In Case 216/78

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

NICOLAI BELJATZKY, Berlin,

and

HAUPTZOLLAMT [Principal Customs Office] AACHEN-SÜD,

on the interpretation of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 (Official Journal, English Special Edition 1972 (II), p. 559) concerning the application of the favourable tariff provisions provided for in that regulation to concentrated butter from storage,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. O'Keeffe and G. Bosco, Judges

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. Since it was impossible to dispose on normal market terms of all the butter stored with the intervention agencies of Member States and since it was necessary to avoid the high cost entailed in prolonged storage, the Commission, in Regulation No 1259/72 on the disposal of butter at a reduced price to certain Community processing undertakings (Official Journal, English Special Edition

1972 (II), p. 559) adopted measures permitting intervention agencies to sell butter at a reduced price to certain Community processing undertakings.

Regulation No 1259/72, in order to ensure the proper operation of the system thus established, provides:

— To ensure that all purchasers have equal access, sales of butter at a reduced price must be effected by the intervention agencies by the tendering procedure;

— The tenderer may not take part in the invitation to tender unless he gives an undertaking in writing *inter alia* to comply with certain conditions regarding the composition and production of concentrated butter, the use thereof, the time within which such use must take place and obligations to be complied with where concentrated butter is resold.

Article 6 (1) establishes:

— The minimum fat content of the concentrated butter produced in an approved establishment after processing of the butter sold from storage by the intervention agencies (the product referred to under (a));

— The additives to be incorporated in the butter in the course of such processing which is required to take place in the same establishment (product referred to under (b));

— The products into which the above-mentioned concentrated butter is to be processed. Such processing is identified with the "final" destination of the stored butter which, after processing into concentrated butter with the addition of certain ingredients, is finally processed into specified products (listed unter c)). These products fall under heading 19.08 of the Common Customs Tariff (fine bakers' wares);

— The period within which such final processing must take place (120 days from the time when the butter is taken over by the successful tenderer);

— The duty of the tenderer to keep stock records enabling certain supervision to be effected.

Article 6 (1) *(e)* provides finally that the tenderer shall undertake to include in the contract of sale, in the case of any subsequent resale of concentrated butter, the same requirements as those relating to the keeping of stock records and the use of the product.

When the tenderer is awarded the butter from storage he becomes the "successful tenderer": he "takes over" the quantities of butter which have been awarded him and has a period of 120 days in which to complete the processing in accordance with the prescribed use. In order to ensure that the conditions prescribed by Article 6 (1) are complied with the regulation provides as follows:

— On the one hand (Article 12 (1)) the successful tenderer is to provide a "processing security". Under Article 18 (2) that security "shall be released only for quantities in respect of which the successful tenderer has furnished proof" to the competent agency "that the conditions laid down in Article 6 have been fulfilled". Where the processing has been carried out in a Member State other than that of sale, proof may be furnished only by production of the control copy referred to in Article 17.

— On the other hand (Article 15) "from the time of its removal from store and until it is processed into products coming under heading 19.08 of the Common Customs Tariff, the butter shall be subject to customs or equivalent administrative control".

Finally, in view of the fact that, in applying monetary compensatory amounts to importations into another Member State of butter from storage or concentrated butter, it was necessary to take account of the reduced value of such products it was provided in Article 20 that the monetary compensatory amounts normally applicable (Regulation No 974/71 of the Council) to butter, concentrated butter or butter with added sugar should be multiplied by a coefficient of 0.3.

2. The dispute which gave rise to the present case concerns the application of the reduced monetary compensatory amounts to consignments of concentrated butter imported into the Federal Republic of Germany in 1973 by the undertaking Nicolai Beljatzky (hereinafter referred to as "Beljatzky") which were manufactured from butter from storage and intended for the manufacture of fine bakers' wares.

Initially the German customs authorities admitted such products into free circulation after payment of the reduced monetary compensatory amounts pursuant to Article 20 of Regulation No 1259/72. Later, however, the authorities entrusted with the customs or administrative control provided for in Article 15 of the said regulation found that proof had not been furnished that the use of the disputed consignments of concentrated butter resold by Beljatzky was in accordance with the prescribed purpose.

