JUDGMENT OF THE COURT (Fifth Chamber)
22 January 1986 *

In Case 266/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal administratif [Administrative Court], Rouen, for a preliminary ruling in the proceedings pending before that court between

Denkavit France SARL

and

Fonds d'orientation et de régularisation des marchés agricoles [Agricultural Markets Guidance and Stabilization Fund]

on the interpretation and validity of Article 15 of Commission Regulation (EEC) No 1380/75 of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1975, L 139, p. 37),

THE COURT (Fifth Chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Fonds d'orientation et de régularisation des marchés agricoles, by P. Villey, Avocat, and,

the Commission of the European Communities, by Mrs D. Sorasio, a member of its Legal Department, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 October 1985,

gives the following

* Language of the Case: French.

JUDGMENT

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

Decision

1 By a judgment of 9 November 1984, which was received at the Court on 12 November 1984, the tribunal administratif, Rouen, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the validity and interpretation of Article 15 of Commission Regulation No 1380/75 of 20 May 1975 laying down detailed rules for the application of monetary compensatory amounts.

2 Those questions were raised in proceedings between Denkavit France (hereinafter referred to as 'Denkavit') and the Fonds d'orientation et de régularisation des marchés agricoles (hereinafter referred to as 'the Fund'), a French intervention agency, which had refused an application by Denkavit for the payment of monetary compensatory amounts.

3 Article 15 of Regulation No 1380/75 provides that 'except in cases of *force majeure*, no claim for payment of a monetary compensatory amount shall be entertained unless the relevant documents are submitted within the six months following the day on which customs formalities were completed'. Proof of completion of those formalities is to be furnished in principle in the form required by Article 11 (2) of the same regulation by production of the control copy provided for in Article 1 of Commission Regulation (EEC) No 2315/69 of 19 November 1969 (Official Journal, English Special Edition 1969 (II), p. 515).

4 Article 11 (5), which was added by Commission Regulation (EEC) No 1498/76 (Official Journal 1976, L 167, p. 28) provides that 'where the control copy referred to in paragraph (2) is not returned to the office of departure or relevant central body within three months of its issue owing to circumstances beyond the control of the person concerned, the latter may make application to the competent agency for other documents to be accepted as equivalent, stating the grounds for such application and furnishing supporting documents . . . '.

5 As regards the procedure for paying the monetary compensatory amounts, in so far as it is relevant in the present case, it should be noted that where goods are exported from France to the United Kingdom it is the French authorities who pay the trader the monetary compensatory amounts which should be granted by the United Kingdom, in accordance with a procedure agreed between those two Member States pursuant to Article 2a of Regulation (EEC) No 974/71 of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257), as amended by Regulation (EEC) No 1112/73 (Official Journal 1973, L 114, p. 4). According to French administrative practice the original of the T5 form is returned through the customs office of departure to the trader; it is not forwarded directly by the customs authorities of the State of destination to the body responsible for payment, as is the practice in other Member States.

6 As is apparent from the documents before the Court, on 19 January 1977 Denkavit exported to the United Kingdom 20 tonnes of a product described as Finisher C2 intended for use as animal feed and conferring entitlement to monetary compensatory amounts on importation into the United Kingdom. A T5 form was completed.

7 In a letter dated 25 April 1977 Denkavit informed the Fund that the original of the T5 control copy had not been returned to it.

8 On 4 November 1977 Denkavit submitted the documents in its possession to the Fund with a view to being paid the monetary compensatory amounts. Those documents included a letter dated 11 October 1977 from the United Kingdom customs authorities stating that the T5 control copy had been lost.

9 As from 10 May 1978 Denkavit took steps to obtain from the United Kingdom authorities equivalent documents which it finally lodged with the Fund on 29 August 1978, together with an application for payment of the monetary compensatory amounts.

10 On 1 September 1978 the Fund refused payment on the ground that Denkavit had not furnished evidence that it had taken all the necessary steps to lodge its application for payment within the six-month period following importation of the product, as required by law. Denkavit brought an action for the annulment of that decision before the Tribunal administratif, Rouen.

