JUDGMENT OF THE COURT
3 July 1985 *

In Case 20/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad [Supreme Court] of the Netherlands for a preliminary ruling in the action pending before that court between

NV De Jong Verenigde, Noordwijk,

and

Coöperatieve Melkprodukten Bedrijven 'Domo-Bedum' GA, Beilen,

and

Voedselvoorzienings In- en Verkoopbureau (VIB), Hoensbroek,

on the interpretation of Regulation (EEC) No 232/75 of the Commission of 30 January 1975 on the sale of butter at reduced prices for use in the manufacture of pastry products and ice-cream (Official Journal 1975, L 24, p. 45),

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris, Presidents of Chambers, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H.A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

NV De Jong Verenigde and Coöperatieve Melkprodukten Bedrijven 'Domo-Bedum' GA, by A. F. de Savornin Lohmann, Advokaat of the firm Nauta van Haersolte, Rotterdam,

* Language of the Case: Dutch.

the Netherlands Government, by I. Verkade, *Secretaris-Generaal* at the Ministry of Foreign Affairs, and at the hearing by Mr Keur,

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

after hearing the Opinion of the Advocate General delivered at the sitting on 9 May 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By judgment dated 13 January 1984, which was received at the Court on 20 January 1984, the Hoge Raad [Supreme Court] of the Netherlands referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Regulation (EEC) No 232/75 of the Commission of 30 January 1975 on the sale of butter at reduced prices for use in the manufacture of pastry products and ice-cream (Official Journal 1975, L 24, p. 45) and in particular on the conditions for the release of the processing security provided for in that regulation.

2 That question was raised in proceedings between, on the one hand, NV De Jong Verenigde (hereinafter referred to as 'De Jong') and Coöperatieve Melkprodukten Bedrijven 'Domo-Bedum' GA (hereinafter referred to as 'Domo-Bedum') and, on the other hand, the Voedselvoorzienings In- en Verkoopbureau, a Netherlands intervention agency (hereinafter referred to as 'the VIB'). The proceedings concern the release of a number of processing securities which De Jong furnished to the VIB under the scheme introduced by Regulation No 232/75. For those securities Domo-Bedum acted as guarantor.

3 In order to facilitate the disposal of surplus butter stocked under the intervention system, Regulation No 232/75 introduced a scheme under which intervention agencies may, by means of a standing invitation to tender, sell butter at a reduced

price to certain processing undertakings for the purpose of manufacturing pastry products and ice-cream. Under the scheme each tenderer must, in particular, undertake to have the butter awarded processed into concentrated butter and to have the concentrated butter processed into pastry products or ice-cream in the manner laid down in Article 6 (1) of the regulation and in accordance with the statements in his tender. If he is awarded a quantity of butter, the successful tenderer is required by Article 12 of the regulation to provide a processing security to ensure that the butter is not used for another purpose. The amount of the security is fixed by reference to the difference between the market price of the butter and the minimum price at which the butter is sold under the tendering procedure.

4 Article 15 of the regulation provides that, from the time of its removal from store until it is processed into pastry products or ice-cream, the butter is to be subject to customs or administrative control by the competent authorities. Where the butter is processed into pastry products or ice-cream in a Member State other than that in which it is sold, such control is ensured by a document called a 'T 5 control copy'.

5 Article 18 (2) provides that 'except in cases of *force majeure*...the processing security . . . shall be released only for quantities in respect of which the successful tenderer has furnished proof that the conditions laid down in Article 6 have been fulfilled.' Such proof is furnished in different ways depending on the circumstances, one way being the production of the T5 control copy.

6 Since 1974 De Jong has bought a number of consignments of butter under this scheme. It processed the butter into concentrated butter and then supplied it to Sahne-Heinrich KG in the Federal Republic of Germany subject to the obligation to process it into pastry products or ice-cream. That company sold the concentrated butter to the undertaking W. S. Scheunemann, which resold it without observing the processing conditions.

7 Until the Autumn of 1975 the T5 control copies bearing the German authorities' attestation that the butter had been processed in accordance with Regulation No 232/75 were nevertheless returned in due time for a number of consignments and the VIB released the processing securities provided by De Jong in respect of those consignments. According to the findings of the national courts, the German authorities had neglected to exercise proper supervision over the sale and use of the consignments of butter in question before issuing the T5 control copies.

8 In the Autumn of 1975 the German authorities stopped returning the T5 control copies for the consignments of butter which De Jong had supplied to Sahne-Heinrich. The VIB then refused to release the securities relating to the consignments for which no T5 control copies had been produced and sued De Jong and Domo-Bedum for the unreleased securities, which amounted to HFL 2 561 714.13 for a total quantity of 611 661 kilograms of butter.

