Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

18 July 2013 *

(Agriculture — System of import licences — Regulation (EC) No 1291/2000 — Article 35(4)(c) — Securities lodged at the time of application for the issue of the licences — Import licence — Late submission of proof of its use — Penalty — Calculation of the amount forfeited — Regulation (EC) No 958/2003 — Tariff quotas)

In Case C-211/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte d'appello di Roma (Italy), made by decision of 26 March 2012, received at the Court on 3 May 2012, in the proceedings

Martini SpA

v

Ministero delle Attività produttive,

THE COURT (Ninth Chamber),

composed of J. Malenovský, President of the Chamber, U. Lõhmus (Rapporteur) and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2013,

after considering the observations submitted on behalf of:

— Martini SpA, by F. Capelli and M. Valcada, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Varrone, avvocato dello Stato,

— the Greek Government, by X.A. Basakou, acting as Agent,

— the European Commission, by P. Rossi and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Italian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 35 of Commission Regulation (EC) No 1291/2000 of 9 June 2000 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 2000 L 152, p. 1), as amended by Commission Regulation (EC) No 325/2003 of 20 February 2003 (OJ 2003 L 47, p. 21) ('Regulation No 1291/2000').

2 The request has been made in proceedings between Martini SpA ('Martini') and the Ministero delle Attività produttive (Ministry of Manufacture and Production) ('the Ministero'), concerning the amount of the penalty imposed for the late submission of proof of the use of an import licence.

Legal context

Regulation No 1291/2000

3 Regulation No 1291/2000 was repealed and replaced by Commission Regulation (EC) No 376/2008 of 23 April 2008 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 2008 L 114, p. 3). However, in view of the date of the facts of the dispute in the main proceedings, that dispute is still governed by Regulation No 1291/2000, recitals 10 and 12 in the preamble to which state:

'(10) The Community Regulations which introduced the [import and export] licences and [advance fixing] certificates [for agricultural products] provide that they are to be issued subject to the lodging of a security so as to guarantee that the undertaking to import or export will be fulfilled during the period of their validity. It is necessary to define when the undertaking to export or import is fulfilled.

…

(12) Import licences are sometimes used to administer quantitative import arrangements. This is possible only where knowledge of the imports effected under the licences issued is available within a fairly short period. In such cases, the requirement to produce evidence that licences have been used is not merely in the interest of sound administration but becomes essential for administering these quantitative arrangements. The evidence in question is supplied by producing copy 1 of the licence and, where appropriate, the extracts therefrom. It is possible to supply such evidence within a fairly short period. Such a time-limit should therefore be fixed for cases where the Community rules on the licences used to administer quantitative arrangements make reference thereto.'

4 Article 35 of Regulation No 1291/2000 contains the rules governing the procedure for the release of securities and sets out, inter alia, the conditions and proportions in which a security is to be forfeit. Article 35(2) provides:

'Subject to application of Articles 40, 41 or 49, where the obligation to import or export has not been met the security shall be forfeit in an amount equal to the difference between:

(a) 95% of the quantity indicated in the licence or certificate, and

(b) the quantity actually imported or exported.

If the licence is issued on a headage basis, the result of the 95% calculation referred to above shall, where applicable, be rounded off to the next lesser whole number of head.

However, if the quantity imported or exported amounts to less than 5% of the quantity indicated in the licence or certificate, the whole of the security shall be forfeit.

…'

5 Article 35(4) of Regulation No 1291/2000, relating to, inter alia, the consequences of a delay in the submission of the proof of the use of a licence or certificate, is worded as follows:

'4.

(a) — The proof referred to in Article 33(1)(a) and (b) must be produced within two months of the expiry of the licence or certificate, unless this is impossible for reasons of force majeure,

…

(b) The amount to be forfeited in respect of quantities for which proof concerning the export licence with advance fixing of the refund has not been provided within the time-limit set under the first indent of subparagraph (a) shall be reduced [by different percentages in relation to the delay in producing proof, calculated per month following the date of expiry of the licence or certificate].

(c) In cases other than in point (b), the amount to be forfeited in respect of quantities for which proof is not provided within the time-limit set in subparagraph (a) and at the latest in the 24th month following the date of expiry of the licence or certificate shall be 15% of the amount which would have been forfeited completely if the products had not been imported or exported; where, for a given product, there are licences or certificates with different levels of security, the lowest rate applicable to imports or exports shall be used to calculate the amount to be forfeited.

