JUDGMENT OF THE COURT (Fifth Chamber)
11 July 1989 *

In Case 195/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven (Administrative court of last instance in matters of trade and industry) for a preliminary ruling in the proceedings pending before that court between

Cehave NV, Veghel,

and

Hoofdproduktschap voor Akkerbouwprodukten

on the interpretation and validity of the provisions governing the co-responsibility levy in the cereals sector,

THE COURT (Fifth Chamber)

composed of: R. Joliet, President of Chamber, Sir Gordon Slynn, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: G. Tesauro
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Cehave NV, by B. H. ter Kuile, of the Hague Bar,

the Hoofproduktschap (Central Board for Agricultural Products), by its Company Secretary, A. W. F. Helmstrijd,

the Italian Government, by Ivo M. Braguglia, avvocato dello Stato, acting as Agent,

* Language of the case: Dutch.

the Council of the European Communities, by A. Brautigam, acting as Agent,

the Commission of the European Communities, by R. C. Fischer, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 1 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 20 April 1989,

gives the following

Judgment

1 By an order of 19 June 1987, which was received at the Court Registry on 22 June 1987, the College van Beroep voor het Bedrijfsleven referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions on the interpretation and validity of the Community provisions governing the co-responsibility levy in the cereals sector.

2 The questions arose in proceedings between Cehave NV (hereinafter referred to as 'Cehave'), a cereals processor, and the Hoofdproduktschap voor Akkerbouwprodukten (Central Board for Agricultural Products). Cehave processed certain quantities of cereals produced in various Member States of the Community. Consequently, it had to pay the sum of HFL 542 644 by way of co-responsibility levy. That sum was calculated by converting the levy expressed in ecus into Netherlands currency in accordance with the agricultural conversion rate applicable in the Netherlands.

3 By its appeal before the College van Beroep voor het Bedrijfsleven, Cehave disputes the manner in which the amount levied was calculated. It claims that the levy expressed in ecus should first have been converted into the national currency of the Member State in which the cereals were produced, applying the green

exchange rate for that Member State, and that the sum arrived at in that way should then have been converted into Netherlands currency in accordance with the true exchange rate for the two currencies.

4 In order to be able to assess the validity of that argument, the College van Beroep voor het Bedrijfsleven stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) The Community rules on the co-responsibility levy in the cereals sector are based on the following regulations:

Regulation (EEC) No 2727/75 of the Council of 29 October 1975, in particular Article 4 thereof;

Commission Regulation (EEC) No 2040/86 of 30 June 1986;

Council Regulation (EEC) No 1584/86 of 23 May 1986;

Council Regulation (EEC) No 1676/85 of 11 June 1985, in particular Article 2 thereof.

Must those rules be interpreted as meaning that the co-responsibility levy referred to therein, which is to be imposed on and is payable by the undertaking which carried out first-stage processing, must be calculated in the national currency of the Member State in which first-stage processing took place in accordance with the agricultural conversion rate applicable in that State?

(2) If Question 1 is answered in the affirmative, must the rules referred to in that question be interpreted as meaning that the undertaking which paid the co-responsibility levy may and must subsequently pass on to its suppliers the negative or positive difference between the levy which it paid (equal to the amount of the levy expressed in ecus and converted into the national currency of the Member State in which first-stage processing took place in accordance with the agricultural conversion rate applicable in that State) and the discount which it received from its suppliers (equal to the amount of the levy expressed

in ecus and converted into the national currency of the Member State of production in accordance with the agricultural conversion rate applicable in that State, and subsequently converted into the national currency of the Member State in which first stage processing took place in accordance with the true market exchange rate)?

(3) If Question 2 is answered in the affirmative, the application of the rules referred to in Question 1 may at times lead to a situation in which the producer of the grain ultimately bears a levy, the amount of which depends on the Member State in which the grain undergoes first-stage processing.

Does this mean that those rules are invalid inasmuch as they are contrary to the EEC Treaty, in particular Articles 12, 16, 34 and/or 40(3) thereof, or to certain principles upon which the Treaty is based?

(4) If Question 2 is answered in the negative, the rules referred to in Question 1 may at times lead to a situation in which the first processor of the grain ultimately bears a levy (the difference between the levy imposed on him and the lower amount of the discount received by him) or gains a benefit (the difference between the discount received by him and the lower amount of the levy imposed on him) the amount of which varies according to the Member State in which the grain was produced.

Does this mean that those rules are invalid inasmuch as they are contrary to the EEC Treaty, in particular Articles 12, 13 and 30 and/or 40(3) thereof, or to certain principles upon which the Treaty is based?

