JUDGMENT OF THE COURT

12 MAY 1971[1]

Ludwig Wünsche & Co. v Hauptzollamt Ludwigshafen am Rhein (Reference for a preliminary ruling by the Finanzgericht Rheinland-Pfalz)

'Agricultural levy/Turnover equalization tax'

Case 76/70

Summary

1. *Agriculture — Common organization of the markets — Cereals — Common wheat, barley, maize and rye — Threshold price — Calculation — Reduction of the basic target price by an amount representing the incidence of internal taxation levied in respect of imports*
   (Regulation No 19 of the Council, Article 4)

2. *Agriculture — Common organization of the markets — Cereals — Common wheat, barley, maize and rye — Threshold price — Calculation — Mistake by national authorities — Powers of the Commission — Limits*
   (Regulation No 19 of the Council, Article 4)

1. Article 4 of Regulation No 19 of the Council of the European Economic Community, on the progressive establishment of a common organization of the market in cereals must be interpreted as meaning that in calculating the threshold price of cereals the basic target price must be reduced *inter alia* by a fixed amount corresponding to the incidence of internal taxation levied in respect of imports, such as the turnover equalization tax.
2. Since the validity of decisions taken by the Member States in fixing the threshold price does not depend on the view taken thereof by the Commission but on their objective conformity with requirements of the regulation, the second paragraph of Article 4 of that regulation cannot be interpreted as conferring on the Commission power to validate by its conduct errors which the national authorities may commit in implementing the tasks laid down in that article.

In Case 76/70

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Rheinland-Pfalz for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

LUDWIG WÜNSCHE & Co., Hamburg,

and

HAUPTZOLLAMT LUDWIGSHAFEN AM RHEIN,

on the interpretation of Articles 2 and 4 of Regulation No 19 of the Council of the EEC, on the progressive establishment of a common organization of the market in cereals (Official Journal 1962, No 30, p. 933)

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts and course of the procedure

The facts and procedure may be summarized as follows:
Under Article 2 (1) of Regulation No 19:

> 'The amount of the intra-Community levy shall be equal to the difference between the free-at-frontier price of the product from the exporting Member State . . . and the threshold price of the importing Member State, fixed in accordance with the provisions of Article 4 or Article 8, such difference being reduced by a fixed amount determined in accordance with Article 9'.

Article 4 of Regulation No 19 is as follows:

> 'With regard to common wheat and barley . . . the threshold price shall be fixed annually by the Member States for an identical standard of quality in such a way that the selling price of the imported product in the marketing centre of the zone having the largest deficit, shall, after taking account of the standard amount laid down in Article 2 (1) and the coefficient of equivalence laid down in Article 12, be level with the basic target price provided for in Article 5 below.
> Each Member State shall, before 1 March in each year, notify the other

Member States and the Commission of the threshold price for the following marketing year. Where the threshold price has not been fixed as stipulated above it shall be reviewed in accordance with the procedure laid down in Article 26' (the so-called 'Management Committee' procedure).

Pursuant to the said Article 4, the Federal Republic of Germany, by a second order in implementation of the Law implementing Regulation No 19/62/EEC, on 30 July 1962 fixed the threshold prices for the Federal Republic of Germany (Bundesgesetzblatt, 62, I 473). This fixing involved in particular special higher threshold prices for barley of brewery quality and seed-grain.

In Regulation No 112/62/EEC of 16 August 1962 (Official Journal 1962, No 72, p. 2024) the Commission decided in particular that the threshold price fixed for 'barley except for barley of brewery quality for breweries' must also apply to barley of brewery quality because paragraph (1) of Article 4 of Regulation No 19 only empowered Member States to fix the threshold prices for identical standards of quality.

By an order of 27 December 1962 (Bundesgesetzblatt 1962, I, 774) the Federal Minister of Food, Agriculture and Forestry not only gave effect to this regulation of the Commission by abolishing the special threshold price for barley of brewery quality but in addition reduced the amount of each of the threshold prices by DM 4, with effect from 1 January 1963, because the levying of the turnover equalization tax had resulted in imposing an additional charge on imported cereals.

On 1, 3 and 7 December 1962 the undertaking Ludwig Wünsche & Co. (hereinafter referred to as 'the plaintiff') imported from France in three consignments a total of 499 585 kg of barley of brewery quality for which it obtained customs clearance from the customs office, Speyer, for supply to the domestic market. Since the customs office imposed the levy under Regulation No 19 in addition to the turnover equalization tax the plaintiff lodged an administrative complaint against those decisions and, since this was unsuccessful, it then brought an action before the Finanzgericht Rheinland-Pfalz.

With regard more particularly to the rate of the levy imposed the plaintiff complains that the threshold price—one of the determining factors in fixing such rates—was fixed without taking account of the levying of the abovementioned turnover equalization tax.

In parallel proceedings the Bundesfinanzhof dismissed this complaint of the defendant (decisions of 10 July 1968, VII, 202-63, and 18 July 1968, VII, 251-64). In the course of the present proceedings before the Finanzgericht, the plaintiff asserted that this case-law was not well founded. It observed that the Bundesfinanzhof based itself in particular on the fact that, contrary to paragraph (1) of Regulation No 13/64.[1] Regulation No 19 did not provide that account should be taken of the turnover equalization tax in calculating the threshold price. Furthermore the Bundesfinanzhof held that in the abovementioned Regulation No 122/62 relating to the same subject-matter the Commission did not preclude the method of calculating the threshold prices originally adopted by the Federal Republic of Germany.

Against this case-law of the Bundesfinanzhof the plaintiff argued before the Finanzgericht Rheinland-Pfalz that this case-law in particular disregards the fact that it is for the Court of Justice and not the Commission or the Bundesfinanzhof to provide an authoritative interpretation of the provisions applicable in the present case.

By an order of 14 October 1970 the Finanzgericht Rheinland-Pfalz decided to stay the proceedings and to request

1 — Regulation No 13/64/EEC of the Council of 5 February 1964 on the progressive establishment of a common organization of the market in milk and milk products (Official Journal 1964, No 34. p. 549).

the Court of Justice to give a preliminary ruling on the following questions:

(1) Must Articles 2 and 4 of Regulation No 19/1962 of the Council of the European Economic Community (Official Journal 1962, p. 933) be interpreted as meaning that in calculating the levy there should be deducted from the threshold price an amount equal to the turnover equalization tax levied in respect of imports, or should this tax not have been taken into consideration?

(2) If it is considered necessary to take into account the domestic charges levied in respect of imports: Does it follow from the second sentence of Article 3 of Regulation No 19/62 that the Commission could give its assent, either tacitly or by an act from which it might be deduced that such was its intention, to an erroneous method of calculating the threshold price adopted by the national authorities with the result that the conduct of the Commission had the effect of rectifying this defect?
If so, must the fact that Regulation No 122/1962 of the Commission of the EEC (Official Journal 1962, p. 2024) restricted itself to abolishing the special threshold prices fixed for seed-grain and barley of brewery quality but did not at the same time require the turnover equalization tax to be taken into consideration as regards the threshold price be considered as such a measure of assent?

In its order of reference the Finanzgericht takes the view in particular that differences in the wording of Regulations Nos 19/62 and 13/64 are irrelevant regarding the deduction of internal charges from the rate of the respective threshold prices. The German court considers that since the rules underlying the two organizations of the market were similar the Community legislature must be regarded as having intended to arrive at the same solution, namely, to take into consideration the internal charges levied in respect of imports in imposing the levy.
With regard to the second question submitted to the Court, the Finanzgericht considers that even if, in adopting Regulation No 122/62, the Commission had intended to approve the method of calculating the threshold price originally adopted by the Federal Republic of Germany, such approval can in no way exclude the proper review of either the national courts or the Court of Justice.
The request of the Finanzgericht was received at the Court Registry on 17 November 1970.
Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the plaintiff and by the Commission of the European Communities.
Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided not to order any preparatory inquiries.
The plaintiff and the Commission of the European Communities presented oral argument at the hearing on 16 March 1971.
The Advocate-General delivered his opinion at the hearing on 1 April 1971.
The plaintiff was represented by Mr Modest of the Hamburg Bar.
The Commission of the European Communities was represented by its Legal Adviser, Mr Kalbe.

