JUDGMENT OF THE COURT
OF 5 DECEMBER 1973 [1]

Neufeld & Co.
v Hauptzollamt Hamburg-Waltershof
(preliminary ruling requested by the Finanzgericht Hamburg)

'Turnover equalization tax'

Case 125/73

Summary

Agriculture — Common organization of the markets — Cereals — Processed products within the meaning of Article 1 (d) in conjunction with the Annex to Regulation No 19/62 — Levy — Calculation — Turnover equalization tax — Set off — Prohibition

(Regulation No 19 of the Council, Article 14; Regulation No 55 of the Council, Article 7)

Articles 14 of Regulation No 19 of the Council of the EEC of 4 April 1962 and 7 of Regulation No 55 of the Council of the EEC of 30 June 1962 must be interpreted as meaning that the amount of the turnover equalization tax imposed on the import of the processed products referred to in Article 1 (d) and in the Annex to Regulation No 19/62 may not be deducted from the levy.

In Case 125/73

Reference to the Court under Article 177 of the EEC Treaty by the Hamburg Finanzgericht (IVth Senate) for a preliminary ruling in the action pending before that court between

NEUFELD & Co., Berlin,

and

HAUPTZOLLAMT HAMBURG-WALTERSHOF,

on the interpretation of the provisions of Article 14 of Regulation No 19 of the Council dated 4 April 1962 (OJ 1962, No 30) in conjunction with Article 7

1 — Language of the Case: German.

of Regulation No 55 of the Council dated 30 June 1962 (OJ 1962, No 54), regarding the taking into account of turnover equalization tax and costs inherent in denaturing for the purposes of the levy on processed cereal products,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco (Rapporteur), J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. In order to afford Community cereal producers, as well as guaranteed market prices, a guarantee of sales and income, Regulation No 19 provided for the most cultivated cereals in the various Member States, in particular wheat and barley, as well as maize and rye in Member States having a considerable production of these cereals, a system of levies intended to compensate for the difference between the prices on the world market and the internal guaranteed prices (Articles 4 and 10 of Regulation No 19).

This system aimed at securing:

— that in the area where the basic target price was valid, i.e. on the internal market concerned, imported cereals should not be offered below the basic target price, and

— that the internal market prices should thus be protected against fluctuations in world rates and stabilized at the level of the basic target price.

With regard to the other basic cereals within the meaning of Article 1 of Regulation No 19, not mentioned in Article 4 and being of less importance in the various Member States, such an elaborate price guarantee was not necessary.

Consequently Regulation No 19 did not provide for these cereals a guarantee of fixed internal prices based on a system of common prices. Nevertheless in order to prevent imports of these kinds of cereals competing as substitutes with and replacing the protected cereals, a system of levies had been provieded for imports

of cereals not mentioned in Article 4 of Regulation No 19 (Article 8 of Regulation No 19). The levies were intended to increase the price of imported cereals to such an extent that they could be offered only at prices so close to the target prices of the protected cereals that the price of these latter could attain the level of the target prices.

For processed products referred to in Article 1 (d) and in the Annex to Regulation No 19, the levy was calculated under Article 14 of this Regulation and was made up:

— of a variable (flat-rate) component determined, for products processed from basic products referred to in Article 1 (a), on the basis of the incidence on the cost price of these products of the levies fixed for the basic products used in their manufacture; the resulting amount was revised in accordance with the variations in the levies applicable to the basic products (Article 14 (1) (A) (a)); for processed products not containing basic products referred to in Article 1 (a), taking into account the market conditions for processed products referred to in the previous paragraph which are most like them (Article 14 (1) (A) (b));

— of a fixed component, determined taking into account the necessity of ensuring protection for the processing industry (Article 14 (1) (B)).

The calculation of these components and of the levy to be applied had to be made according to the criteria laid down in Regulation No 55.

2. In its judgment dated 12 May 1971 in Case 76/70 *Wünsche v Hauptzollamt Ludwigshafen,* (Rec. 1971, p. 393), the Court ruled that in calculating the treshold price of the cereals mentioned in Article 4 of the Regulation, the basic target price must be reduced, *inter alia,* by a fixed sum corresponding to the effect of the internal taxes levied on import, such as turnover equalization tax. This case was concerned with the product mentioned in Article 4 of Regulation No 19, for which this Regulation provided an elaborate system of target prices and threshold prices derived therefrom.