The German customs authority therefore requested from the importer, by a "Steuerbescheid" (notice of assessment) of 21 May 1974, payment of an additional sum corresponding to the difference between the monetary compensatory amounts normally payable and the reduced amounts originally paid.

3. Beljatzky's protest against that assessment was rejected and the dispute was brought before the Finanzgericht Düsseldorf. Since the Finanzgericht considered:

— On the one hand that an interpretation of Article 20 of the regulation in question in the light of the objective pursued by the system thereby set up would logically lead to the taking into account of the ultimate use of the butter and permit withdrawal of the tariff advantage granted if it were shown that the butter was not used in accordance with its lawful purpose; and

— On the other hand that a strict interpretation of the relevant provisions, which is particularly necessary where such provisions make a concession, must lead to the interpretation of sale of butter or of concentrated butter within the meaning of Article 20 of the said regulations as meaning only sale across a frontier, that is to say the transactions concerning delivery by the exporter to the importer and not the whole commercial transaction beginning with the sale of concentrated butter up to the final use thereof by the ultimate consumer,

it decided, by an order of 18 July 1978, to stay the proceedings and to refer the following questions for a preliminary ruling to the Court of Justice, pursuant to Article 177 of the EEC Treaty:

"1. Is Article 20 of Regulation (EEC) No 1259/72 of 16 June 1972 (Official Journal, English Special Edition 1972 (II), p. 559) to be interpreted as meaning that the definitive preferential levy treatment (reduction of the compensatory amounts) is subject only to the

condition that the product be marketed in accordance with Articles 1 to 19 of the regulation or is there the further condition that the product be *used* in the manner prescribed by the regulation?

2. In the latter case:

Is Article 20 itself an independent provision allowing for the levy of a supplementary charge?

4. The order making the reference was received at the Court on 29 September 1978.

Beljatzky, represented by J. Neumann, Rechtsanwalt, and the Commission of the European Communities, represented by its Legal Adviser, Peter Gilsdorf, assisted by Jörn Sack, a member of its Legal Department, lodged written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to assign the case to the First Chamber, pursuant to Article 95 of the Rules of Procedure. It also decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. *Beljatzky* observes first that in accordance with the judgment of the Court of Justice in Case 44/76 *(Eier-Kontor)* the granting of any subsidy and the charging of any levy are subject to the condition that the ultimate use should be in accordance with the purpose prescribed within the meaning of Community law.

The present dispute nevertheless differs to a considerable degree from the situation considered by the Court in the above-mentioned case.

Beljatzky put the imported goods under the control of the German customs authorities. Further, a security was provided. When that security was released by the German customs authorities, acting in this matter on behalf of the Commission of the European Communities, they officially established that the goods had been used in accordance with the prescribed purpose. It is thus impossible to argue against the plaintiff, as was done in Case 44/76, that he relied upon mere declarations and statements by the Commission.

According to Beljatzky it is furthermore possible that settlement of the point of law referred to the Court of Justice by the Finanzgericht is not directly necessary for the latter to give judgment in the main action.

With regard to the second question Beljatzky considers that Community law, in particular Regulation No 1259/72, does not establish an independent provision allowing for subsequent recovery or restitution. The point concerning the legal justification for such recovery can thus be settled only in terms of national law.

On the basis of those considerations Beljatzky refrains from putting forward conclusions with regard to the first question which might bind him in law and suggests that the reply to the second question should be in the negative.

(2) The *Commission* first observes, with regard to the *first question* that Article 20 of Regulation No 1259/72 does not provide a basis for the conclusion that the transfer of goods in accordance with the provisions of that regulation is sufficient for the granting of a final reduction in the monetary compensatory amount.

It must be pointed out that Article 20 of Regulation No 1259/72 has undoubtedly the same scope as Article 20 of Regulation (EEC) No 232/75 of the Commission of 30 January 1975 (Official Journal 1975 L 24, p. 45) which states that the goods in question are "sold pursuant to this regulation".

The sale in question is thus not a clearly specified operation forming part of a series of legal steps extending from the sale of the butter by the intervention agency to its use for the manufacture of pastry products. It is not necessary that the sale should be with a view to export nor is it a purely commercial operation since the sale is effected subject to the condition that the butter is in fact used for the purpose intended. In conclusion the concept of sale here covers the entire economic process extending from the sale of the butter by the intervention agency up to its final use.

