JUDGMENT OF THE COURT (Second Chamber)
12 March 1986 *

In Case 10/85

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

Milac GmbH, Groß- und Außenhandel

and

Hauptzollamt [Principal Customs Office] **Lörrach**

on the validity of Commission Regulation (EEC) No 1036/78 of 19 May 1978 fixing the monetary compensatory amounts and certain coefficients and rates for their application (Official Journal 1978, L 133, p. 1),

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, O. Due and F. Schockweiler, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Milac GmbH, Groß- und Außenhandel, the plaintiff in the main proceedings, by D. Ehle, of the Cologne Bar, assisted by A. Nöll, in his capacity as an expert,

the Commission of the European Communities, by B. Jansen, a member of its Legal Department, acting as Agent, assisted by T. Leenders, in his capacity as an expert,

* Language of the Case: German.

after hearing the Opinion of the Advocate General delivered at the sitting on 23 January 1986,

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 order of 11 December 1984 which was received at the Court on 18 January 1985, the Bundesfinanzhof referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Regulation (EEC) 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) and the validity of Commission Regulation (EEC) No 1036/78 of 19 May 1978 fixing the monetary compensatory amounts and certain coefficients and rates for their application.

2 Those questions were raised in a dispute between Milac GmbH, Groß- und Außenhandel, Wadersloh, the plaintiff in the main proceedings, and the Hauptzollamt Lörrach, concerning the monetary compensatory amounts levied by the Hauptzollamt upon the importation into the Federal Republic of Germany on 5 September 1978 of a consignment of whole-milk powder which the plaintiff had purchased in France.

3 It is common ground that the Hauptzollamt calculated the monetary compensatory amounts entirely in accordance with the provisions of Regulation No 1036/78. That regulation fixed the rate of the monetary compensatory amounts for whole-milk powder by reference to its fat content and on the basis of the rates fixed for skimmed-milk powder and butter. Up to 50% of the processing costs for those two products covered by intervention arrangements were taken into account in fixing the rates applicable to dairy products, such as whole-milk powder, which were not covered by intervention arrangements.

4 The plaintiff brought an action challenging the Hauptzollamt's decision in the Finanzgericht [Finance Court] Baden-Württemberg. The action was dismissed whereupon the plaintiff appealed to the Bundesfinanzhof primarily on the ground that Regulation No 974/71, which was the basic regulation applicable to the system of monetary compensatory amounts, did not permit such amounts to be fixed for whole-milk powder, the price of which did not depend on the price of dairy products covered by intervention arrangements. In the alternative, the plaintiff maintained that it was contrary to the aforesaid regulation to take into account part of the cost of processing skimmed-milk powder and butter when calculating the monetary compensatory amounts for whole-milk powder.

5 The Bundesfinanzhof considered that its decision depended on the validity of Regulation No 1036/78. It therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Was the Commission of the European Communities empowered by virtue of Article 1 of Regulation (EEC) No 974/71 to fix monetary compensatory amounts in the manner in which this was done in Part 5 of Annex I to Regulation (EEC) No 1036/78 in respect of whole-milk powder classified under subheading 04.02 A II (b) 2 of the Common Customs Tariff which was imported into the Federal Republic of Germany from France in 1978?

(2) If so, was the Commission empowered by virtue of Article 2 (2) of Regulation (EEC) No 974/71 to take into account, in calculating the incidence on the price of whole-milk powder, the processing costs for skimmed-milk powder and butter, in the manner in which this was done in Commission Regulation (EEC) No 1036/78?'

Question 1

6 In substance this question seeks to ascertain whether Regulation No 1036/78 is invalid inasmuch as it provides for the application of monetary compensatory amounts for whole-milk powder although that product does not satisfy the conditions laid down in that regard by the basic regulation.

7 The plaintiff observes that, in the case of products which, like whole-milk powder, are covered by a common organization of the market but not by intervention arrangements, paragraphs (2) and (3) of Article 1 of Regulation No 974/71 make the application of monetary compensatory amounts subject to a twofold condition.

The price of the product concerned must be dependent on that of products covered by intervention arrangements and the application of monetary measures in the agricultural sector, that is to say the 'green' rates, must be capable of leading to disturbances in trade.

8 According to the plaintiff, the price of whole-milk powder cannot be dependent on that of the two products covered by intervention arrangements, namely skimmed-milk powder and butter. Whole-milk powder is a specific product used in the manufacture of foodstuffs for human consumption, such as chocolate. It is normally manufactured to order and in limited quantities. It has its own market and its price depends in particular on the state of that market. In any event, in normal circumstances, there is no competitive relationship between that product and skimmed-milk powder, which is a bulk product largely used in animal feed.