(5) If Questions 3 or 4, or both, are answered in the affirmative, does the Court consider that there are grounds for regulating the effects of its ruling with regard to the past?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts, the Community provisions at issue, the course of the procedure and the

submissions of the parties, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

6 The first question asks essentially whether Article 2(1) of Commission Regulation No 2040/86 of 30 June 1986 laying down detailed rules for the application of the co-responsibility levy in the cereals sector (Official Journal 1986, L 173, p. 65), is to be interpreted as meaning that the co-responsibility levy in the cereals sector must be calculated in accordance with the agricultural conversion rate applicable in the Member State on whose territory the first-stage processing of the cereals was carried out, or alternatively, as meaning that it must be calculated in accordance with the agricultural conversion rate applicable in the Member State in which the cereals originated.

7 In that regard it is appropriate to recall that under Article 2(1) of Regulation No 2040/86 'the levy shall be paid by operators who undertake processing . . . The levy shall be paid to the competent body appointed for the purpose by each Member State'. Thus, as the co-responsibility levy is payable by the processor of the cereals to the competent body of the Member State in which the processing operation takes place, irrespective of the origin of the cereals, it follows, as the Court has already held in the judgment in Case 64/87 *Versele-Laga NV* v *Robegra NV* [1988] ECR 1961, that the amount to be paid must be converted into the currency of that Member State using the green rate for that currency.

8 Consequently, the reply to the first question must be that Article 2(1) of Commission Regulation No 2040/86 of 30 June 1986 must be interpreted as meaning that the co-responsibility levy in the cereals sector must be calculated using the agricultural conversion rate applicable in the Member State in whose territory the first-stage processing of the cereals was carried out.

The second and fourth questions

9 Essentially, the second question seeks to ascertain whether the combined provisions of Article 4(6) of Regulation No 2727/75 of the Council of 29 October 1975 (Official Journal 1975, L 281, p. 1), as amended by Council Regulation No 1579/86 of 23 May 1986 (Official Journal 1986, L 139, p. 29) and Article 5(1) of Commission Regulation No 2040/86 of 30 June 1986, cited above, are to be interpreted as meaning that operators who undertake first-stage processing of cereals must subsequently pass on to their suppliers any positive or negative difference between the co-responsibility levy payable by those operators and the discount which they receive from their suppliers by virtue of that levy.

10 In that regard, it should be pointed out that under Article 4(6) of Regulation No 2727/75, as amended, 'the levy shall be passed on to the producer'. Article 5(1) of Regulation No 2040/86 states that 'operators who carry out the operations . . . shall pass on the co-responsibility levy to their suppliers. The levy shall also be passed on at each transaction prior thereto, as far as supply by the farmer'.

11 It follows both from the wording of those provisions and their aim, which is to ensure that the levy is neutral in its effect as regards cereals processors and any intermediate suppliers, that the provisions in question are to be interpreted as meaning that the whole of the levy must be passed on to the producers, if necessary in the context of their transactions with any intermediate suppliers. The amount to be passed on to the producer is thus equal to the amount due from the processor, calculated on the basis of the criteria identified in answering the first question.

12 That interpretation is not changed by the fact that the sum which is payable when the first-stage processing is carried out is, in practice, paid when the cereals are sold by the producer to the first supplier, being deducted from the selling price charged by the producer, and that the sum deducted in that way is calculated using the green rate applicable for the Member State in which the cereals are produced. That method, which has the advantage of facilitating the administrative control and the auditing of the transactions in question, may not be relied on in order to avoid the duty of the processors and any intermediate suppliers to pass on the entire amount of the levy to the producers, using for that purpose the agri-

cultural conversion rate which is applicable for the Member State in whose territory the first-stage processing of the cereals is carried out.

13 Consequently, where the amount deducted from the selling price, calculated using the agricultural conversion rate applicable for the Member State in which the cereals were produced, and the amount payable by the processor of the cereals, that is to say the amount calculated on the basis of the agricultural conversion rate applicable for the Member State in which the first-stage processing is carried out, differ because the cereals in question are exported to another Member State for first-stage processing, the principle that the whole amount of the levy must be passed on requires that the difference must subsequently be either charged to or refunded to the producer, if necessary in transactions with any intermediate suppliers.

14 Against that interpretation it has been argued that it is not always possible, for practical reasons, to pass on subsequently the difference between the amount payable by the processor and the amount deducted from the selling price. In many cases it is impossible for the processor, or his intermediate suppliers, to identify the producer because the cereals of different producers are often mixed in the same silo for the purposes of storage.

15 It should be pointed out that such difficulties, supposing that they exist, do not constitute an insurmountable obstacle to the application of the principle that the whole levy is to be passed on. In order to overcome those difficulties it is sufficient to require the operators concerned to keep records which would permit the reconstruction of the marketing chain for the different quantities of cereals in question. More specifically, where it is impossible to distinguish between cereals which are mixed up in one and the same storage facility, it should be added that neither the letter nor the spirit of the regulations precludes the processors, and any intermediate suppliers, from passing on the levy by apportioning the total sum payable for the mixed cereals among the different producers in proportion to the quantity of cereals supplied by each of them.