An interpretation, without regard to the surrounding circumstances, whereby the sale by the intervention agency must in itself suffice, irrespective of the subsequent use of the concentrated butter, to obtain a final reduction in the monetary compensatory amounts would in fact constitute an incitement to abuse. Even a successful tenderer acting in bad faith would then have an assurance that he would pay in respect of butter purchased at a reduced price only a monetary compensatory amount markedly lower than the normal amount whilst he would not suffer excessively from the forfeiture of the processing security which merely covers the difference between the reduced price and the normal market price of the butter. Such a situation would give rise to serious disturbances in the market in butter which Regulation No 1259/72, as it is stated in its recitals, is in fact concerned to prevent.

The argument put forward by the Commission is furthermore confirmed by the wording of other provisions of Community law. The differences in the wording used in adopting the various regulations governing the same subject-matter show that in interpreting those regulations it is impossible to accord prime importance to the terms of such provisions. On the contrary the spirit and objective of the rules are decisive for their interpretation and application. Such a criterion moreover leads to an interpretation of Article 20 of Regulation No 1259/72 to the effect that the reduction in the monetary compensatory amount is only obtained conditionally. If this were not so it would be impossible to prevent abuses, even the most flagrant.

In support of this interpretation it is also possible to refer to the fact that the goods are subject to customs or administrative control until their final use. When such control shows that the goods were used for objectives at variance with the intended purpose it must be possible for such a situation to be followed by the appropriate consequences in respect not only of the processing security but also of the compensatory amounts. Since the importer is aware that such control is permanent he cannot assert that he failed to reckon that a re-assessment might be made and that his expectation that the reduction was final should be safeguarded. The re-assessment is not excluded merely because the use at variance with the purpose was by subsequent purchasers since in that case no administrative control would be necessary.

According to the Commission the importer can moreover pass on (for example through a contractual provision) the supplement to the monetary compensatory amount which he has been obliged to pay to the purchaser who has

failed to use the goods in accordance with the purpose. Where the importer does not take such steps for his protection he must bear the consequences.

The principles applicable to monetary compensatory amounts are thus the same as those which apply to the forfeiture of the processing security in connexion with which the Court of Justice has already ruled that the successful tenderer cannot rely on the circumstance that it was not he himself but a subsequent purchaser who used the goods for ends at variance with the purpose.

Considering the *second question* the Commission observes that, in view of the argument that neither Community law nor national law provides legal grounds for recovery of monetary compensatory amounts in situations such as that in the present case the question whether there is a legal basis for such recovery must be viewed in entirely general terms, not merely within the restricted context of Article 20 of Regulation No 1259/72. Furthermore, if it were possible to find an appropriate legal basis in Community law national law would no longer be of any relevance in this respect.

If the Commission's argument is accepted, that is, if Article 20 of Regulation No 1259/72 merely accords a temporary benefit conditional upon the use of the butter for the prescribed purposes, it will be found that the legal basis for the refund does not rest on the provisions granting the above-mentioned benefit but on the provisions establishing the monetary compensatory amounts which are normally imposed on importations, that is, in the present case, on the provisions of the Commission regulation fixing the monetary compensatory amounts in force at the time when the importation is effected. It is significant in this connexion that those provisions do not state that a reduced amount other than the normal monetary compensatory amount shall be applied to the butter in question but in fact state that "that amount shall be multiplied by a coefficient". This amounts to stating that the normal compensatory amount remains applicable and that it is to be reduced (provisionally) only through the coefficient. If the reason for the reduction were to prove to be absent the entire amount would automatically be applicable again under the rule that a general provision becomes applicable as soon as a provision containing a derogation ceases to apply.

The present case differs solely by the fact that the normal monetary compensatory amounts remain applicable after the formalities for the importation of the goods have been completed and the monetary compensatory amount has actually been collected. However, since in such cases the reduction is granted purely because the person concerned undertakes to put the goods, which are furthermore subject to control, to a specific purpose it is clear that the operation in question is not definitively concluded by the completion of the import formalities.

