamburg should be that Article 1 (3) of Regulation No 572/78 is not invalid in providing that the security lodged by the importer must be forfeit and retained as levy when the period prescribed by that provision for the due processing of the frozen beef is exceeded.

Costs

15 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable.

16 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 (Third Chamber),

in answer to the question referred to it by the Finanzgericht Hamburg by order of 7 May 1981, hereby rules:

Article 1 (3) of Regulation No 572/78 is not invalid in providing that the security lodged by the importer must be forfeit and retained as levy when

the period prescribed by that provision for the due processing of the frozen beef is exceeded.

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 29 April 1982.

For the Registrar
H. A. Rühl
Principal Administrator

A. Touffait
President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 11 FEBRUARY 1982 [1]

Mr President,
Members of the Court,

1. This reference for a preliminary ruling raises one problem of the validity and another of the interpretation of the Community rules requiring importers of frozen beef intended for processing to lodge a security in order to qualify for the total or partial suspension of the import levy.

Let me give a brief summary of the facts.

The undertaking Merkur Fleisch-Import of Hamburg, by a declaration of 16 October 1978, requested the customs authorities of the Federal Republic of Germany to release into free circulation some 13 tonnes of frozen boned or boneless beef and stated that it was intended for the manufacture of products other than preserved beef. The customs office at Hamburg-Ericus cleared the goods for release into free circulation and suspended the charging of the levy since the beef was for industrial processing and for its part Merkur lodged a security in the form of a bank guarantee; all this was in accordance with the relevant Community rules whose salient features I shall summarize below. However, the customs authorities

1 — Translated from the Italian.