This judgment gave rise to a series of actions in which German importers claim that the equalization tax payable on the import of products other than those mentioned in Article 4 of Regulation No 19 should also be deducted.

In two jugdments dated 11 July 1972 the Bundesfinanzhof drew the conclusion from the judgment given in Case 76/70 that the equalization tax must also be deducted from the levy on the import of tapioca flour.

3. In 1963 the plaintiff in the main action imported tapioca flour which comes under tariff heading 11.06-A-I from Thailand into Germany and paid on this occasion the levy determined in accordance with Article 14 of Regulation No 19 and Article 7 of Regulation No 55. It brought an action in the Hamburg Finanzgericht (IVth Senate) claiming, *inter alia,* that this turnover equalization tax payable at the rate of 4 % of the value of the goods should be deducted from the amount of the levy.

By order dated 16 March 1973, the Finanzgericht stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Must Article 14 of Regulation No 19/62 (1) and Article 7 of Regulation No 55/62, which are material for the calculation of the amounts of the levy for processed products, (Article 1 (d) in conjunction with the Annex to Regulation No 19/62), be interpreted, having regard to the judgment of the European Court in Case 76/70 of 12 May 1971, whereby in the calculation of the threshold price for cereals under Article 4 of Regulation No 19/62 a fixed sum corresponding to the effect of the internal taxes levied on import — such as turnover equalization tax — is to be

deducted from the target price, as meaning that the amount of turnover equalization tax levied in the particular case must be deducted from the levy?'

4. The order of reference was registered at the Court on 18 April 1973. The plaintiff, represented by Walter Röll of the Hamburg Bar, the German Federal Republic, represented by Christof von Arnim, and the Commission of the European Communities, represented by its legal adivser Peter Kalbe, submitted written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court of Justice.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided to proced without a preparatory inquiry.

The oral observations of the parties to the main action and the Commission were made at the hearing on 3 October 1973.

The Advocate-General delivered his opinion at the hearing on 7 November 1973.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

The observations submitted under Article 20 of the Statute of the Court of Justice may be summarized as follows:

A — Observations submitted by the plaintiff

The plaintiff sets out first of all the conclusions which it considers may be drawn from the case law of the Court and in particular the judgment in Case 76/70. It appears in its opinion from this judgment that the German equalization tax was of a prohibited nature as a charge having an effect equivalent to a customs duty if the internal price, to which the external price of the imported goods is brought up by means of the levy, was determined in such a way as to include, among the marketing costs taken into account, a sum corresponding to the equalization tax. In order not to have the nature of a charge having an equivalent effect, the levy so calculated needed to be reduced by the amount of marketing costs necessarily falling upon the importer. This interpretation, it is said, is consistent with the scheme of Regulation No 19/62. It is likewise consistent with that of Regulation No 55/62, this latter being only a measure applying Regulation No 19/62 to processed products and imposing a levy based on the same principles and the same objectives as those of the levy provided for by Regulation No 19/62.

It appears moreover from Article 7 (2) of Regulation No 55/62, as well as from the fourth recital of the reasons on which it is based, that the legislature regarded 'denatured tapioca flour' as a product competing with barley fodder and which therefore necessarily had to reach the national market at a corresponding price — taking into account the different starch content and other differences of quality determining its use — at the guide price for barley. It follows also from this system that the rate of the levy had been fixed by reference to the evaluation made by the Council on the basis of the criteria set out above, which ought to have sufficed by itself to achieve the required equalization of prices.

To enable Regulation No 55/62 to attain its aim, which was not to impose a levy on denatured tapioca flour except to the extent that it could be held to be a product competing with barley fodder and that the levy was strictly necessary for the protection of national or Community barley fodder producers, the assessment by the Council had to be made on the basis of identical criteria for all the Member States.

In other words, the Council's assessment could attain its objective, which is to

impose neither excessive nor inadequate levies, only if it tended to equalize prices at a defined economic stage. In the absence of such a condition this assessment would necessarily have been arbitrary.

The only question which arises, then, is to determine the internal economic stage serving as a basis for this assessment; or which the subjects could and should regard as a basis for this assessment. Contrary to Regulation No 19/62, Regulation No 55/62 contains no express provisions on this point. But in the absence of contrary indications, and taking into account the relationship between the two Regulations, it is proper to proceed from the assumption that Regulation No 55/62 envisages the same economic stage as that contemplated by Regulation No 19/62. In this case it follows that the Council has been able to proceed to the assessment only with a view to adapting the price of the product in dispute to the stage of purchase in the wholesale trade in barley fodder, taking into account the differences in quality and destination. It is indeed by reference to the wholesale stage that Regulation No 19/62 as well as Regulations Nos 13/64 and 14/64 had fixed the threshold price of the products in question.