Since Community law thus provides a legal basis for a re-assessment of the difference between the reduced compensatory amount and the normal amount any reference to provisions of national law is irrelevant.

On the basis of those observations the Commission suggests that the reply to the questions submitted should be as follows:

1. Article 20 of Regulation (EEC) No 1259/72 must be interpreted to mean that it confers the benefit of a reduction in monetary compensatory amounts only on condition that the goods are used in accordance with

that regulation. This also applies when the goods are resold by the importer in accordance with Article 6 (1) (e) of the said Regulation No 1259/72 after the completion of the customs formalities.

2. The provisions of the Commission regulations fixing the monetary amounts constitute the legal basis for the imposition of the normal monetary compensatory amount where the goods are used for purposes at variance with the regulation applicable.

III — Oral procedure

Beljatzky, represented by J. Neumann, and the Commission of the European Communities, represented by Jörn Sack, acting as Agent, presented oral argument at the hearing on 3 May 1979.

The Advocate General delivered his opinion in the course of the same hearing.

Decision

1 By an order of 18 June 1978, which was received at the Court of Justice on 29 September 1978, the Finanzgericht Düsseldorf submitted to the Court of Justice under Article 177 of the EEC Treaty two preliminary questions on the interpretation of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 on the disposal of butter at a reduced price to certain Community processing undertakings (Official Journal, English Special Edition, 1972 (II), p. 559).

2 These questions were raised in the course of an action between the customs authorities of the Federal Republic of Germany and an importer of butter from Belgium concerning the application to that butter of the tariff provisions laid down in Article 20 of Regulation No 1259/72.

3 The German customs authorities first charged on the importations of that product, which was produced from butter from storage and intended for the manufacture of fine bakers' wares in accordance with the provisions of Regulation No 1259/72, the reduced monetary compensatory amounts provided for in the above-mentioned Article 20 and subsequently, by a notice of corrective assessment, charged in respect of the importations a sum equal to the difference between those reduced amounts and the amounts normally applicable outside the system established by Regulation No 1259/72.

4 In stating the reasons for the corrective assessment the German authorities claimed that, since the butter in question had not been put by the final user to the use prescribed in the above-mentioned regulation, it could not qualify for the reduced compensatory amounts thereby fixed and that it became liable to the monetary compensatory amounts prescribed for butter freely marketable without restrictions as to its use.

5 The plaintiff in the main action objects *inter alia* that there is no legal basis for such a corrective assessment since Community law, in particular Regulation No 1259/72, does not contain any independent provisions which authorize the subsequent recovery of the difference between the normal rate and the reduced rate of the compensatory amounts initially applied to the product where it is diverted from its destination laid down by law.

6 In order to have this point clarified the Finanzgericht Düsseldorf has referred the following questions to the Court of Justice:

"1. Is Article 20 of Regulation (EEC) No 1259/72 of 16 June 1972 (Official Journal, English Special Edition 1972 (II), p. 559) to be interpreted as meaning that the definitive preferential levy treatment (reduction of the compensatory amounts) is subject only to the condition that the product be marketed in accordance with Articles 1 to 19 of the regulation or is there the further condition that the product be *used* in the manner prescribed by the regulation?

2. In the latter case:

Is Article 20 itself an independent provision allowing for the levy of a supplementary charge?"

7 Since the questions are related they should be considered together.

8 The first paragraph of Article 20 of Regulation No 1259/72 of the Commission provides that:

"The compensatory amounts applicable to butter, concentrated butter and concentrated butter with added sugar ..., for the part consisting of butter, shall be equal to the compensatory amounts fixed pursuant to Regulation (EEC) No 974/71, multiplied by a coefficient of 0.3".

This provision must be interpreted within the framework not only of Regulation No 1259/72 but also of the general rules governing the arrangements for monetary compensatory amounts.