9 Although it is true, as the Finanzgericht Baden-Württemberg has acknowledged, that the price of products covered by intervention arrangements indirectly affects the price of whole-milk powder through the price of milk which is the raw material for all the products in question, the plaintiff maintains that it does not have a significant effect on the price of whole-milk powder. In the first place, the price of milk is a market price and, secondly, several other significant factors are involved in the formation of the price of whole-milk powder which are not relevant in the case of products covered by intervention arrangements. In order to establish that changes in the price of whole-milk powder are unconnected with the price of products covered by intervention arrangements, the plaintiff has submitted graphs which show the price trends for that product and for skimmed-milk powder in 1974-1976, 1979 and 1980.

10 Finally, the plaintiff denies that the application to whole-milk powder of the 'green' rates, unadjusted by monetary compensatory amounts, is capable of leading to disturbances in trade. It maintains that in view of the specific nature of whole-milk powder, the application of those rates without adjustment has no effect on trade in other dairy products. On the other hand, the application of monetary compensatory amounts to whole-milk powder had led, in its view, to disturbances in trade in that product between France and the Federal Republic of Germany, by substantially overcompensating for the differences in prices between those two Member States.

11 The Commission agrees that skimmed-milk powder and whole-milk powder are not in direct competition with one another, since whole-milk powder is sold on a

separate market. It maintains, however, that there can be no question of not applying monetary compensatory amounts to whole-milk powder. That product is obtained by drying milk and the aim of intervention in the dairy sector is precisely to guarantee the income of milk producers by exerting an influence on the market price of that raw material. Accordingly, the price of the products covered by intervention arrangements and the price of whole-milk powder are dependent on one another. Moreover, the existence in practice of a close connection between the trends of, on the one hand, the intervention price for skimmed-milk powder and butter and, on the other, the market price of whole-milk powder is borne out by the graphs and statistical tables for 1975-1984 which the Commission has submitted to the Court.

12 The Commission also emphasizes that whole-milk powder can be re-processed into liquid milk by adding water, with the result that other dairy products can subsequently be manufactured from it. If whole-milk powder were excluded from the system of monetary compensation, attempts would almost certainly be made to circumvent the system by using whole-milk powder in cross-frontier trade instead of milk and other dairy products provided that the differences between the amounts payable were sufficiently high to cover the additional processing costs. Accordingly, in the Commission's view, there is a risk of disturbances in trade within the meaning of Regulation No 974/71.

13 In order to resolve that difference of opinion, it is necessary to emphasize, as the Commission has done, that intervention arrangements in the dairy sector, which exist for certain major processed products that are relatively easy to store and, in particular, for skimmed-milk powder and butter, constitute the chief form of income support for milk producers. Therefore the price mechanism for that sector presupposes that the intervention prices fixed for those processed products have an appreciable effect on the market price of milk. Since that price accounts for by far the largest proportion of the cost price of whole-milk powder, it cannot be denied that the price of that product depends on the market price of milk.

14 The fact that the price of the aforesaid products covered by intervention arrangements and that of whole-milk powder are to a large extent inter-dependent is confirmed by the various tables submitted by the Commission and even by the graphs submitted by the plaintiff. Although those figures do not indicate the existence of absolutely parallel trends with regard to the prices in question, which confirms the existence of specific factors in the case of whole-milk powder, they

reveal such a degree of similarity that it cannot be explained by the increase in the level of prices in general.

15 Accordingly, it is by no means certain that the Commission was mistaken in considering that the price of whole-milk powder depends on the price of the products covered by intervention arrangements or, consequently, that that condition for the application of monetary compensatory amounts to the product in question was satisfied.

16 With regard to the other condition, that there exists a risk of disturbances in trade, it must be pointed out that the last worked examples submitted by the plaintiff and by the Commission reveal that at the time there was a difference between the prices of whole-milk powder in France and in the Federal Republic of Germany which was of such a nature that the Commission was reasonably justified in fearing disturbances in trade in that product, unless that difference was compensated for by the application of monetary compensatory amounts. The worked examples also reveal that the application of those amounts has equalized the two price levels almost completely with over-compensation of little more than 1% of the price. The plaintiff arrives at a figure of 4%-5% over-compensation by including in its calculation additional transport costs and the importer's profit margin. Those sums are in principle extraneous to such a comparison, since transport costs depend essentially on the distance covered and the mere fact that the goods cross a frontier does not necessarily mean that an importer distinct from the other parties to the transaction has to be involved.