II — Summary of the observations of the parties

The observations of the parties may be summarized as follows:

A — *The first question*

1. Observations of the Commission

The Commission states first that under Articles 2 and 10 of Regulatiin No 19 the amount of the levy to be imposed

is arrived at through a mathematical and virtually automatic comparison of two reference prices (the threshold price on the one hand and the cif price or the free-at-frontier price on the other hand). On the supposition that account should be taken in this matter of the imposition of internal taxation by the importing State on the price of imported cereals, it follows that this must be done when the threshold prices are fixed by the Member States and not through a deduction of the amount of the levy in each particular case. Consequently, the question raised by the German court is whether, in fixing the threshold prices, the Member States are bound to take into account taxes such as the German tax in question.

The Commission recalls that under Article 4 of Regulation No 19, the threshold price must be fixed 'in such a way that the selling price of the imported product in the marketing centre of the zone having the largest deficit shall . . . be level with the basic target price . . .'. It deduces from this that the level of the threshold price must be equal to the level of the basic target price reduced by the marketing costs occasioned between the frontier crossing point and the place where this basic target price is applied. With regard to the concept of 'marketing costs' the Commission considers that within the framework of a 'general' system of levies such as that established by Regulation No 19, there are to be considered as such not the costs which each individual importer has actually incurred in each particular case, but on the contrary the costs, calculated on a flat-rate basis, which each importer must unavoidably bear in effecting imports and which furthermore are included in calculating the selling price properly so-called and are not compensated and passed on separately. The German turnover equalization tax fulfils those conditions and must consequently be deducted from the threshold price of the Federal Republic of Germany.

Secondly, the Commission makes the further observation, with arguments in support of it, that the various common organizations of the agricultural markets present so many special features that support cannot be derived for the present case from provisions applicable to other agricultural products, such as milk products and olive oil.

Finally, the Commission dismisses the argument that the taking into account of the turnover equalization tax is a matter for the complete discretion of the national legislature. In fact, since this tax is of necessity passed on to the selling price the application of this argument amounts to allowing the national authorities at their discretion to increase the selling price of imported products to a higher level than that of the basic target price. If this were to be conceded it would constitute a failure to observe the nature of the basic target price and its function in the cereal regulations.

From the foregoing the Commission concludes that although the Member States remain free to levy taxes such as the German turnover equalization tax the imposition of such taxes must be taken into account, if appropriate, in the threshold prices fixed under Article 4 of Regulation No 19.

2. Observations of the plaintiff

The plaintiff too considers that the turnover equalization tax forms part of the marketing costs which should be taken into account in fixing the levy to be imposed. However, unlike the Commission, it asserts that the taking into consideration of the marketing costs must not always be effected in the abstract and on a flat-rate basis at the time of fixing the threshold price but may be effected with regard to variable or incidental expenses through a reduction in each individual case of the levy to be paid. The German turnover equalization tax constitutes precisely such a variable component in that it is levied on the actual value of the product in

each particular case. Furthermore, even supposing that a lump sum must be adopted, the average of the actual amount of this tax is higher than the amount of DM 4 per metric ton adopted by the German order of 27 December 1962. From this the plaintiff concludes that even this amending order did not bring the German provisions into conformity with provisions of Regulation No 19.

In the course of the oral procedure the plaintiff asserted in particular that if it is conceded that in addition to the agricultural levies an equalization tax in respect of imports should be levied, then, in order not to distort the system of stabilizing agricultural prices on the Community market, this must either be calculated on a flat-rate basis or else set off in accordance with its actual amount in each particular case.