9 Before the Netherlands courts De Jong and Domo-Bedum pleaded *force majeure* within the meaning of Article 18 (2) of Regulation No 232/75. De Jong claimed to have relied on the attestations of the German authorities on the T5 control copies which had previously been returned. It argued that, if those authorities had carried out the necessary controls and not issued the relevant attestations, it would have become clear sooner that the buyers had not observed the processing conditions. De Jong would therefore have stopped supplying concentrated butter to Sahne-Heinrich and the securities provided for later supplies of butter would not have been forfeited.

10 That argument was rejected both by the Arrondissementsrechtbank and, on appeal, by the Gerechtshof, Amsterdam. Both courts ordered De Jong and Domo-Bedum to pay the forfeited securities. On an appeal in cassation the Hoge Raad of the Netherlands referred the following question to the Court for a preliminary ruling:

'Is a person who buys butter directly from an intervention agency and who has undertaken to comply with the conditions laid down in Article 6 (1) (c) of Regulation No 232/75 discharged from his obligations by virtue of Community law and in particular by virtue of general legal principles or the provisions of that regulation — with the result that the processing securities must be released although the relevant control copies have not been produced — where he relied on the competent authorities to have exercised proper supervision over earlier consignments before they issued the customs declarations — which subsequently proved to be incorrect — that led to the release of the processing securities furnished in respect of those consignments and where the buyer would not have bought and supplied the butter in question if the competent authorities had exercised proper supervision over the earlier consignments?'

11 That question is designed to clarify the conditions laid down in Article 18 (2) of Regulation No 232/75 for the release of the processing security and in particular the concept of *force majeure* within the meaning of that provision.

12 In the view of De Jong and Domo-Bedum, the concept of *force majeure* should comprise in a case such as this the *mora creditoris* and the liability of the various authorities charged, on behalf of the Community, with implementing the scheme established by Regulation No 232/75. They maintain that the supervisory duty laid down in Article 15 of that regulation, which the German authorities failed to fulfil in this case, is intended *inter alia* to protect the first buyer against risks which he is not in a position to assume. The VIB must be held responsible for the maladministration of other authorities which, like itself, act on behalf of the Community under this scheme. In accordance with the principles of proportionality and the protection of legitimate expectation, De Jong is entitled to expect that the competent authorities will properly perform the duty of control which they have under Regulation No 232/75 and that it will not have to bear the detrimental consequences of maladministration.

13 The Netherlands Government takes the view that the conditions for the release of the processing securities in question are not fulfilled. Those conditions should be examined with respect to each individual transaction without considering the results of controls carried out in previous transactions. The view that the course of previous transactions may create rights in the future is not compatible with the system of control established by Regulation No 232/75. That system protects the Community's interests by preventing the butter from being diverted from its intended use. The first buyer is responsible for the subsequent processing of the butter and is not discharged from his undertakings by circumstances such as those which occurred in this case. The risk that a subsequent buyer might not comply with the processing conditions is not abnormal or unforeseeable and such a circumstance does not therefore constitute *force majeure*.

14 The Commission observes that the buyer's obligation to process the butter is the basis of the scheme. The assumption of that obligation by a subsequent buyer does not discharge him from his obligation towards the intervention agency. The T5

control copies are not proof of the good conduct of a subsequent buyer and no legitimate expectation can arise from the fact that they are duly returned. The first buyer can protect himself against the risk of improper use of the butter by choosing his buyers carefully and requiring a security from them. If the scheme established by Regulation No 232/75, under which the subsidy is paid prior to the final processing of the butter, is to function properly, the furnishing of a processing security and the risk which this involves for the first buyer are absolutely necessary.

15 The Court would observe first of all that the purpose of the processing security which the successful tenderer must furnish for each quantity of butter awarded to him and taken over by him is to ensure that the butter, which is sold on particularly favourable terms, is not diverted from its intended use and does not find its way on to the normal market. To that end Article 18 (2) provides that, except in cases of *force majeure*, the security is to be released only if proof is furnished that the relevant quantity of butter has in fact been processed in accordance with the conditions laid down. It is clear that that requirement is not satisfied where the competent authorities have not issued the control copies to certify that the butter has been processed because the quantities of butter in question have been used for purposes other than those prescribed.

16 As regards the question whether that requirement can be waived on grounds of *force majeure*, it is clear from the objectives and the provisions of the relevant legislation that the concept of *force majeure*, within the meaning of Article 18 (2) of Regulation No 232/75, must be understood as meaning absolute impossibility caused by abnormal circumstances beyond the control of the purchaser of the butter the consequences of which could not have been avoided without unreasonable sacrifices, despite the exercise of all due care.

