JUDGMENT OF THE COURT (Second Chamber)
12 December 1985 *

In Case 208/84

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 action pending before that court between

Vonk's Kaas Inkoop en Produktie Holland BV

and

(1) **Minister van Landbouw en Visserij** [Minister for Agriculture and Fisheries]

(2) **Produktschap voor Zuivel** [Dairy Board]

on the validity of the provisions contained in Note 5 to Part 5 of Annex I to Commission Regulation (EEC) No 1245/83 of 20 May 1983 fixing the monetary compensatory amounts and certain coefficients and rates required for their application (Official Journal 1983, L 135, p. 3), as successively amended by Commission Regulations (EEC) No 3281/83 of 18 November 1983 (Official Journal 1983, L 322, p. 36) and No 270/84 of 1 February 1984 (Official Journal 1984, L 31, p. 15),

THE COURT (Second Chamber),

composed of: K. Bahlmann, President of Chamber, T. Koopmans and O. Due, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

Vonk's Kaas Inkoop en Produktie Holland BV, the plaintiff in the main proceedings, by H. J. Bronkhorst, advocate at the Hoge Raad, assisted by W. de Jong, acting as expert,

* Language of the Case: Dutch.

the Government of the Netherlands, by I. Verkade, Secretary-General at the Ministry of Foreign Affairs, acting as Agent, in the written procedure,

the Commission of the European Communities, by R. C. Fischer, a Legal Adviser of the Commission, acting as Agent, assisted by J. de Jong, acting as expert,

after hearing the Opinion of the Advocate General delivered at the sitting on 24 October 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 a judgment of 14 August 1984, which was received at the Court on 16 August 1984, the College van Beroep voor het Bedrijfsleven referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the validity of Note 5 to Part 5 of Annex I to Commission Regulation No 1245/83 of 20 May 1983 fixing the monetary compensatory amounts and certain coefficients and rates required for their application, as successively amended by Commission Regulations No 3281/83 of 18 November 1983 and No 270/84 of 1 February 1984.

2 That question was raised in proceedings brought by Vonk's Kaas Inkoop en Produktie Holland BV (hereinafter referred to as 'Vonk') against the Netherlands Minister for Agriculture and Fisheries and the Produktschap voor Zuivel [Dairy Board]. Vonk processes cheese waste from various kinds of cheese into processed cheese and cheese powder. It obtains its raw material chiefly in the Federal Republic of Germany and France and resells surplus raw material, *inter alia*, in Denmark. The main proceedings relate to decisions adopted at the beginning of 1984 by the Netherlands authorities under the provision cited above requiring

Vonk to pay monetary compensatory amounts on the import of cheese waste while refusing to grant compensatory amounts on its re-exportation.

3 Before the College van Beroep, Vonk claimed that those decisions should be annulled on the ground that the Community provision under which they were adopted was invalid. The College van Beroep stayed the main proceedings and referred the following question to the Court:

'In so far as Note 5 to Part 5 of Annex I to Regulation (EEC) No 1245/83, as successively amended by Regulations (EEC) No 3281/83 and No 270/84, provides that no monetary compensatory amount is to be paid on exports of the cheese of low value referred to in that note and that if a monetary compensatory amount is chargeable in respect of a consignment consisting of different types of cheese of low value the compensatory amount applicable is to be the amount referred to in the note, is Regulation (EEC) No 1245/83 invalid on any of the following grounds:

(a) breach of Article 12 taken together with Articles 38 to 46 of the EEC Treaty, or

(b) breach of Regulation (EEC) No 974/71 of the Council, or

(c) inadequate or invalid statement of the reasons on which Regulations (EEC) No 3281/83 and No 270/84, by which Note 5 was amended, are based, or

(d) breach of the principle of proportionality, or

(e) breach of the principle prohibiting discrimination?'

4 To answer that question, it is necessary first of all to examine the history of the Community legislation governing the monetary compensatory amounts for the product at issue as set out in the documents and the supplementary explanations submitted to the Court.

5 Before 1977 the regulations did not lay down any specific monetary compensatory amount for cheese waste. Thus where the product was traded internationally, either within the Community or with non-member countries, it was necessary to

apply the monetary compensatory amounts laid down for the type or types of cheese of which the waste was made up.

6 By a note to Annex I to Commission Regulation (EEC) No 1824/77 of 4 August 1977 altering the monetary compensatory amounts applicable to milk and milk products (Official Journal 1977, L 203, p. 7), the Commission set a single, lower rate for the monetary compensatory amounts in respect of 'cheese rinds and wastes', which were defined as products 'unfit as such for human consumption'. The reason given in the preamble for that amendment, which was made in response to trade requests, was that the compensatory amounts for cheese rinds and waste were not in correct proportion to the value of those products.

7 Commission Regulation No 1245/83, cited above, incorporated that provision in Note 5 to Part 5 of Annex I. The provision remained in force in that form until 2 January 1984.