16 It falls to the Member States, who have the task of implementing the co-responsibility levy scheme from an administrative point of view, to adopt the necessary

measures so that the levy payable by the processors can, in all cases, be passed on in full to the producers of the cereals.

17 Therefore, the answer to the second question must be that the combined provisions of Article 4(6) of Regulation No 2727/75 of the Council of 29 October 1975, as amended by Council Regulation No 1579/86 of 23 May 1986, and Article 5(1) of Commission Regulation No 2040/86 of 30 June 1986, must be interpreted as meaning that operators who carry out first-stage processing of cereals must subsequently pass on to their suppliers any positive or negative difference between the co-responsibility levy payable by them and the discount which they receive from their suppliers on account of that levy.

18 In view of the reply to the second question, there is no need to reply to the fourth question.

The third and fifth questions

19 The third question concerns the validity of the regulations at issue in the light of the interpretation given in reply to the second question.

20 In that regard, Cehave maintains that, since the amount of the co-responsibility levy varies according to the conversion rate applicable for the Member State in whose territory the first-stage processing of the cereals is carried out, the effect of the levy is to hinder the exportation of the cereals to other Member States and consequently it constitutes a measure having equivalent effect to a quantitative restriction on exports, prohibited by Article 34 of the Treaty, and a charge having equivalent effect to customs duties on exports, prohibited by Articles 12 and 16 of the Treaty. Cehave also maintains that in so far as cereals producers bear, as a result of the passing on of the levy, a tax which varies according to the conversion rate applicable for the Member State in which the first-stage processing is carried out, the co-responsibility levy scheme creates discrimination between producers within the Community, which is prohibited by Article 40(3) of the Treaty.

21 With regard to the submission that Articles 12, 16 and 34 of the Treaty have been infringed, it should be stated that the variations in the amount of the levy, of which the appellant in the main proceedings complains, are the direct result of the difference between the agricultural conversion rates, which are applicable under the common agricultural policy by virtue of Article 2(1) of Council Regulation No 1676/85 of 11 June 1985 on the value of the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy (Official Journal 1985, L 164, p. 1), and the market rates of the currencies involved. The establishment of agricultural conversion rates, as distinct from market rates, is justified, with regard to trade between Member States, by the need to compensate for the effects of fluctuations in unstable exchange rates which, in a system where markets for agricultural products are organized on the basis of common prices, can disturb trade. Thus, agricultural conversion rates seek to ensure that normal trade patterns are maintained in spite of the effect of divergent monetary policies. It cannot therefore be subject to the prohibition laid down by Articles 12, 16 and 34 of the Treaty.

22 With regard to the submission that the principle of non-discrimination has been infringed, it must be pointed out that the differences in the amount of levy paid by cereals producers are the result of the fact that the entire amount of the levy, calculated using the agricultural conversion rate applicable for the Member State where first-stage processing of the cereals takes place, is passed on to those producers. As stated in the reply to the second question, the entire amount of the levy is passed on to the producer in order to ensure that it is neutral in its effects as regards processors and any intermediate suppliers, so that the financial burden of the levy falls on the producers alone who, by their very production, contribute to the creation of structural surpluses on the cereals market. The different treatment of producers within the Community which results is thus objectively justified and consequently cannot be described as discrimination within the meaning of Article 40(3) of the Treaty.

23 For the above reasons, the reply to the third question must be that consideration of the rules in question has disclosed no factor of such a kind as to affect their validity.

24 In view of the reply to the third question, the fifth question need not be answered.

Costs

25 The costs incurred by the Italian Government, the Council of the European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings 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 (Fifth Chamber),

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven, by an order of 19 June 1987, hereby rules:

(1) Article 2(1) of Regulation No 2040/86 of the Commission of 30 June 1986 is to be interpreted as meaning that the co-responsibility levy in the cereals sector must be calculated using the agricultural conversion rate which is applicable for the Member State in whose territory the first-stage processing of the cereals is carried out.

(2) The combined provisions of Article 4(6) of Regulation No 2727/75 of the Council of 29 October 1975, as amended by Council Regulation No 1579/86 of 23 May 1986, and Article 5(1) of Commission Regulation No 2040/86 of 30 June 1986 are to be interpreted as meaning that operators who carry out first-stage processing of cereals must subsequently pass on to their suppliers any positive or negative difference between the co-responsibility levy payable by them and the rebate granted to them by their suppliers by virtue of that levy.

(3) Consideration of the rules in question has disclosed no factor of such a kind as to affect their validity.

Joliet Slynn

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 11 July 1989.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber