JUDGMENT OF THE COURT (Second Chamber)
9 July 1987 *

In Case 182/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Amtsgericht Köln (Local Court, Cologne), for a preliminary ruling in the proceedings pending before that court between

Alfons Lütticke GmbH, having its registered office in Hamburg,

and

Denkavit-Futtermittel GmbH, Warendorf,

on the interpretation of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176), Commission Regulation (EEC) No 625/78 of 30 March 1978 on detailed rules of application for public storage of skimmed-milk powder (Official Journal 1978, L 84, p. 19) and Commission Regulation (EEC) No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (Official Journal 1979, L 199, p. 1), and on the validity of Article 1 (2) of Regulation No 1725/79,

THE COURT (Second Chamber),

composed of: T. F. O'Higgins, President of Chamber, O. Due and K. Bahlmann, Judges,

Advocate General: G. F. Mancini
Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of

Alfons Lütticke GmbH, by Mr Mittelstaedt, Rechtsanwalt, Cologne,

* Language of the Case: German.

Denkavit-Futtermittel GmbH, by Mr Schiller, Rechtsanwalt, Cologne,

the Commission of the European Communities, by its Legal Adviser, Mr Booss,

having regard to the Report for the Hearing as supplemented further to the hearing on 18 March 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 9 June 1987,

gives the following

Judgment

1 By order of 7 December 1984, which was received at the Court Registry on 4 June 1985, the Amtsgericht Köln referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the interpretation of certain provisions of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products, the intervention system (Commission Regulation No 625/78 of 30 March 1978 on detailed rules of application for public storage of skimmed-milk powder, Official Journal L 84, p. 19) and the aid system (Commission Regulation No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves, Official Journal L 199, p. 1), which were established in connection with that common organization of the market, and on the validity of a provision of the aid system.

2 Those questions arose in a dispute between Alfons Lütticke GmbH, the plaintiff, and Denkavit-Futtermittel GmbH, the defendant. The defendant manufactures compound feedingstuffs using skimmed-milk powder which it purchases from the plaintiff, amongst others. Under a standard agreement concluded between the parties, the defendant is not obliged to take delivery of skimmed-milk powder supplied by the plaintiff unless that product is eligible, under the provisions of Community law applicable at the time, for aid with a view to being processed into compound feedingstuffs.

3 The main dispute is concerned with the question whether a consignment of spray skimmed-milk powder, which was delivered by the plaintiff on 14 July 1983, was eligible for aid and therefore had to be accepted by the defendant even though the consignment in question was shown, after it had been subjected to chemical analysis at the defendant's laboratory, to have a whey content varying between 0.5 and 3%, according to the method of analysis applied. The defendant considered that the product which had been delivered did not satisfy, owing to the presence of whey, the conditions laid down in Regulation No 1725/79 for the grant of aid, according to which skimmed-milk powder was not to contain any extraneous substance. The plaintiff, however, claimed that, in order to detect the presence of whey, the method of analysis which is provided for by Regulation No 625/78 and which allows for a tolerance margin of 2% should also have been applied in connection with the inspection measures provided for by Regulation No 1725/79.

4 In order to resolve that dispute, the Amtsgericht Köln referred the following questions to the Court for a preliminary ruling:

'(1) Is the intervention system laid down for the milk sector under basic Regulation No 804/68 on the common organization of the market in milk and milk products to be interpreted as meaning that skimmed-milk powder which meets the quality requirements for intervention storage in accordance with Article 5 of Regulation No 804/68, taken in conjunction with Regulation No 625/78, must therefore be regarded as being eligible for aid under Article 10 of Regulation No 804/68, taken in conjunction with Regulation No 1725/79?

(2) If, upon application of the method of analysis provided for in Annex IV to Regulation No 625/78, it may be concluded, having regard to the tolerance margin specified in that provision, that whey is absent, does that mean that the skimmed-milk powder in question may also be regarded as free of whey for the purposes of the grant of aid under Regulation No 1725/79?

(3) If Question 2 is answered in the affirmative:

(a) does the fact that the method of analysis provided for under the intervention rules in Annex IV to Regulation No 625/78 allows for a tolerance margin of 2% mean that the same tolerance margin is to be applied to the results of analyses carried out by the Member States, using other methods not laid down by Community law, in the procedure for the grant of aid under Regulation No 1725/79?

(b) if it may be concluded on the basis of the results of an analysis taking into account the relevant tolerance margin that whey is absent from a consignment of skimmed-milk powder, does that mean that the recipient of aid under Regulation No 1725/79 has an absolute defence to a claim for repayment of the aid even if the competent authority establishes on the basis of other findings (for example following an inspection at the premises of the manufacturer of the skimmed-milk powder in question) that whey powder has been added to the consignment of skimmed-milk powder?

(4) Does Article 1 (2) of Regulation No 1725/79 contravene the principle of proportionality in Community law, in so far as skimmed-milk powder is not eligible for aid because whey is found to be present even though the same product must be held to be eligible for sale to the intervention agency on the basis of Annex IV to Regulation No 625/78?'

5 Reference is made to the Report for the Hearing for a more detailed account of the facts, the relevant legislation and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

6 In its first question, the national court asks whether skimmed-milk powder which meets all the conditions as to composition and quality that are required for intervention in the form of public storage must, for that reason, be regarded as eligible for the aid provided for in respect of skimmed-milk powder intended for use as feedingstuffs.

7 In the first place, it must be borne in mind that, in order to qualify for the aid provided for in Article 10 of Regulation No 804/68, skimmed-milk powder must satisfy the following conditions:

(i) it must be manufactured from milk to which nothing has been added, except for buttermilk, and no other substances must have been added subsequently;

(ii) its fat content must not exceed 11%;

(iii) its moisture content must not exceed 5%.

8 Skimmed-milk powder eligible for intervention must satisfy the following requirements:

(i) it must be a first-quality product manufactured by properly equipped production plants;

(ii) it must not contain other products, in particular buttermilk or whey, and must be produced from skimmed milk without the addition of other products;

(iii) its fat content must not exceed 1.25%;

(iv) its moisture content must not exceed 4%;

(v) it must not be more than one month old;

(vi) it must exhibit a number of other characteristics which are specified in Annex I to Regulation No 625/78 and relate to titratable acidity, the absence of neutralization agents and additives, the total colony count, the degree of purity and so on.

9 The conditions as to composition and quality required by the intervention system differ from those required by the aid system essentially in so far as the former are much stricter with the result that, as the Commission has rightly stated in the proceedings before the Court, the two products are not, in general, interchangeable on the market. However, if the products are totally identical, in the sense that a given consignment of skimmed-milk powder intended for use as feedingstuffs also fulfils all the conditions as to composition and quality required for intervention, it cannot be denied that the consignment must be regarded as eligible for aid.

10 The answer to the first question must therefore be that the provisions of Regulations Nos 804/68, 625/78 and 1725/79 must be interpreted as meaning that skimmed-milk powder which meets the conditions as to composition and quality that are required for intervention must be regarded as eligible for aid.

The second question

11 In this question the national court seeks to ascertain whether, if the application of the method of analysis described in Annex IV to Regulation No 1725/79 reveals, having regard to the tolerance margin laid down therein, that no whey is present in skimmed-milk powder, that means that the skimmed-milk powder which has been analysed must also be regarded as free of whey for the purposes of the grant of aid under Regulation No 1725/79, even if it is not identical, in terms of composition and quality, to skimmed-milk powder eligible for intervention.

12 In that regard, it must be emphasized in the first place that the method of analysis provided for in Annex IV to Regulation No 625/78, as amended by Commission Regulation (EEC) No 2188/81 of 28 July 1981 amending Regulation (EEC) No 625/78 (Official Journal 1981, L 213, p. 1), the application of which is compulsory under the intervention system, allows, according to No 1 of the annex, the determination of rennet whey in skimmed-milk powder intended for public storage. That method is subject, from the point of view of its practical utility, to a twofold limitation. As the Commission's expert explained at the hearing, without being contradicted, in reply to questions put to him by the Court, the method in question was conceived specifically and exclusively for first-quality skimmed-milk powder fulfilling all the conditions as to composition and quality required for intervention and, when it is applied to any other product with a different composition or of lesser quality, it does not yield reliable results. Moreover, even when it is used for analysing a first-quality product, that method works only in so far as it enables the presence of rennet whey to be detected.

13 With regard to the tolerance margin allowed for by the method laid down in Annex IV, it should be noted that, although No 8.3 of that annex makes it clear that 'allowing for errors in the method and natural variations in the composition of the sample', the definitive conclusion may be drawn that whey is absent when the value resulting from the calculation provided for in No 8.2 is 2.0 or less, that margin does not mean that a whey content of 2% would be tolerated for intervention purposes. The value in No 8.2 of Annex IV indicates only the ratio which expresses the content in sialic acid of the sample, and the determination of that acid makes it possible to detect the presence of any rennet whey.

14 With regard to the aid system, it must be stated that, although the Member States are obliged, under Article 10 of Regulation No 1725/79, to ensure, by taking

certain minimum inspection measures, that the provisions of that regulation, including those concerning the absence of whey, are complied with, that system does not provide for any Community method of analysis for detecting the presence of whey. It follows that the Member States are free to apply, in addition to the inspection measures laid down by Regulation No 1725/79, the methods of analysis which they consider to be appropriate and reliable, having regard to, and making allowances for, the errors and tolerance margins inherent in those methods. That includes even the possibility of using the method provided for in Annex IV although, having regard to the limited practical utility of that method, the Member States are not obliged by Community law to apply it systematically for purposes for which it was not conceived such as, for instance, the detection of whey in a sample of skimmed-milk powder which does not fulfil all the conditions as to composition and quality required for intervention.

15 The answer to the second question must therefore be that, if the application of the method of analysis described in Annex IV to Regulation No 625/78 reveals, having regard to the tolerance margin laid down therein, that no whey is present in skimmed-milk powder, that does not mean that the skimmed-milk powder which has been analysed must also be regarded as free of whey for the purposes of the grant of aid under Regulation No 1725/79, if it is not identical, in terms of composition and quality, to skimmed-milk powder eligible for intervention.

The third question

16 As the third question was submitted only in the event of an affirmative answer being given to the second question, there is no need to give a ruling on the third question.

The fourth question

17 In its fourth question, the national court seeks to ascertain essentially whether the fact that the method of analysis described in Annex IV to Regulation No 625/78 is inapplicable to skimmed-milk powder which is not identical, in terms of composition and quality, to skimmed-milk powder eligible for intervention is contrary to the principle of proportionality.

18 In that regard, it is sufficient to point out that the aid system prohibits the addition of whey to skimmed-milk powder in respect of which the grant of aid is sought, and that it imposes on the Member States the obligation to use certain control

methods in that respect. The fact that the Community legislature has not required, for the analysis of skimmed-milk powder which has neither the composition nor the quality of the product eligible for intervention, the use of the method provided for in Annex IV, to the exclusion of other control methods, does not, having regard to the limited practical utility of the method provided for in Annex IV, exceed the bounds of what is appropriate and necessary for the achievement of the aim pursued, namely ensuring that Community aid is not paid in respect of products that are ineligible for it.

19 The answer to the fourth question must therefore be that the fact that the method of analysis described in Annex IV to Regulation No 625/78 is inapplicable to skimmed-milk powder which is not identical, in terms of composition and quality, to skimmed-milk powder eligible for intervention is not contrary to the principle of proportionality.

Costs

20 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 proceedings 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 Amtsgericht Köln, by order of 7 December 1984, hereby rules:

(1) The provisions of Regulations Nos 804/68, 625/78 and 1725/79 must be interpreted as meaning that skimmed-milk powder which meets the conditions as to composition and quality that are required for intervention must be regarded as eligible for aid.

(2) If the application of the method of analysis described in Annex IV to Regulation No 625/78 reveals, having regard to the tolerance margin laid down therein, that no whey is present in skimmed-milk powder, that does not mean that the skimmed-milk powder which has been analysed must also be regarded as free of whey for the purposes of the grant of aid under Regulation No 1725/79, if it is not identical, in terms of composition and quality, to skimmed-milk powder eligible for intervention.

(3) The fact that the method of analysis described in Annex IV to Regulation No 625/78 is inapplicable to skimmed-milk powder which is not identical, in terms of composition and quality, to skimmed-milk powder eligible for intervention is not contrary to the principle of proportionality.

O'Higgins Due Bahlmann

Delivered in open court in Luxembourg on 9 July 1987.

P. Heim
Registrar

T. F. O'Higgins
President of the Second Chamber