17 It is appropriate to add that the possibility of re-processing whole-milk powder into liquid milk and subsequently into other dairy products constitutes a valid ground for taking the view, as the Commission has done, that the absence of monetary compensatory amounts for whole-milk powder would have led to disturbances in trade in those other products where the differences in the amounts payable were greater than the additional processing costs necessarily incurred.

18 Accordingly, consideration of Question 1 has disclosed no factor of such a kind as to affect the validity of Regulation No 1036/78 in so far as that regulation provides for the application of monetary compensatory amounts in respect of whole-milk powder.

Question 2

19 This question seeks in substance to ascertain whether Regulation No 1036/78 is invalid in so far as it takes account, for the purpose of fixing the monetary compensatory amounts for whole-milk powder, of 50% of the processing costs for skimmed-milk powder and butter.

20 The plaintiff observes that, according to the sixth recital in the preamble to Regulation No 974/71, the compensatory amounts should be limited to the amounts strictly necessary to compensate for the incidence of the monetary measures on the prices of basic products covered by intervention arrangements. The basic product in whole-milk powder is milk. Accordingly, the costs inherent in the industrial manufacture of skimmed-milk powder and butter should be left entirely out of account, in case they lead to over-compensation and, consequently, to distortions of competition on the market in whole-milk powder. That was in effect recognized as a valid consideration by the Commission which subsequently reduced the proportion of the costs taken into account to 25% and finally provided that they should not be taken into account at all as from 2 April 1984.

21 The Commission emphasizes that the cause of the problem is that, in the dairy sector, it is the processed products, rather than the basic product itself, namely milk, which are covered by intervention arrangements. In such a case, the wording of Article 2 (2) of Regulation No 974/71 would suggest that it is necessary to take into consideration the processing costs for the products covered by intervention arrangements in fixing the monetary compensatory amounts for the other products such as whole-milk powder. When the system of monetary compensatory amounts was introduced, the Commission was concerned that if those costs were taken into account solely in the case of the products covered by intervention arrangements, it might lead to distortion of competition, particularly in relation to other products, such as whole-milk powder, which are at a comparable stage of processing.

22 Meanwhile, the Commission has come to the conclusion that, in principle, in the case of other dairy products, it is necessary to disregard the processing costs for the products covered by intervention arrangements since such costs are not affected by the 'green' rates. That is the reason why the Commission proceeded to abolish that element in the calculation in four stages spread out over several years.

However, the fact that the progressive abolition of that element has effectively demonstrated that the Commission's initial fears were unfounded cannot affect the legality of the measures previously adopted.

23 According to Article 2 (2) of Regulation No 974/71, the monetary compensatory amounts for products not covered by intervention arrangements are to be equal to the incidence, on the prices of the product concerned, of the application of the compensatory amount to the prices of the product covered by intervention arrangements on which they depend. As the Commission has maintained, and as the Bundesfinanzhof has emphasized, moreover, it is possible to construe that provision as referring also to the proportion of the price of a product covered by intervention arrangements which corresponds to the processing costs. Moreover, at a time when there was no previous experience in this area, the possibility could not be ruled out that to take processing costs into account only for the products covered by intervention arrangements to the exclusion of other products at a comparable processing stage might lead to disturbances in trade. Nor can the Commission be held at fault for proceeding with caution and excluding that element from the calculation in the case of those other products as and when it was satisfied that there was no risk of creating disturbances in trade.

24 The Court has consistently held that the mere fact that certain provisions of Community law have been progressively amended in the light of past experience so as to constitute a body of rules ultimately more suited to resolving the problem in question than the rules initially adopted does not affect the validity of the provisions previously in force. Moreover, the proportion of the price of skimmed-milk powder and butter which corresponds to the processing costs is very small by comparison with that which corresponds to the price of the milk and, consequently, the fact that those costs were taken into account in fixing the monetary compensatory amounts for whole-milk powder had little impact on the final price of that product.

Costs

25 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 (Second Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 11 December 1984, hereby rules:

Consideration of the questions submitted for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Commission Regulation (EEC) No 1036/78 of 19 May 1978 fixing the monetary compensatory amounts and certain coefficients and rates for their application, inasmuch as that regulation provides for the application of compensatory amounts in respect of whole-milk powder imported from France into the Federal Republic of Germany and, for the purpose of calculating those amounts, takes into account the processing costs for skimmed-milk powder and butter.

Bahlmann Due Schockweiler

Delivered in open court in Luxembourg on 12 March 1986.

P. Heim
Registrar

K. Bahlmann
President of the Second Chamber