17 In this regard it must be pointed out that Article 10 (5) of Regulation No 232/75 provides that 'rights and obligations arising in connection with the invitation to tender shall not be transferable'. The effectiveness of the control system would be seriously impaired if the acceptance of a processing obligation by a subsequent purchaser who was not himself under any legal obligation towards the competent authority was sufficient to discharge the secured undertaking given by the successful tenderer. It follows that the successful tenderer is responsible for the conduct of a subsequent buyer of the concentrated butter who has not complied with the obligation to process it in accordance with Regulation No 232/75.

18 The failure by a subsequent buyer to comply with the processing obligation is not therefore, as far as the successful tenderer is concerned, an unforeseeable and unavoidable circumstance which might constitute *force majeure*. Indeed, no provision of Community law prevents the successful tenderer from including in his supply contract with a subsequent buyer terms enabling him to verify whether the subsequent buyer complies with his undertakings and requiring the subsequent buyer to bear the financial consequences of any failure to comply with his undertakings and to provide securities or other guarantees in that regard.

19 By providing in Article 12 (1) that a processing security must be given before 'each quantity' is taken over and in Article 18 (2) that this processing security is to be released 'only for quantities in respect of which the successful tenderer has furnished proof' of processing, Regulation No 232/75 made it clear that each transaction had to be considered separately for the purposes of the scheme concerned. The fact that some transactions proceed normally cannot therefore be a legitimate ground for expecting subsequent transactions to proceed normally. The obligation to provide a processing security for each quantity of butter awarded would in practice become completely meaningless if a plea invoking general principles of law and based on the fact that the competent authorities had, rightly or wrongly, issued the required documents in some transactions were sufficient to obtain the release of other securities, even where the requisite proof had not been furnished.

20 It follows that in the present case it is irrelevant whether, as the national court found, the authorities of the Member State in which processing was to take place failed to exercise proper supervision and therefore issued incorrect documents. The fact that this occurred in the case of certain quantities can under no circumstances justify the release of securities given for quantities supplied later for which such documents have not been issued.

21 Furthermore, the loss of the processing security, which, according to Article 9 (2) of Regulation No 232/75, covers the difference between the market price of the butter and the minimum selling price fixed for each tender, has the result, where the processing conditions are not observed either by the successful tenderer himself or by a later buyer of the butter, of making the successful tenderer pay an amount

equivalent to the advantage which he has obtained in spite of the fact that the undertaking which he gave has not been complied with. Since firms participate in the scheme for the sale of butter at reduced prices on the basis of an undertaking freely entered into and for the advantage which it may bring them and since they are free to choose the buyers with whom they wish to enter into contracts for the subsequent processing of the concentrated butter, it cannot therefore be considered that the rules concerning the provision of the processing security exceed what is appropriate and necessary for attaining the desired objective or impose an excessive burden on the successful tenderer.

22 The answer to the question submitted by the Hoge Raad must therefore be that Article 18 (2) of Regulation No 232/75 of the Commission of 30 January 1975 must be interpreted as meaning that:

(i) the processing securities given by a successful tenderer for quantities of butter awarded to him under the scheme for selling butter at reduced prices established by that regulation are not to be released if the control copies attesting that those quantities of butter have been processed cannot be submitted because a subsequent buyer of those quantities of butter has used them for purposes other than that prescribed;

(ii) the same applies if, when supplying those quantities of butter to a buyer who undertook to comply with the processing conditions, the successful tenderer relied on the fact that the authorities responsible for supervising the processing of the butter had issued in good time the control copies relating to quantities previously supplied to the same buyer and those documents subsequently prove to be incorrect.

Costs

23 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have 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 proceedings before the national court, the decision on costs is a matter for that court.

On those grounds

THE COURT,

in answer to the question submitted to it by the Hoge Raad of the Netherlands by judgment of 13 December 1984, hereby rules:

(1) Article 18 (2) of Regulation No 232/75 of the Commission of 30 January 1975 must be interpreted as meaning that the processing securities given by a successful tenderer for quantities of butter awarded to him under the scheme for selling butter at reduced prices established by that regulation are not to be released if the control copies attesting that those quantities of butter have been processed cannot be submitted because a subsequent buyer of those quantities of butter has used them for purposes other than that prescribed.

(2) The same applies if, when supplying those quantities of butter to a buyer who undertook to comply with the processing conditions, the successful tenderer relied on the fact that the authorities responsible for supervising the processing of the butter had issued in good time the control copies relating to quantities previously supplied to the same buyer and those documents subsequently prove to be incorrect.

Mackenzie Stuart Bosco Due Kakouris

Koopmans Everling Bahlmann Galmot Joliet

Delivered in open court in Luxembourg on 3 July 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President