The producers have sold and still sell their products to wholesalers. The sale price, including transport costs, was the same as the purchase price paid at the wholesale stage for cereals. This price included the whole of the costs and charges applying at earlier stages to barley fodder as well as the whole of the marketing costs to the wholesale stage. Consequently this price likewise included for the period in question the turnover tax directly or indirectly imposed on national barley fodder. In these circumstances the amount of the levy determined for tapioca flour coloured with eosin likewise included the whole of the marketing costs and charges imposed on the competing national product. To prevent the equalization tax levied on imports in the Federal Republic of Germany from having the effect of an additional levy, it was thus necessary to reduce again the amount of the levy first fixed by calculation by the amount of the equalization tax, calculated, where appropriate, at a flat rate.

In the present state of the German legislation, however, it would not be possible to calculate at a flat rate the amount of the tax to be deducted from the levy. The plaintiff concludes by proposing that the question should be answered as follows:

'The combined provisions of Article 14 of Regulation No 19/62 and Article 7, regarding the fixing of the levy applicable to processed products referred to in Article 1 (d) of Regulation No 19/62 and its Annex, must be interpreted as meaning that the national judge is entitled to deduct from the amount of the levy that of the turnover equalization tax, where appropriate, insofar as the national legislature has not provided for a general deduction based on an appropriate flat rate calculation.

The measures taken so far by the Federal Republic of Germany have not involved a sufficient reduction in the levies.'

B — Observations submitted by the Federal Republic of Germany

The Federal Republic of Germany sets out the objectives of the levy established by Regulation No 19/62 and states that the financial mechanism for stabilizing prices was not calculated in the same way for all the products subject to the Regulation. After pointing out the method of calculation adopted for basic products, it observes that as regards processed products, which include denatured tapioca flour, the calculation of the levy conforms to special rules contained in Article 14 of Regulation No 19/62 and in Regulation No 55/62. As regards processed products, indeed, the levy could not have been calculated according to the same criteria as for

basic products because of the absence of a transparent market with representative prices and qualities permitting comparison of the various prices to be taken into consideration in fixing the levy. The levy applicable to processed products has two components, one fixed — which as regards denatured tapioca flour was almost equal to zero — and the other variable. In accordance with Article 7 (1) and (2) of Regulation No 55/62 the variable component of the levy for 100 kg of denatured tapioca flour was equal to the levy applicable to 40 kg of barley.

According to this method of calculation the marketing costs, including the equalization tax, could only have been taken into account to the extent that they had already been taken into account in the calculation of the levy applicable to the basic product which had served as a basis for fixing the variable component. The amount of the levy was, indeed, exactly fixed, since the amount of the variable component had been calculated by reference to the levy for the product most similar to the processed product. It would have been possible to modifiy it only in the circumstances set out in Article 7 (2) of Regulation No 55/62.

It follows from such a system of calculation that the equalization tax could not therefore have been taken into account at the time of calculating the levy applicable to the product in question.

Basing itself on the case law of the Court, the Federal Republic asserts that the equalization tax is not a charge having an effect equivalent to a customs duty and is not unlawful under the Treaty. Moreover it does not appear at all from the judgment of the Court in Case 76/70 that the equalization tax must be taken into account 'likewise' in the calculation of the levy applicable to processed products referred to in the Annex to Regulation No 19/62. In this judgment the Court limited itself to interpreting Article 4 of the said Regulation. This provision concerned solely the fixing of the threshold price of basic products which are mentioned therein and did not provide any rule for the calculation of the levy applicable to processed products dealt with in the Annex.

C — Observations submitted by the Commission

According to the Commission it is necessary to distinguish between the pricing system relating to the products referred to in Article 4 of Regulation No 19/62 and that relating to other cereals. As regards these latter Regulation No 19/62 did not provide a guarantee of fixed internal prices based on a common pricing system. If nevertheless a levy were payable on imports of these kinds of cereals, it would be because these cereals can be used in place of those which are mentioned in Article 4 of Regulation No 19/62, the sale of which, as well as the guarantee of the price given for the same article, would be compromised if the import of substitute cereals at too cheap a price had made possible competition by substitutes. The system of levies thus had to remove the difference between the level of prices of imported cereals and that of cereals referred to in Article 4 of Regulation No 19.