9 Regulation No 1259/72 lays down measures of conjunctural economic policy intended to promote the disposal of butter from storage, the prolonged storage of which entails high costs for the agricultural intervention agencies. It promotes such disposal by making provision, through arrangements for standing invitation to tender, for the sale of butter from storage at a reduced price by the agricultural intervention agencies to butter-processing undertakings in the Community, whereby the successful tenderer undertakes to process the butter purchased into concentrated butter having the composition specified in Article 6 (1) (b) and not to use it or to ensure that it is not used otherwise than for the manufacture of the products in heading 19.08 of the Common Customs Tariff. In order to ensure that the butter thus disposed of is used in accordance with that purpose and that it is not freely marketed the regulation establishes a system of supervision entailing the provision of a processing security, to be released on the conditions set out in Articles 18 and 19 of the regulation.

10 Multiplication, in accordance with Article 20 of the said regulation, by a correcting coefficient which applies to butter from storage sold on the above-mentioned conditions compensatory amounts considerably less than those normally applied to butter under Regulation No 974/71, does not constitute one of the above-mentioned measures intended to promote the disposal and marketing of butter from storage but forms part of the general rules set out in Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257).

11 It is in fact clear from those rules, in particular from Article 2 of that regulation, that the fixing of monetary compensatory amounts is based *inter alia* on the prices of the products in question. The penultimate recital in the preamble to Regulation No 1259/72, which states that "as regards the compensatory amounts fixed pursuant to Council Regulation (EEC) No 974/71 of 12 May 1971 ... account should be taken of the value of the products concerned", clearly refers to the principle underlying that provision whereby compensatory amounts must be adjusted on the basis of the prices of the products in question, representing their market value.

12 It is in implementation of that regulation that Article 20 of Regulation No 1259/72 makes provision, with regard to the butter and concentrated butter referred to in Article 6 (1) of that regulation, for the application of a reduced monetary compensatory amount because, having regard to the restrictions on marketing to which that product is subject, its market value, and consequently its price, and proportionately reduced.

13 It is in accordance with the same principle for the competent customs authorities to re-assess the reduced compensatory amounts if the products in question have been diverted from their destination or if they have not been used in accordance therewith within the period prescribed by Article 6 of Regulation No 1259/72. In fact, in so far as the importer has failed to furnish proof within the above-mentioned period that the goods have reached the destination which was made a condition of the reduction of the compensatory amounts, the goods cannot be considered as having the conventional value attributed to them on the basis of the minimum selling price referred to in Regulation No 1259/72 and they must be considered as butter sold at the normal market price. In that case the competent customs authorities are required under Regulation No 974/71 of the Council to apply the compensatory amounts laid down for butter marketed at such a price and thus to re-assess the reduced compensatory amounts which were initially applied. Since that re-assessment has regard to the market price of the products in question its legal basis is to be found in the general rules themselves which govern the application of monetary compensatory amounts.

14 For these reasons the reply to the questions submitted must be that the definitive application of the reduced monetary compensatory amounts provided for by Article 20 of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 presupposes that the goods in question, having regard in particular to the use to which they are to be put, have the reduced value attributed to them by virtue of Regulation No 1259/72. In so far as the importer has not furnished the proof, within the period prescribed in Article 6 (1) (c) and (2) of Regulation No 1259/72, that the goods have been put to the use to which the reduction of the compensatory amounts is subject, the legal basis for the subsequent re-assessment of such amounts is to be found in the general rules governing the system of monetary compensatory amounts, as established by Regulation No 974/71 of the Council of 12 May 1971.

Costs

15 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 (First Chamber),

in answer to the questions referred to it by the Finanzgericht Düsseldorf by an order of 18 July 1979, hereby rules:

The definitive application of the reduced monetary compensatory amounts provided for by Article 20 of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 and in Article 20 of Regulation (EEC) No 232/75 of the Commission of 30 January 1975 presupposes that the goods in question, having regard in particular to the use to which they are to be put, have the reduced value attributed to them by virtue of those regulations. In so far as the importer has not furnished the proof, within the period prescribed in Article 6 of the said regulations, that the goods have been put to the use to which the reduction of the compensatory amounts is subject, the legal basis for the subsequent re-assessment of such amounts is to be found in the general rules governing the system of monetary compensatory amounts, as established by Regulation No 974/71 of the Council of 12 May 1971.

Mertens de Wilmars O'Keeffe Bosco

Delivered in open court in Luxembourg on 28 June 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of Chamber