8 On that date the first of the contested regulations entered into force, namely Commission Regulation No 3281/83 of 18 November 1983 amending Regulation No 1245/83 in respect of the monetary compensatory amounts applicable to cheese rinds and wastes. That regulation introduced an amended version of the provision, which differs from the previous version in three material respects.

9 Firstly, the product in question is defined by reference to its low value. The stated reason for that amendment was that the previous definition could give rise to different interpretations, and this, according to the Commission, is what actually happened.

10 Secondly, the new Note 5 provides that no monetary compensatory amount is to be *granted* on the import or export of the product. Thirdly, it no longer sets any specific monetary compensatory amount for the product, which means that compensatory amounts are once again *chargeable* at the rates fixed for the types of cheese from which the waste derives. As stated in the preamble to the regulation, the reasons for those two changes are as follows:

'... the difference between the compensatory amounts for fresh cheeses and for cheese rinds and wastes has created artificial trade flows between Member States; ... to discourage such trade, a compensatory amount should no longer be granted for the latter products and any amount charged should be the full amount ... '.

11 The Commission has enlarged upon that reasoning in the observations it has submitted to the Court. The Commission states that cheese rinds and waste occur in two different forms which it is practically impossible for the national authorities to distinguish when accepting declarations made in connection with monetary compensatory amounts on import or export. The first of those two forms is a product which cannot be re-used and therefore has no commercial value. However, under the former version of the note, it was eligible for the grant of monetary compensatory amounts where it was exported from a Member State with a strong currency to a Member State with a weak currency, and the amount involved could be well in excess of transport costs, in particular where the gap between the exchange rate and the green rate was especially great. In the second form the product was capable of being re-used as a raw material for processed cheese or cheese powder. According to the Commission, that product has been the subject of 'roundabout' trade in which the product is imported into a Member State with a strong currency in the form of waste, so that compensatory amounts are levied on it at the single, lower rate, and then re-exported from that State in the form of processed cheese eligible for the 'full' monetary compensatory amount without ever having been offered for direct consumption. It was in order to avoid those two kinds of artificial trade flow that the Commission drew up the new version of Note 5.

12 Finally, by the second regulation referred to in the College van Beroep's question, namely Regulation No 270/84 of 1 February 1984 amending Regulation No 1245/83 as regards certain monetary compensatory amounts in the cereals and milk and milk products sectors (cited above), the Commission added to Note 5 a paragraph introducing an increased standard rate to be charged in respect of consignments consisting of different types of cheese. The reason for that addition, as stated in the preamble to the regulation, is that the application of the general rules laid down for the levying of monetary compensatory amounts on mixed consignments was capable of giving rise to excessively high monetary compensatory amounts in the case of waste derived from different types of cheese. According to the Commission, the effect of applying the general rules is in most

cases to make the compensatory amounts applicable to the mixed consignment depend on the constituent attracting the highest rate, whereas the standard rate constitutes the average of the compensatory amounts laid down for the types of cheese capable of being re-used in the form of waste.

13 In argument before the Court, Vonk has pointed out that according to the terms of Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257), which still forms the legal basis for Commission regulations on monetary compensatory amounts, the sole purpose of those amounts is to correct the effects of irregular exchange rate fluctuations which might otherwise lead to disturbances in trade in a system where the organization of the markets in agricultural products is based on common prices. Monetary compensatory amounts should therefore ensure neutrality in trade, and, as Article 2 of the regulation provides, they must be adjusted to the market value of the various products. Yet, Vonk argues, the abolition of the grant of compensatory amounts for cheese rinds and waste and the increase in the amounts chargeable in respect of those products can only have the effect of creating disturbances in trade and do not take market values into account. They are therefore contrary to both the letter and the spirit of Regulation No 974/71.

14 Vonk further maintains that in so far as the monetary compensatory amounts levied are too high in relation to the market value of the product, they amount in fact to a charge having an effect equivalent to a customs duty contrary to Article 12 of the EEC Treaty taken in conjunction with Articles 38 to 46.

15 The measures adopted by the Commission are also disproportionate to their purpose, which is to prevent artificial trade flows. In the first place, they affect trade flows which are not at all artificial in the same way. In the second place, irregular trade flows may be prevented by means of less drastic measures such as, for instance, checks on the basis of invoices or checks carried out where the products are processed.

16 Furthermore, the contested measures are especially unfavourable to traders who export cheese waste from Member States with a strong currency. The measures are

therefore contrary to the general principle of non-discrimination as laid down in particular in the second subparagraph of Article 40 (3) of the Treaty.

17 Finally, the measures are inadequately reasoned. The only reason given in the preamble to Regulation No 3281/83 is the need to discourage artificial trade flows, but that in no way explains why the abolition of the grant of monetary compensatory amounts or the increased rate of the amounts chargeable should be necessary for that purpose. The preamble to Regulation No 270/84 gives the reasons for the introduction of a standard rate for a consignment of cheese waste composed of different kinds of cheese but not the reasons justifying the particular rate chosen.