…'

Regulation (EC) No 1162/95

6 Article 10 of Commission Regulation (EC) No 1162/95 of 23 May 1995 laying down special detailed rules for the application of the system of import and export licences for cereals and rice (OJ 1995 L 117, p. 2), as amended by Commission Regulation (EC) No 2333/2002 of 23 December 2002 (OJ 2002 L 349, p. 24), ('Regulation No 1162/95') provides:

'Securities for licences for products listed in Article 1 of [Council] Regulation (EEC) No 1766/92 [of 30 June 1992 on the common organisation of the market in cereals (OJ 1992 L 181, p. 21)] shall be at the following rates:

(a) EUR 1 per tonne in the case of import licences to which the fourth indent of Article 10(4) of Regulation (EEC) No 1766/92 does not apply …'

Regulation (EC) No 958/2003

7 Commission Regulation (EC) No 958/2003 of 3 June 2003 laying down detailed rules for the application of Council Decision 2003/286/EC as regards the concessions in the form of Community tariff quotas on certain cereal products originating in the Republic of Bulgaria and amending Regulation (EC) No 2809/2000 (OJ 2003 L 136, p. 3) was repealed by Commission Regulation (EC) No 1996/2006 of 22 December 2006 adapting several regulations concerning the cereals market by

reason of the accession of Bulgaria and Romania to the European Union (OJ 2006 L 398, p. 1). However, in view of the date of the facts of the dispute in the main proceedings, that dispute is still governed by Regulation No 958/2003.

8 Recital 6 in the preamble to Regulation No 958/2003 states:

'To ensure sound management of the quotas, the security on the import licences should be set at a relatively high level, by way of derogation from Article 10 of [Regulation No 1162/95]'.

9 Article 1(2) of Regulation No 958/2003 provides:

'Imports of maize … originating in the Republic of Bulgaria and benefiting from a zero rate of import duty, under the tariff quota … shall be subject to an import licence issued in accordance with this Regulation.'

10 Article 1a of Regulation No 958/2003 provides:

'Traders may submit only one import licence application per period concerned ... Where traders submit more than one application, all their applications shall be rejected and the securities lodged when the applications were submitted shall be taken over by the Member State concerned.'

11 Article 8 of Regulation No 958/2003 provides that the 'security for the import licences provided for in this Regulation shall be EUR 30 per tonne'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Martini was the holder of a licence, issued by the competent Italian authority on 15 September 2003, for the zero-rated importation of 7 000 tonnes of maize from Bulgaria. In accordance with Article 8 of Regulation No 958/3003, that company lodged a security of EUR 30 per tonne in respect of its obligations to import the maize.

13 In addition to those obligations, compliance with which is not disputed, Martini was required, in order to secure the release of the security in question, to submit proof of the use of its licence at the latest by the end of the second month following the date on which that licence expired. On 17 February 2004, the Ministero adopted a decree declaring the amount of EUR 31 500, corresponding to 15% of that security, forfeit on the ground that Martini had not complied with the time-limit laid down.

14 On 20 February 2004, Martini lodged an administrative appeal against that decree, disputing the use of the amount of the security actually lodged in respect of the importation in question as a parameter for the calculation of the amount to be forfeited. It takes the view that, under Article 35(4)(c) of Regulation (EC) No 1291/2000, the amount to be forfeited for the late submission of proof of the use of the import licence should be calculated, not on the basis of the level of security of EUR 30 per tonne of product imported paid in the present case, but on the basis of the rate of EUR 1 per tonne, which is generally applied to licences for imports of maize from third countries under Article 10 of Regulation No 1162/95.

15 On 8 March 2004, the Ministero confirmed that decree. However, in response to a proposal by Martini, it asked the Directorate-General for Agriculture of the European Commission for an opinion on the interpretation of Article 35(4)(c) of Regulation No 1291/2000. It is apparent from the Commission's reply of 20 April 2004 that the latter part of that provision may be applied only if there is a second import licence with a different level of security which may be used to import the product in question under the same conditions. In the light of that reply, the Ministero confirmed the content of its decree declaring the security forfeit.

16 By letter of 21 May 2004, Martini informed the Ministero that it came within the scope of the conditions for application of the derogation set out in Article 35(4)(c) of Regulation No 1291/2000 given that it was also the holder of an import licence, issued in respect of the same period and for the same type of product from a third country other than Bulgaria, which referred to a security of EUR 1 per tonne. Consequently, it repeated its request that the Ministero calculate the amount to be declared forfeit by using as its basis the normal rate of security applied on the market in question.

17 The Ministero, however, took the view that that other licence did not satisfy the conditions for application of the derogation because it had not been issued on the basis of Regulation No 958/2003 and did not relate to imports of maize from Bulgaria. Consequently, on 22 June 2004, the Ministero once again confirmed its decree.

18 As the action brought by it before the Tribunale di Roma (Rome District Court) against that decree was dismissed by judgment of 14 January 2008, Martini appealed against that judgment to the Corte d'appello di Roma (Appeal Court, Rome). The Corte d'appello took the view that the rules in question were open to several possible interpretations.

19 In those circumstances, the Corte d'appello di Roma decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 35 of [Regulation No 1291/2000] be interpreted as meaning that the essential aim underlying the penalty laid down therein – consisting in total forfeiture of the security required from Community economic operators which have obtained an import or export licence for a product governed by the common organisation of the market for cereals – is to deter those operators from failing to comply with a primary obligation (such as the actual importation or exportation of the cereals covered by the relevant licence) which they are required to fulfil with regard to the operation in respect of which they have been granted the licence and lodged the relevant security?

(2) Must Article 35(4) of [Regulation No 1291/2000], in so far as it lays down the time-limits and procedure for the release of the security lodged at the time when an import licence is issued, be interpreted as meaning that, where there is a failure to comply with a secondary obligation – consisting, in particular, in the late production of proof that the product has been correctly imported (and, consequently, the late submission of the related application for release of the security lodged) – the amount of the penalty to be imposed must be determined independently of the amount of the specific security the forfeiture in full of which must be ordered for non-compliance with a primary obligation in relation to those same imports, and must the amount of the penalty be determined, in particular, by reference to the normal amount of security applicable to most imports of products of the same type carried out during the reference period?

(3) Must Article 35(4)(c) of [Regulation No 1291/2000], in so far as it provides that "…. where, for a given product, there are licences or certificates with different levels of security, the [lowest] rate applicable to imports [or exports] shall be used to calculate the amount to be forfeited …", be interpreted as meaning that, where cereals have been correctly imported by a Community economic operator, non-compliance with the time-limit laid down for producing proof that the product has actually been imported into the European Community must be subject to a penalty calculated by reference to the lowest amount of security in force during the same period in which that product was imported, irrespective of the specific duty applicable (as argued by Martini) or only where the same duty applies (as argued by the Italian State)?'

Consideration of the questions referred

The first question

20 By its first question, the national court asks, in essence, whether Article 35 of Regulation No 1291/2000 is to be interpreted as meaning that the objective of the security referred to by that provision is to guarantee that the obligation to import the product concerned will be fulfilled.

21 In that regard, it must be pointed out that, according to recital 10 in the preamble to Regulation No 1291/2000, one of the objectives of such a security is to guarantee that the undertaking to import the product concerned will be fulfilled during the period of validity of the import licence.

22 However, as is apparent from the actual wording of Article 35(4) of Regulation No 1291/2000, that security is also intended to guarantee that proof of the use of the licence will be submitted within a certain period. As is borne out by recital 12 in the preamble to that regulation, import licences are sometimes used to administer quantitative import arrangements, something which requires that knowledge of the imports effected under the licences issued should be available within a fairly short period. The security referred to in Article 35 of Regulation No 1291/2000 therefore also contributes to the pursuit of the objective of administering quantitative import arrangements.

23 Consequently, the answer to the first question is that Article 35 of Regulation No 1291/2000 must be interpreted as meaning that the objective of the security referred to by that provision is not only to guarantee that the obligation to import the product concerned will be fulfilled but also to ensure that proof of the use of the licence will be submitted within a certain period.

The second and third questions

24 By its second and third questions, which it is appropriate to examine together, the national court asks, in essence, whether Article 35(4)(c) of Regulation No 1291/2000 is to be interpreted as meaning that, where proof that the product has been correctly imported has been submitted late, the amount to be forfeited, in respect of quantities for which proof has not been provided within the time-limit set under Article 35(4)(a) of that regulation, must be calculated on the basis of the level of security which was actually applied at the time when the application for the issue of the licence or licences relating to that importation was made. For the purposes of such an interpretation, the national court raises the question of the possible effect of the fact that the security was lodged on the basis of a rate that was higher than that applicable to other imports of the same type of product as the product imported, given that the latter was exempt from the payment of import duty.

25 It should be noted at the outset that the wording of Article 35(4)(c) of Regulation No 1291/2000 states clearly that the penalty for the late submission of proof that the product has been correctly imported is, as a general rule, 15% of the amount of the security lodged which would have been forfeited completely if the product had not been imported. It follows that the calculation of that penalty must, as a rule, be based on the level of security actually applied at the time of submission of the application for the issue of the import licence relating to the product in respect of which proof of importation was not provided within the time-limit laid down.

