JUDGMENT OF THE COURT (Second Chamber)
14 November 1985 *

In Case 299/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht Frankfurt am Main for a preliminary ruling in the proceedings pending before that court between

Firma Karl-Heinz Neumann

and

Bundesanstalt für landwirtschaftliche Marktordnung

on, in substance, the interpretation of Council Regulation No 850/81 of 1 April 1981 amending Regulation No 878/77 on the exchange rates to be applied in agriculture,

THE COURT (Second Chamber),

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

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

Firma Karl-Heinz Neumann, the plaintiff in the main proceedings, in the written procedure by D. Ehle, Rechtsanwalt, Cologne, and in the oral procedure by V. Schiller, Rechtsanwalt, Cologne,

the Commission of the European Communities, by P. Karpenstein, a member of its Legal Department, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 26 September 1985,

gives the following

* Language of the Case: German.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order dated 15 November 1984, which was received at the Court on 14 December 1984, the Verwaltungsgericht [Administrative Court] Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning, first, the interpretation of Council Regulation (EEC) No 850/81 of 1 April 1981 amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture (Official Journal 1981, L 90, p. 1) and secondly the existence in Community law of a general legal principle of objective unfairness ('sachliche Unbilligkeit').

2 The questions have been raised in proceedings between Firma Karl-Heinz Neumann, Hamburg (hereinafter referred to as 'the plaintiff'), and the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the organization of agricultural markets, hereinafter referred to as 'the Bundesanstalt'] concerning the forfeiture of a security which the plaintiff had provided in connection with a purchase application made under Commission Regulation (EEC) No 713/81 of 19 March 1981 on the sale at a price fixed in advance of certain boned beef and veal held by certain intervention agencies (Official Journal 1981, L 74, p. 27).

3 Under that regulation certain quantities of beef and veal were sold between 30 March and 30 April 1981 at prices fixed in advance in ECU as set out in Annex I to the regulation. For the further conditions of sale the regulation referred to Commission Regulation (EEC) No 2173/79of 4 October 1979 on detailed rules of application for the disposal of beef bought in by intervention agencies (Official Journal 1979, L 251, p. 12).

4 Article 5 of Regulation No 2173/79 provides that the exchange rate to be applied to sale prices fixed in advance in ECU is the representative rate in force on the day on which the application is deemed valid for consideration. According to Articles 2 and 3, that day is the day on which the application is supported by a security in favour of the intervention agency, that day also determining the priority between

purchase applications in the event that stocks are exhausted. Finally, Article 3 (2) provides that, save in exceptional circumstances, applications are to be accepted within five working days following their submission.

5 According to the documents before the Court, on 27 March 1981 the plaintiff submitted a purchase application and lodged the appropriate security which was then 50 ECU (DM 137.59) per tonne. The purchase application was based on a price of DM 10 112.68 per tonne which corresponded to the price fixed in advance on the basis of the representative rate in force on the relevant day.

6 Adjustments to the central rates of the Community currencies had previously come into effect within the European Monetary System as from 23 March 1981. However, the representative rates to be applied in agriculture ('the green rates') were still unchanged on 27 March when the plaintiff submitted its purchase application and lodged its security. It was not until 1 April, when it adopted Regulation No 850/81, which was published in the Official Journal on 4 April and entered into effect for the beef sector on 6 April, that the Council adjusted the green rates to the central rates which had been changed within the European Monetary System. As a result of that adjustment, the equivalent value of the price fixed in ECU for the meat for which the plaintiff had submitted a purchase application fell from DM 10 112.68 to DM 9 763.01 per tonne.

7 On 7 April 1981, the day after the new green rates entered into force, the Bundesanstalt sent the plaintiff a 'confirmation of sale' at the price on which the plaintiff had based its application, namely DM 10 112.68 per tonne.

8 Since the new green rate for the German mark was to the advantage of the plaintiff's competitors who had submitted their purchase applications after 6 April 1981, the plaintiff decided that if it remained bound by the original conditions of sale it had no chance of selling the meat on the German market without making a loss. It therefore gave notice to the Bundesanstalt that it would not meet its obligations to take delivery of and pay for the beef. It also submitted a new purchase application which the Bundesanstalt accepted. Nevertheless, the Bundesanstalt declared the security forfeit pursuant to Article 16 (2) of Regulation No 2173/79 on the ground that the plaintiff had not paid the sums it was obliged to pay as a result of its first application.