11 Denkavit argued before that court *inter alia* that to bar its application on the ground that it had been submitted out of time was a penalty disproportionate to the objective pursued and Article 15 of Regulation No 1380/75 was therefore invalid. Further, it maintained that since the loss of the T5 document by the customs authorities was a case of *force majeure* the application could not be regarded as having been submitted out of time.

12 The Fund, on the other hand, maintained that Article 15 was valid and that, in view of Denkavit's failure to take reasonable steps before 20 July 1977, the date of expiry of the six-month period for making an application to the competent agency to have other documents accepted as equivalent, the failure to return the original of the T5 control copy could not be regarded as a case of *force majeure*. Accordingly, the application for payment of the monetary compensatory amounts was already barred by lapse of time when it was made on 29 August 1978.

13 In order to resolve that issue the Tribunal administratif, Rouen, stayed the proceedings until the Court had given a preliminary ruling on the two questions set out in the grounds of the judgment in the following terms:

'Is the rule that claims submitted out of time will not be entertained, laid down in Article 15 of Regulation (EEC) No 1380/75, contrary to the general principles of Community law in so far as it does not comply with the rule that penalties must be in proportion, and contrary to the spirit of the Community system of payment of compensatory amounts; if not, does the fact that Control Copy EC T5 was not returned constitute a case of *force majeure* within the meaning of the above-mentioned article and what conditions apply thereto?'

First question

14 Denkavit has argued that the rule in Article 15 of Regulation No 1380/75 which bars claims submitted out of time is contrary to two general principles of Community law. In the first place it is contrary to the principle of proportionality because the penalty is excessive and unnecessary for the achievement of the objective pursued, as is apparent from the case-law of the Court and in particular the judgments of 29 February 1979 in Case 122/78 *Buitoni* v *Fonds d'orientation et de régularisation des marchés agricoles* [1979] ECR 677 and 9 November 1983 in Case 46/82 *Federal Republic of Germany* v *Commission* [1983] ECR 3549. On the other hand, Denkavit considers that the judgment of 29 April 1982 in Case 147/81 *Merkur Fleisch-Import GmbH* v *Hauptzollamt Hamburg-Ericus* [1982] ECR 1389 is

concerned with the system of suspension of import levies and cannot be applied to monetary compensatory amounts. In the second place, to bar claims submitted out of time would be contrary to the principle of 'due regard for the spirit of the system of monetary compensatory amounts'. Denkavit therefore considers that the provision in question cannot be regarded as valid.

15 In the Fund's view, Article 15 is contrary neither to the principle of proportionality nor to the spirit of the system of monetary compensatory amounts.

16 The Commission points out first of all that the barring of claims submitted out of time is not a penalty but a normal consequence of the expiry of any prescribed period the observance of which is mandatory. In its view, the general principles of Community law do not include a principle of due regard for 'the spirit of the system of monetary compensatory amounts', which is in fact merely an aspect of the principle of proportionality. With regard to that principle, the Commission contends that the setting of a mandatory time-limit, disregard of which bars the claimant on the ground that his claim is out of time, is a necessary and appropriate means for achieving the objective of equal treatment of traders in the application of the machinery for granting monetary compensatory amounts. In its view the six-month period is reasonable having regard to the practice of national customs authorities. Moreover, exceptional circumstances are taken into account in Article 15.

17 According to a consistent line of decisions of the Court, in order to determine whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement.

18 In the present case the aim of the prescribed period is set out in the 14th recital in the preamble to Regulation No 1380/75, which reads as follows: 'In the interests of sound administration, it seems desirable to require that application for payment of the compensatory amount be made within a reasonable period'. That period is thus intended to ensure that administrative matters are dealt with without undue delay.

19 In view of those considerations and 'in order to prevent distortions of competition between the trade interests concerned in the Member States', Article 16 of the regulation completes the system by requiring, in principle, payment of the monetary compensatory amounts within two months from the day of deposit of sufficient supporting documents.

20 Having regard to the aforesaid aim, the setting of a mandatory time-limit for the submission of applications is a necessary measure. A period of six months is not unreasonable if it is borne in mind in the first place that it is in the interest of traders to receive the monetary compensatory amounts as soon as possible, and secondly that according to current administrative practice the control form, as is apparent from the documents before the Court, is generally returned within a relatively short period.