26 However, it must be borne in mind that the latter part of Article 35(4)(c) of Regulation No 1291/2000 also provides that, where, for a given product, there are licences or certificates with different levels of security, the lowest rate applicable to imports is to be used to calculate the amount to be forfeited.

27 Those licences must, however, be simultaneously applicable to the same imported quantity. The wording of the latter part of Article 35(4)(c) of Regulation No 1291/2000, in particular the words ‘the lowest rate applicable to imports’, means that a level of security which is not actually applicable to the

importation in question (or, indeed, even used for the purpose of a licence which actually covers the quantities imported) cannot be taken into account in the calculation of the penalty set out in that provision, irrespective of the fact that such a level of security may be regarded as a 'normal rate' for the type of product concerned.

28 Such an interpretation is, moreover, supported by the fact that, as was pointed out by the Commission, the specific rule set out in the latter part of Article 35(4)(c) of Regulation No 1291/2000 may be explained by the interchangeable nature of the quantities imported and the difficulty in relating a particular licence to one quantity rather than to another. Without that specific rule, a competent authority would risk penalising a delay by applying the highest rate, instead of the lowest rate, in respect of quantities to which licences with different levels of security are applicable.

29 Consequently, that specific rule applies only if the importer simultaneously relies, before the competent authority, on a number of licences with different levels of security in respect of an entire operation relating to the same product with the same origin.

30 In those circumstances, a number of licences with different levels of security are applicable to the importation of a specific product for the purposes of the latter part of Article 35(4)(c) of Regulation No 1291/2000 since the importer simultaneously submits to the competent authority a number of licences with different levels of security in respect of an entire operation relating to the same product with the same origin and the competent authority is actually in a position to apply those different rates to an imported quantity.

31 So far as the dispute in the main proceedings is concerned, it is not apparent from the file submitted to the Court that Martini had submitted a number of licences with different levels of security in respect of imports of maize from Bulgaria, this being a matter for the national court to ascertain. If that proves to be the case, the specific rule set out in the latter part of Article 35(4)(c) of Regulation No 1291/2000 does not apply to the circumstances of the dispute in the main proceedings.

32 By contrast, even if that specific rule were to apply to the circumstances of the dispute in the main proceedings, on the ground that the national court finds that Martini had in fact submitted a number of licences with different levels of security in respect of the importation of maize at issue in the main proceedings, it must be pointed out that the words 'lowest rate applicable to imports', within the meaning of the latter part of Article 35(4)(c) of Regulation No 1291/2000, also refer, having regard to the general nature of those words, to a situation in which the level of security applied to a licence issued subject to the full rate of duty is lower than that applicable to a licence issued subject to a zero rate of duty under preferential arrangements, such as that created by Regulation No 958/2003.

33 In the light of the foregoing, the answer to the second and third questions is that Article 35(4)(c) of Regulation No 1291/2000 must be interpreted as meaning that, where proof that a product has been correctly imported has been submitted late, the amount to be forfeited, in respect of the quantities for which proof has not been provided within the time-limit set under Article 35(4)(a) of that regulation, must be calculated on the basis of a level of security which was actually applied at the time when the application for the issue of the licence or licences relating to that importation was made. For the purposes of such an interpretation, it is irrelevant that the security was lodged on the basis of a rate that was higher than that applicable to other imports of the same type of product as the product imported, given that the latter was exempted from the payment of import duties.

Costs

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 35 of Commission Regulation (EC) No 1291/2000 of 9 June 2000 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products, as amended by Commission Regulation (EC) No 325/2003 of 20 February 2003, must be interpreted as meaning that the objective of the security referred to by that provision is not only to guarantee that the obligation to import the product concerned will be fulfilled but also to ensure that proof of the use of the licence will be submitted within a certain period.**

2. **Article 35(4)(c) of Regulation No 1291/2000, as amended by Regulation No 325/2003, must be interpreted as meaning that, where proof that a product has been correctly imported has been submitted late, the amount to be forfeited, in respect of the quantities for which proof has not been provided within the time-limit set under Article 35(4)(a) of that regulation, must be calculated on the basis of a level of security which was actually applied at the time when the application for the issue of the licence or licences relating to that importation was made. For the purposes of such an interpretation, it is irrelevant that the security was lodged on the basis of a rate that was higher than that applicable to other imports of the same type of product as the product imported, given that the latter was exempted from the payment of import duties.**

[Signatures]