9 The plaintiff then brought an action before the Verwaltungsgericht to recover the security. That court took the view that, according to Article 16 (2) of Regulation No 2173/79, the Bundesanstalt had rightly declared the security forfeit but also that there were grounds for it to be returned. In order to resolve the issue the Verwaltungsgericht has submitted the following questions to the Court for a preliminary ruling:

(1) Must the fifth recital in the preamble to Council Regulation (EEC) No 850/81 of 1 April 1981 amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture be construed as meaning that when altering the exchange rates the Council also intended to avoid hardship caused to persons buying commodities from intervention agencies under Commission Regulation (EEC) No 713/81 of 19 March 1981 owing to the fact that they lodged their purchase applications before 6 April 1981 and as a result have to pay a higher price than their competitors who submitted applications after 6 April 1981?

(2) There a general principle of objective unfairness (*sachliche Unbilligkeit*) in Community law so that an applicable provision of Community law may not be applied if it causes hardship to those concerned which the Community legislature would clearly have sought to avoid if it had envisaged that case when enacting that provision?

Question 1

10 This question seeks to ascertain whether Regulation No 850/81, construed in the light of the fifth recital in its preamble, must be interpreted as meaning that the Council intended to avoid a situation in which a buyer who, before the adjustment of the green rates, lodged an application to purchase a commodity held in intervention whose price was fixed in advance in ECU, must pay a higher price in national currency than competitors who submitted their applications after the adjustment of the green rates.

11 Before examining that question the Court would observe that the plaintiff has suggested in the observations which it has submitted to the Court that the question should be widened so as to include the significance of the fact that the Bundesanstalt did not send it the 'confirmation of sale' until 7 April 1981 when the five-day period laid down in Article 3 (2) of Regulation No 2173/79 had expired and the adjustments of the green rates had entered into force.

12 However, that point raised by the plaintiff concerns a regulation different from that which the Verwaltungsgericht has asked the Court to interpret and neither the facts nor the legal arguments set out in the order for reference allow of the conclusion that the Verwaltungsgericht considers a decision on that point necessary in order for it to give judgment. Consequently, in view of the division of jurisdiction under Article 177 of the EEC Treaty in proceedings for a preliminary ruling, it is solely for the national court to determine in the light of the facts of the case the relevance of the point raised by the plaintiff and if necessary to make a fresh reference to the Court on the point.

13 With regard to Question 1 the Verwaltungsgericht refers in its order for reference to the fifth recital in the preamble to Regulation No 850/81, which reads as follows:

'... when that rate is adjusted account must be taken of the effects of the operation, particularly on prices; ... therefore, provision must be made for the new rate to take general effect after a reasonable lapse of time, to coincide as a rule with the beginning of the new marketing year or the date of an adjustment in prices, although it should take effect immediately in certain cases'.

14 In the Verwaltungsgericht's view, that recital shows that the Council clearly wished to take account of the effects of the adjustment of the exchange rates on prices. The explanation for this could only be that the agricultural prices fixed by the Community were meant to afford the producers and traders concerned a stable basis for their calculations. It was also for that reason that the new rate was in principle to enter into force at the beginning of the new marketing year when agricultural prices change in any case. However, the Council wished to take account not only of the stability of prices that are linked to the marketing year; even in other cases the new green rate was meant, according to the recital, to enter into force 'as a rule' at the time when prices were adjusted, save only in 'certain cases' in which it should take effect immediately. In the Verwaltungsgericht's view, the selling prices fixed in advance do not belong to that group of cases. It therefore takes the view that Question 1 must be answered in the affirmative.

15 The plaintiff shares the Verwaltungsgericht's view concerning the interpretation and application of Regulation No 850/81.

16 The Commission points out that Regulation No 850/81 does not concern Community rules relating to agricultural prices expressed in ECU but only the exchange rates for converting those prices into national currency. The fifth recital in the preamble to that regulation corresponds to almost identical recitals in the preambles to a large number of other regulations of the same kind and merely indicates that when adjusting the green rates on 1 April 1981 the Council wanted to continue to adhere to the principles which it had observed for a long time, namely:

(i) to take account of the effects of the adjustment of the green rates on national price structures;

(ii) to make the adjustment of the green rates coincide as far as possible with the beginning of the new marketing year for the product in question when as a general rule common prices are adjusted in any case;

(iii) to adjust the green rates for countries with strong currencies only when common prices are adjusted because this helps to prevent a fall in agricultural producers' incomes which would otherwise occur as a result of the new green rates.

Those principles were observed in Regulation No 850/81 since the beginning of the new marketing year for beef coincided exactly with the entry into force of the regulation.

17 The Commission observes, however, that it has never been suggested in this context that the adjustment of the green rates on the dates laid down in the relevant regulations applies only to the prices related to a marketing year, such as guide prices and intervention prices, and not to other selling or purchase prices fixed within the framework of the relevant market organization.

18 The Commission's observation that the regulation in question does not alter the common prices expressed in ECU but only the exchange rates for converting those prices into national currencies is correct. The reason why the fifth recital in the preamble to the regulation emphasizes the relationship between those rates and the prices and also the need to make the entry into force of the new rates coincide as far as possible with an adjustment of the common prices is that such adjustments, which are made in particular at the beginning of the marketing year, may alleviate the undesirable effects of the new green rates on the standard of living of agri-

cultural producers in the Member States with strong currencies and on consumer prices in Member States with weak currencies.

19 However, neither the provisions of the regulation nor its annexes nor its preamble support the conclusion that in the case of certain selling or purchase prices fixed in advance in ECU the Council envisaged a date for the application of the new green rates which was different from that laid down in the annexes for the relevant commodities in general. The Court would also point out that Regulation No 713/81 concerns the sale of certain types of beef not only from stocks held by German intervention agencies but also from stocks held by the intervention agencies of other Member States and that a departure from the date laid down for the application of the new green rates generally would have the opposite effect on traders who purchased beef held in intervention in those Member States.

20 The answer to Question 1 must therefore be that, even when construed with reference to the fifth recital in its preamble, Council Regulation No 850/81 of 1 April 1981 amending Regulation No 878/77 on the exchange rates to be applied in agriculture does not imply that the Council intended to avoid a situation in which a buyer, who before the adjustment of the green rates lodged an application to purchase a commodity held in intervention whose price was fixed in advance in ECU, has to pay a higher price in national currency than competitors who submitted their applications after the green rates were adjusted.

Question 2

21 On the assumption that Question 1 must be answered in the affirmative the Verwaltungsgericht observes in its order for reference that in German law this case is then one of objective unfairness ('sachliche Unbilligkeit') which requires the courts to carry out the legislature's presumed intention by removing the unfairness. It acknowledges, however, that in its judgment of 28 June 1977 in Case 118/76 (*Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1177) the Court of Justice held that such a principle did not exist in Community law. The Verwaltungsgericht considers, however, that, since it is really a particular embodiment of the more general legal principle of proportionality, which is recognized and applied by the Court, it is possible that Community law on this point may evolve.

22 The plaintiff shares the view of the Verwaltungsgericht and also submits that the aim of any legal order based, like the Community legal order, on the rule of law should be to avoid any hardship which the legislature would clearly have sought to avoid if it had envisaged such an eventuality when enacting the legislation; this should be achieved by applying a legal concept of objective unfairness. Such concepts are necessary in order to preserve the confidence of the citizens in the law as an institution and in the concordance of law and justice.

23 In the Commission's view, the considerations which led the Court to refuse to recognize in its judgment in *Balkan-Import-Export* the existence in Community law of a general legal principle of objective unfairness remain entirely valid. Even though certain provisions of secondary Community law enacted after that judgment have made it possible for debts to be remitted on equitable grounds, their scope of application has always been restricted to specific charges and in some cases their practical application has caused considerable difficulties.

24 In *Balkan-Import-Export* the Court ruled that a national administration was not entitled to apply national law to an application for a remission on equitable grounds of charges due under Community law if this would alter the effect of the Community rules governing the basis and conditions of assessment or the amount of the charge in question; there was no legal basis in Community law for remitting charges on equitable grounds. The first ruling was based in particular on considerations regarding the division of powers between the Community and the Member States.

25 It would indeed be contrary to that division of powers if a national authority were entitled, or even obliged, not to apply a provision of Community law in a case in which it considered that its application would lead to a result which the legislature would clearly have sought to avoid if it had envisaged such an eventuality when enacting the provision in question. If such a general principle were recognized, it might prevent the provisions of Community law from having full effect in the Member States and would be prejudicial to the fundamental principle that Community law must be applied uniformly throughout the Community.