21 Next, it should be noted that the barring of claims on the ground that the requisite documents have been submitted out of time is not a penalty but, as a general rule, the normal consequence of the expiry of any prescribed period the observance of which is mandatory. It must be borne in mind that in the present case Article 15 provides that delays may be justified by exceptional circumstances amounting to *force majeure.*

22 In those circumstances there are no grounds for stating that the rule in Article 15 which bars claims submitted out of time is out of proportion to the aim pursued by the Community legislature.

23 Accordingly, the answer to the first question submitted by the national court must be that consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Article 15 of Regulation No 1380/75.

Second question

24 Denkavit claims that the loss of the T5 document owing to the negligence of the customs authorities is a case of *force majeure.* It adds that it informed the Fund of the loss of that document on 25 April 1977, that is to say within the prescribed period. In its view, the three-month period provided for in Article 11 (5) of Regulation No 1380/75 for submitting an application for other documents to be accepted as equivalent is optional. In support of that contention Denkavit relies on

the Court's judgment of 6 October 1982 in Case 302/81 *Eggers* v *Hauptzollamt Kassel* [1982] ECR 3443.

25 In the Fund's view, however, the mere failure to return the T5 control copy cannot be a case of *force majeure*, since Article 11 of the regulation allows the trader to avoid the consequences of such an unusual event by exercising due care.

26 The Commission considers that in principle acts of the administrative authorities which are beyond the trader's control constitute unforeseeable and unusual circumstances if they amount to maladministration, that is to say if the public authorities have taken no action at all, have not taken appropriate action or have taken action belatedly. The Commission considers however that a second condition — namely whether the trader has exercised due care — must be fulfilled in order to establish a case of *force majeure*. In that respect the Commission contends that the failure of a trader to avail himself of the possibility of making an application within the six-month period for other documents to be accepted as equivalent under Article 11 (5) of Regulation No 1380/75 is not sufficient evidence in itself that he has failed to exercise due care. In the Commission's view, steps taken to secure the return of the T5 control copy may also amount to due care. On the other hand, the duty to exercise due care does not end with the expiry of the six-month period since even after its expiry the trader must substantiate his claims in the fullest possible manner. To that end he may supply other documents which are considered equivalent under the relevant rules of Community law.

27 It should be noted that, according to a consistent line of decisions of the Court, the concept of *force majeure* must be understood in the sense of unusual and unforeseeable circumstances, beyond the trader's control, the consequences of which could not have been avoided even if all due care had been exercised. That concept must be considered in relation to the provisions of each regulation in which the term '*force majeure*' appears.

28 Article 11 (5) of Regulation No 1380/75 has laid down for the benefit of those concerned a special procedure dealing precisely with cases where the control copy is not returned to the office of departure or relevant central body within three months of its issue. Under that procedure, the person concerned may make appli-

cation to the competent agency for other documents to be accepted as equivalent, and thereby avoid the consequences of the loss of the T5 document. Under the system set up by Regulation No 1380/75, a diligent trader must make an application as early as possible and in any event before the expiry of the six-month period prescribed by Article 15. A person who does not avail himself of that opportunity cannot rely on *force majeure* as provided for by Article 15.

29 The answer to the second question must therefore be that where the T5 control copy has not been returned the person concerned may not plead *force majeure* if he has not taken the necessary steps to avoid the consequences of the failure to return that form and, in particular, if he failed to make an application, before the expiry of the six-month period, for other documents to be accepted as equivalent pursuant to Article 11 (5) of Regulation No 1380/75.

Costs

30 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 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 submitted to it by the tribunal administratif, Rouen, by judgment of 9 November 1984, hereby rules:

(1) Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Article 15 of Regulation No 1380/75.

(2) Where the T5 control copy has not been returned, the person concerned may not plead *force majeure* if he failed to make an application, before the expiry of the six-month period, for other documents to be accepted as equivalent pursuant to Article 11 (5) of Regulation No 1380/75.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 22 January 1986.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber