JUDGMENT OF THE COURT (Second Chamber)
11 August 1995 *

In Case C-12/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Oberlandesgericht Hamm (Germany) for a preliminary ruling in the proceedings pending before that court between

Uelzena Milchwerke eG

and

Willi Antpöhler GmbH&Co. KG

on the interpretation of Article 4 of Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the grant of aid for cream, butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1988 L 55, p. 31), as amended by Commission Regulation (EEC) No 1048/89 of 21 April 1989 (OJ 1989 L 111, p. 24) and Commission Regulation (EEC) No 1157/91 of 3 May 1991 (OJ 1991 L 112, p. 57),

* Language of the case: German.

THE COURT (Second Chamber),

composed of: F. A. Schockweiler, President of the Chamber, G. F. Mancini (Rapporteur) and G. Hirsch, Judges,

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Uelzena Milchwerke eG, by J. Herrmann, Rechtsanwalt, Hamm,

— Willi Antpöhler GmbH&Co. KG, by J. Apel, Rechtsanwalt, Hamm,

— the Commission of the European Communities, by C. Schmidt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Uelzena Milchwerke eG, represented by J. Herrmann and J. Gündisch, Rechtsanwalt, Hamburg, Willi Antpöhler GmbH&Co. KG, represented by V. Schiller, Rechtsanwalt, Cologne, the Commission of the European Communities, by C. Schmidt and U. Wölker, of its Legal Service, acting as Agents, at the hearing on 23 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 17 May 1995,

gives the following

Judgment

1 By order of 9 December 1993, received at the Court on 13 January 1994, the Oberlandesgericht (Higher Regional Court) Hamm (Germany) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 4 of Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the grant of aid for cream, butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs, (OJ 1988 L 55, p. 31), as amended by Commission Regulation (EEC) No 1048/89 of 21 April 1989 (OJ 1989 L 111, p. 24) and Commission Regulation (EEC) No 1157/91 of 3 May 1991 (OJ 1991 L 112, p. 57).

2 The questions were raised in proceedings between Uelzena Milchwerke eG ('Uelzena') and Willi Antpöhler GmbH&Co. KG ('Antpöhler'), concerning a claim for compensation for damage suffered by Uelzena.

3 Uelzena had marketed butter from intervention stocks for which it had received aid after lodging securities. Antpöhler had obtained from Uelzena concentrated butter which it had used to manufacture deep-frozen oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, to be baked by the consumer.

4 The Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of the Agricultural Markets — 'BALM') considered that the processing of the butter carried out by Antpöhler did not qualify for aid, and ordered that the securities lodged by Uelzena should be forfeited. Uelzena then brought an action against Antpöhler for compensation for the damage suffered, claiming that the defendant was liable because it had not fulfilled its undertaking to incorporate the butter in accordance with Article 3 of Regulation No 570/88 'into the final products referred to in Article 4' of that regulation.

5 Antpöhler contended that the butter incorporated into its products could qualify for aid pursuant to Article 4(1), Formula A, or Article 4(3), Formula C, which provide:

'The final products ... shall be as follows:

1. Formula A:

(a) products falling within subheadings 1905 20, 1905 30, 1905 90 40, 1905 90 45, 1905 90 55, 1905 90 60 and 1905 90 90 of the combined nomenclature;

(...)

3. Formula C:

products falling within subheadings 1901 20 00 and 1901 90 90 of the combined nomenclature:

(a) in the form of:

1. uncooked dough:

(i) with a flour base of 51% or more of the weight of the constituents except water, mixed with milkfat and with other ingredients such as sugar (sucrose), eggs or egg yolk, milk powder, salt, etc. and with a milkfat content by weight which exceeds 90% of the total fat content, not including the fat forming part of the normal composition of the ingredients;

(ii) the ingredients of which have been thoroughly kneaded and the fat emulsified so that no matter what physical treatment is applied it is impossible to separate the milkfat;

(...).'

6 Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1) sets

out in Annex I, the Combined Nomenclature, under Chapter 19 'Preparations of cereals, flour, starch or milk; pastrycooks' products'. Subheading 1901 20 00 covers 'Mixes and doughs for the preparation of bakers' wares of heading No 1905'. Heading 1905 refers to 'Bread, pastry, cakes, biscuits (...)' and, particular, in subheading 1905 30, to 'Sweet biscuits; waffles and wafers'.

7 The Oberlandesgericht Hamm considered that the case raised questions concerning the interpretation of Community law and therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is Article 4(1), Formula A(a), of Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the grant of aid for cream, butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs, as amended by Regulations (EEC) No 949/88, No 2951/88, No 352/89, No 1049/89, No 1157/91 and No 2675/91, in conjunction with subheading 1905 30 of the Common Customs Tariff, to be interpreted as meaning that a product (sticks of short pastry made with butter) which consists of deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking only when they reach the end-user can qualify for aid?

Is the flour content of a product relevant for its inclusion under Article 4(1), Formula A, of Regulation No 570/88?

2. If the answer to either or both questions under heading (1) is in the negative:

Is Article 4(3), Formula C(a)(1), of Regulation No 570/88 to be interpreted as meaning that a product of the type described under heading (1) does not qualify for aid if its flour base constitutes less than 51% of its weight?'

First question

8 By the first part of its first question, the national court is asking essentially whether Article 4(1), Formula A(a), of Regulation No 570/88, as amended by Regulation No 1157/91, is to be interpreted as meaning that butter from intervention stocks incorporated into deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking only when they reach the end-user can qualify for aid.

9 That article clearly states that only butter incorporated into products falling within subheadings 1905 20, 1905 30, 1905 90 40, 1905 90 45, 1905 90 55, 1905 90 60 and 1905 90 90 of the combined nomenclature can qualify for aid.

10 The Court has consistently held that the Common Customs Tariff prefers to use criteria for classification based on the objective characteristics of products, as defined in the headings of the Common Customs Tariff and in the notes to the sections or chapters (see the judgment in Case C-35/93 *Develop Dr Eisbein* [1994] ECR I-2655, at paragraph 18).

11 By reason of their flour content, the sticks of short pastry made with butter fall under Chapter 19 of the combined nomenclature which is entitled 'Preparations of (...) flour (...).'

12 According to the information provided by the national court, they are intended to be baked only when they reach the end-user. It follows that the dough of which they are made up is neither cooked nor pre-cooked. However, classification of a product under heading 1905 'Bread, pastry, cakes, biscuits and other bakers' wares (...)' and under subheading 1905 30 'Sweet biscuits; waffles and wafers' presupposes that the product has been cooked at least once. The short-pastry sticks in question do not therefore fall under heading 1905 30 of the combined nomenclature.

13 However, in so far as they need only to be put in the oven to become final products within the meaning of tariff heading 1905, they fall under subheading 1902 20 00 relating to 'Mixes and doughs for the preparation of bakers' wares of heading No 1905'.

14 Since that subheading is not referred to by Article 4(1), Formula A(a), of Regulation No 579/88, butter incorporated into such sticks cannot qualify for aid.

15 By the second part of its first question, the national court asks whether the flour content of a product is relevant for the purposes of the application of Article 4(1), Formula A, of Regulation No 570/88 as amended.

16 In answer to that question it need merely be pointed out that none of the headings or subheadings referred to in Article 4(1), Formula A, refers to flour content for the purposes of classification of a product. It is not therefore relevant for the purposes of the provision in question.

17 Accordingly, the answer to the first question must be that Article 4(1), Formula A(a), of Regulation No 570/88, as amended by Regulation No 1157/91, must be interpreted as meaning that butter from intervention stocks incorporated into deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking only when they reach the end-user cannot qualify for aid. The flour content of such sticks is not relevant for the purposes of the application of that provision.

Second question

18 By this question the national court asks whether Article 4(3), Formula C(a)(1), of Regulation No 570/88, as amended by Regulation No 1048/89 and Regulation No 1157/91, must be interpreted as meaning that butter incorporated into deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking by the end-user can qualify for aid.

19 As stated in paragraph 13 above, such products fall under tariff subheading 1901 20 00 of the combined nomenclature.

20 According to Article 4(3), Formula C(a)(i), butter incorporated into uncooked dough with a flour base can qualify for aid if *inter alia* the flour content is '51% or more of the weight of the constituents (...)'.

21 It is common ground that the average flour content of the short pastry sticks at issue in the main proceedings is only 46%.

22 That flour content, being lower than 51% of the weight of the constituents, precludes the butter incorporated into the product from benefiting from aid, even if the product otherwise satisfies the conditions laid down under Formula C for uncooked dough.

23 All the requirements laid down must be satisfied in order to avoid butter being diverted from its intended use, which is an objective set out in the fifth recital in the preamble to Regulation No 570/88. It is not disputed that, once there is a flour content of 51% of the weight of the constituents, the separation of the butter incorporated into that mixture becomes physically impossible, and in those circumstances its re-use and diversion for purposes other than those for which it was purchased are precluded.

24 Accordingly, the reply to the second question must be that Article 4(3), Formula C(a)(1), of Regulation No 570/88, as amended by Regulation No 1048/89 and Commission Regulation No 1157/91, must be interpreted as meaning that butter incorporated into deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking by the end-user cannot qualify for aid.

Costs

25 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Oberlandesgericht Hamm by order of 9 December 1993, hereby rules:

1. Article 4(1), Formula A(a), of Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the grant of aid for cream, butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs, as amended by Commission Regulation (EEC) No 1157/91 of 3 May 1991, must be interpreted as meaning that butter from intervention stocks incorporated into deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking by the end-user cannot qualify for aid. The flour content of such sticks is not relevant for the purposes of the application of that provision.

2. Article 4(3), Formula C(a)(1), of Regulation No 570/88, as amended by Commission Regulation (EEC) No 1048/89 of 21 April 1989 and Commission Regulation No 1157/91, must be interpreted as meaning that butter incorporated into deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking by the end-user cannot qualify for aid.

Schockweiler Mancini Hirsch

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass F. A. Schockweiler

Registrar President of the Second Chamber