26 It should be added that Community law provides all courts of the Member States with a solution which is wholly in accordance with the division of powers between the Community and the Member States: if such a court decides that the case before it is of the kind described in the Verwaltungsgericht's second question, it may ask the Court of Justice under Article 177 of the EEC Treaty for an interpretation of the Community provision in question or for a declaration that it is invalid, if necessary, thus avoiding what it regards as an injustice.

27 Those considerations provide a sufficient basis for answering Question 2. However, since in its order requesting a preliminary ruling the Verwaltungsgericht has expressly described the principle of objective unfairness as a particular embodiment of the principle of proportionality, the Court must examine whether the result propounded by the Verwaltungsgericht may be founded on the principle of proportionality in the form recognized in Community law.

28 The question to be examined in this regard is whether the forfeiture of the security in circumstances such as those described in the order for reference is a measure disproportionate to the legitimate aim of the rules governing securities.

29 As is clear in particular from the ninth recital in the preamble to Regulation No 2173/79, the aim of the rules requiring a security to be lodged in the context of the disposal of beef bought in by intervention agencies is to guarantee the performance by the buyer of the contractual obligations arising from his purchase application and observance of the conditions of sale laid down in the regulations in question. One of those conditions is the payment in national currency of the sale price fixed in advance in ECU converted at the green rate in force on the day on which the security supporting the purchase application was received.

30 According to Regulation No 713/81, the sale in question began on 30 March 1981 and was to end on 30 April 1981 or earlier if stocks were exhausted; the order of priority of purchase applications was determined by the day on which the supporting securities were lodged. On 23 March 1981 adjustments had already been made to the central rates of the Community currencies and in all probability other changes would follow from the beginning of the new beef marketing year on 6 April.

31 The Community regulations thus offered the prudent trader a choice. He could either lodge his purchase application and security at once, on the basis of the prevailing green rate, and run the risk that the rate would be adjusted to the advantage of competitors who submitted their application after it was adjusted, or he could himself wait for it to be adjusted and run the risk that stocks might by that time be exhausted by his competitors' applications.

32 If, having made his free choice, a trader refuses to accept the goods on the conditions of sale entailed thereby, the forfeiture of the security, the purpose of which is precisely to ensure that those conditions are complied with, cannot be regarded as disproportionate.

33 It follows that in circumstances such as those described in the order for reference the principle of proportionality recognized in Community law cannot provide any solution to the dispute pending before the Verwaltungsgericht. In order to answer the second question referred to the Court it is therefore sufficient to state that in Community law there is no general legal principle that a Community provision that is in force may not be applied by a Community law if it causes the person concerned hardship which the Community legislature would clearly have sought to avoid if it had envisaged that eventuality when enacting that provision. A national court which considers that there is such a case of hardship is, however, always at liberty to refer to the Court for a preliminary ruling any question on the interpretation and the validity of the Community measure concerned, the answer to which it considers necessary to enable it to give judgment.

Costs

34 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since 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 submitted to it by the Verwaltungsgericht Frankfurt am Main by order of 15 November 1984, hereby rules:

(1) Even when construed with regard to the fifth recital in its preamble, Council Regulation No 850/81 of 1 April 1981 amending Regulation No 878/77 on the exchange rates to be applied in agriculture does not imply that the Council intended to avoid a situation in which a buyer who before the adjustment of the green rates lodged an application to purchase a commodity held in intervention whose price was fixed in advance in ECU has to pay a higher price in national currency than competitors who submitted their applications after the green rates were adjusted.

(2) In Community law there is no general legal principle that a Community provision that is in force may not be applied by a Community law if it causes the person concerned hardship which the Community legislature would clearly have sought to avoid if it had envisaged that eventuality when enacting that provision. A national court which considers that there is such a case of hardship is, however, always at liberty to refer to the Court for a preliminary ruling any question on the interpretation and the validity of the Community measure concerned, the answer to which it considers necessary to enable it to give judgment.

Bahlmann Koopmans Due

Delivered in open court in Luxembourg on 14 November 1985.

P. Heim
Registrar

K. Bahlmann
President of the Second Chamber