18 In their observations the Netherlands Government and the Commission contend that in the application of monetary compensatory amounts the Commission must try to avoid not only disturbances caused by the monetary measures of the Member States but also potential disturbances in trade arising from the application of the compensatory amounts themselves. Consequently it is lawful and indeed imperative for the Commission to adjust the Community legislation on monetary compensatory amounts in such a way as to curb artificial trade flows, as the Commission did inadopting the contested regulations. In that regard the Netherlands Government confirms not only the existence of 'roundabouts' but also the fact that if compensatory amounts were granted on export at the higher rate chargeable on import, that might have created new artificial trade flows.

19 The Commission adds that if, in a given case, it proves impossible to set a compensatory amount which is perfectly neutral and has no disturbing side-effects on trade, it must then balance the interests at stake while respecting certain criteria and limitations as regards the level of the compensatory amounts and their purely monetary justification. In fact, both the monetary measures and the application of the compensatory amounts had created disturbances in the trade in cheese and cheese waste even before 1977, when the amounts applied to cheese waste and normal cheese were identical. The various amending regulations from that date were intended to counteract those disturbances in the light of the experience gained. Given those circumstances, the contested rules are not incompatible either

with the combined provisions of Articles 12 and 38 to 46 of the EEC Treaty or with Regulation No 974/71 of the Council or indeed with the principle of non-discrimination.

20 As regards the principle of proportionality, the Commission stresses that the present system in no way prevents trade in the cheese for processing in question. A system of checks such as that suggested by Vonk was considered at the time of the amendment but rejected as unacceptable because, in order to be effective, it would have required extensive administrative supervision of the processing of cheese waste, an extremely cumbersome method which would have been disproportionate to its purpose and the interests involved.

21 Finally, the Commission expresses the view that the reasoning contained in the preamble to the regulations at issue is wholly adequate.

22 Having regard to those arguments it should be stated that when fixing monetary compensatory amounts, the Commission must not only act to prevent disturbances to normal trade caused by the monetary measures adopted by the Member States but also see to it that the compensatory amounts themselves are not so constituted as to provoke such disturbances or to create market conditions favourable to the formation of artificial trade flows. It is therefore not only empowered but under a duty to amend its existing legislation if it finds that improper transactions of the type described above have occurred or that there is a risk that they may occur.

23 In its choice of the measures to be adopted for that purpose, the Commission must be allowed a broad measure of discretion where, as in this instance, the product concerned is of very limited importance for trade within the Community and with non-member countries and where, furthermore, it occurs in two forms which are administratively difficult to distinguish, one of which is devoid of commercial value while the other is perfectly capable of being processed and reprocessed in a closed circuit without ever reaching the stage of final consumption.

24 In this case, it cannot be concluded from the information made available to the Court that the Commission exceeded the limits of its discretion in taking the view

that the measures adopted in the contested regulations were necessary in order to counter the risk of artificial trade flows. Consequently the Commission cannot be regarded as having infringed the basic Regulation No 974/71 of the Council or the principle of proportionality or that of non-discrimination. That being the case, it also cannot be found that there has been any infringement of Articles 12 and 38 to 46 of the EEC Treaty.

25 As far as the reasoning in the preamble to Regulation No 3281/83 is concerned, it should be noted that the preamble explains, albeit in very concise fashion, that the risk of artificial trade flows is thereason both for withdrawing the grant of monetary compensatory amounts and for making the 'full amount' chargeable. It is true, however, that the specific reference to the difference between the compensatory amounts for fresh cheese and those applicable to cheese waste may serve as an explanation only for increasing the amounts charged and not for abolishing the grant of compensatory amounts. In that regard the reasoning should have been more explicit, but this is a want of precision which is not sufficient, in itself and having regard to the historical background which was well known to the traders concerned, to render the regulation invalid. There are no grounds for criticizing the statement of reasons for the amendment to the rules contained in Regulation No 270/84, which was made for the benefit of those traders.

26 On the basis of the foregoing it should be held that examination of the question submitted for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 3281/83 of 18 November 1983, amending Regulation No 1245/83 in respect of the monetary compensatory amounts applicable to cheese rinds and wastes, or Commission Regulation No 270/84 of 1 February 1984, amending Regulation No 1245/83 as regards certain monetary compensatory amounts in the cereals and milk and milk products sectors.

Costs

27 The costs incurred by the Netherlands Government and the Commission, which have 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 (Second Chamber),

in answer to the question referred to it by the College van Beroep voor het Bedrijfsleven by judgment of 14 August 1984, hereby rules:

Examination of the question referred to the Court for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 3281/83 of 18 November 1983, amending Regulation No 1245/83 in respect of the monetary compensatory amounts applicable to cheese rinds and wastes, or Commission Regulation No 270/84 of 1 February 1984, amending Regulation No 1245/83 as regards certain monetary compensatory amounts in the cereals and milk and milk products sectors.

Bahlmann Koopmans Due

Delivered in open court in Luxembourg on 12 December 1985.

P. Heim
Registrar

K. Bahlmann
President of the Second Chamber