B — *The second question*

1. Observations of the Commission

The Commission observes first that although Article 4 of Regulation No 19 confers upon it an independent power of revision, it is nowhere provided that fixing of the threshold price depends on its agreement and this cannot be presumed by implication. Even supposing that the Commission had given its approval to the turnover equalization tax's not being set off against the threshold price, which it disputes, such approval could not cover infringements of the provisions of Regulation No 19, provisions which are binding on the Commission and on the Member States.

2. Observations of the plaintiff

With regard to the second question, the plaintiff concurs with the Commission.

Grounds of judgment

1 By an order of 14 October 1970 which reached the Court on 17 November 1970, the Finanzgericht Rheinland-Pfalz put to the Court of Justice, pursuant to Article 177 of the Treaty establishing the European Community, two questions on the interpretation of various provisions of Regulation No 19 of the Council of the EEC on the progressive establishment of a common organization of the markets in cereals (Official Journal 1962 No 30, p. 933).

The first question

2 First, the Court is requested to rule whether Articles 2 and 4 of the said regulation must be interpreted as meaning that in calculating the levy there must be deducted from the threshold price an amount equal to the turnover equalization tax levied in respect of imports.

3 It is clear from the grounds of the order of the Finanzgericht that the question relates to imports of barley of brewery quality to the Federal Republic from another Member State effected in December 1962 when a threshold price was in force which had been adopted by the competent federal authorities and which did not take account of the imposition of the national turnover

equalization tax on the prices of imported products. Since the importer had thereby had to pay both an intra-Community levy based on the difference between the threshold price and the free-at-frontier price fixed by the Commission and the turnover equalization tax, it brought the matters before the Finanzgericht as it considered that this multiple taxation was incompatible with the provisions of Regulation No 19.

4 Under Article 4 of Regulation No 19 the threshold price for the disputed product was fixed annually by the Member States in such a way that the selling price of the imported product in the marketing centre of the zone having the largest deficit in the Member State concerned should be level with the basic target price laid down in Article 5 of that regulation. The basic target price determines the level fixed, bearing in mind the objectives laid down by Article 39 of the Treaty, in accordance with which market prices required to be aligned through the converting machinery of the common organization of the markets in the appropriate sector. In order to prevent price disturbances as a result of cheap imports the threshold price as provided for by Regulation No 19 was intended to fix through levies the level to which the price of the imported product must be increased in order that it should not be offered on the market in question at a price lower than the basic target price. In order to fulfil this condition the price of the imported product after crossing the frontier—increased by the marketing costs up to the place where the basic target price was to be applied—was required to correspond to this price, so that the threshold price was to be equal to the basic target price reduced by the marketing expenses incurred between the frontier and the first stage of wholesale marketing at the place where the basic target price was applied.

5 In establishing the system of levies provided for by Regulation No 19 the Community legislature deliberately refrained from raising the individual selling prices of the imported product to the level of the basic target price of the importing Member State and opted for a general system of levies established on the basis of the most advantageous purchasing opportunities on the world market or in the exporting Member State, and on the basis of lump sum amounts. Within this system the marketing costs, by which the target price was to be reduced in order to fix the threshold price, were thus not to be calculated on the basis of the costs actually borne by the importer for a specific consignment, which depend to a large extent on the decisions of the importer but were to be subject to a flat-rate calculation of the costs which the importer must unavoidably bear.

6 The turnover equalization tax which is levied without exception on every import of cereals forms part of the unavoidable marketing costs and thus

constitutes a necessary element in calculating the threshold price. If this were not the case the threshold price and, consequently the levies, would be increased by the amount of the turnover equalization tax, so that the product could not be offered at the level of the basic target price. In this respect it is clear from the provisions of and from the preamble to Regulation No 19 that the basic target price was not intended to perform the role of a minimum domestic price which the national legislature would be free to raise but was intended to act as a stabilizing element on the market. In addition, the further objective set out by the regulation itself was that in order to establish a single market the national target prices should be progressively aligned to a common target price so that the application of this regulation was to make a contribution so that the difference between the highest and the lowest national target price should not be increased. The right of the Member States to increase the selling price of imported cereals to a higher level through taxes such as the turnover equalization tax would have been incompatible with this objective. As the Finanzgericht itself notes in the grounds of its order, opposing arguments derived from regulations relating to the common organization of the markets in other sectors cannot invalidate the conclusion to be drawn from the wording of Regulation No 19.

7 The reply should thus be that Article 4 of Regulation No 19 must be interpreted as meaning that in calculating the threshold price of cereals the basic target price must be reduced *inter alia* by a fixed amount corresponding to the incidence of internal taxation levied in respect of imports, such as the turnover equalization tax.

8 Owing to the very specific nature of this charge, if the national legislature has not taken it into consideration in calculating the threshold price, Community law does not prevent the national court from setting off the amount actually paid as turnover equalization tax against the levy paid by the importer.

The second question

9 The second question asks whether it follows from the second paragraph of Article 4 of Regulation No 19 that the Commission could approve, albeit by implication, an erroneous method of calculating the threshold price adopted by the national authorities so that the Commission's conduct would rectify this defect.

10 In accordance with the structure of the Community, the common organization of the markets in cereals established by Regulation No 19 rests on close cooperation between the Member States and the Community institutions, both performing on their own initiative their duties under Community law. The second paragraph of Article 4 only provides that the threshold prices adopted

must be notified to the Commission and that the latter should have power to revise it in accordance with the procedure laid down in Article 26 of the regulation. This independent power of revision enables the Commission to replace incorrect prices by correct prices which it fixes itself. Failure to exercise this power cannot be interpreted as meaning that the Commission concurs in the decisions taken by the Member States, the more so since it had, in fact, limited opportunities of checking the accuracy of the threshold prices adopted. Furthermore even the implied or express agreement of the Commission is incapable of validating decisions of national authorities taken under Article 4 since the validity of such decisions does not depend on the view taken thereof by the Commission but on their objective conformity with the requirements of the regulation.

11 Consequently, the reply must be given that the second paragraph of Article 4 cannot be interpreted as conferring upon the Commission the power to validate by its conduct errors which the national authorities may commit in the implementation of the tasks laid down in that article.

Costs

12 The costs incurred by the Commission of the European Communities which submitted its observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Finanzgericht Rheinland-Pfalz, the decision on costs is consequently a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 19 of the Council of the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Finanzgericht Rheinland-Pfalz, by an order of that court of 14 October 1970, hereby rules:

1. **Article 4 of Regulation No 19 of the Council of the European Economic Community on the progressive establishment of a common organization of the market in cereals must be interpreted as meaning that in calculating the threshold price of cereals the basic target price must be reduced, *inter alia*, by a fixed amount corresponding to the incidence of internal taxation levied in respect of imports, such as the turnover equalization tax.**

2. **The second paragraph of Article 4 of that regulation may not be interpreted as conferring upon the Commission the power to validate by its conduct errors which the national authorities may commit in the implementation of the tasks laid down in that article.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 12 May 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 1 APRIL 1971[1]

Mr President,
Members of the Court,

The reference for a preliminary ruling which was laid before the Court by the Finanzgericht, Rheinland-Pfalz, and with which we are concerned, relates to the interpretation of various provisions of Regulation No 19 (Official Journal 1962, p. 933) on the progressive establishment of a common organization of the markets in cereals.

These provisions come into play with regard to the importation of barley of brewery quality from France into the Federal Republic of Germany which was effected by the plaintiff in the main action in December 1962. The competent customs office in fact not only imposed on this importation the full levy in accordance with the common organization of the market in cereals but also a turnover equalization tax of 1.5% of the import value. The Wünsche

1 — Translated from the German.