The same considerations apply to processed products based on cereals referred to in Article 1 (d) and in the Annex to Regulation No 19, especially tapioca flour. In view of the fact that the basic cereal for this product is not cultivated anywhere in the Community there was no reason for establishing a system of guaranteed prices. Nevertheless, by reason of their lower price, these processed products would be capable of replacing either the protected basic cereals or the products processed from these latter. Consequently it was necessary, with the help of levies, to increase the price on import of tapioca flour at least sufficiently to avoid, in relation to the main protected products, competition by substitutes.

It follows that the levy applied to tapioca flour could not aim to equalize internal and external prices. Its sole objective was to prevent the offer price of tapioca flour on the national markets of the Member States from departing from that of cereals or products based on protected cereals to such an extent that the structure of their market prices was seriously disturbed. Article 14 of Regulation No 19/62 and Article 7 of Regulation No 55/62 reflect this position.

The Commission concludes that the principles of Judgment 76/70 do not apply to the case in question: there was no imperative reason for taking into account the turnover equalization tax in fixing the levy, since the basis for such an operation, i.e. a fixed target price, was lacking. As regards the deduction of the costs of denaturing incurred in colouring the imported tapioca flour with eosin, the Commission observes that the system of levies of Article 7 of Regulation No 55/62 has already sufficiently taken into account the different possibilities of use and the relative value of denatured and non-denatured tapioca flour. Indeed, Article 7 of Regulation No 55/62 provided for two distinct systems of levies: on the one hand for denatured tapioca flour based on the levy applicable to barley, on the other hand for non-denatured tapioca flour based on the levy applicable to maize starch.

It was not necessary to take the costs of denaturing any more fully into account. As regards imported goods which were already denatured it would have been absurd to deduct once again the costs of denaturing from the levy already reduced to take into account this denaturing. As regards goods imported intact, the deduction of costs of denaturing incurred after import would likewise have been illogical: in view of the fact that the users of imported tapioca flour were free to do what they wanted with these goods, the amount of the levy would have had to be fixed with regard to the nature of the domestic product which, in view of the multiple possibilities of use of non-denatured tapioca flour, had to be protected in priority.

Moreover, to accede to the plaintiff's claim to have the various costs taken into account which it has had to bear in certain particular cases would undermine the generic method of calculation usually applied in the common agricultural rules. Finally, to take into account the costs of denaturing incurred after import would be equivalent to granting a Community denaturing premium not having any character of public utility in the Community.

According to the Commission the reply should be given that under Regulation No 19 the levy applicable to denatured tapioca flour does not have to be reduced by the turnover equalization tax payable on import.

Grounds of judgment

1 By order date 16 March 1973 filed at the Court Registry on 18 April 1973 the Hamburg Finanzgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of various provisions of Regulation No 19 of the Council of 4 April 1962 on the gradual establishment of a common organization of the

market in cereals (OJ 1962, No 30), and of Regulation No 55 of the Council of 30 June 1962 on the system of processed goods based on cereals (OJ 1962, No 54).

The question is whether, taking into account the judgment given by the Court of Justice of the European Communities on 12 May 1971 in Case 76/70, Articles 14 of Regulation 19/62 and 7 of Regulation No 55/62 must be interpreted as meaning that the amount of the turnover equalization tax imposed on the import of processed products referred to in Article 1 (d) and in the Annex to Regulation No 19/62 must be deducted from the amount of the levy applicable to these products.

2 The question raised deals with the calculation of the levy applicable to 'tapioca flour' covered by the expression 'processed products' in Article 1 (d) and in the Annex to Regulation No 19/62.

This levy, calculated under Article 14 of the said Regulation, is composed of two components, the one variable and the other fixed.

As regards processed products not containing the basic products referred to in Article 1 (a), the variable component of the levy was fixed in accordance with Article 14 (1) (A) (b), after taking account of the conditions of the markets in products processed from the abovementioned basic products which most resemble them.

For this purpose Article 7 (1) provides, in accordance with the provisions of Article 2 (4), that for the processed products referred to in the Annex to Regulation No 19/62 under heading 11.06 of the Common Customs Tariff, including 'tapioca flour', the variable component applicable to 100 kilogrammes of processed product is equal to the variable component referred to in Article 9 applicable to 100 kilogrammes of maize starch.

According to the said Article 9 the variable component applicable to 100 kilogrammes of maize starch is equal to the levy applicable to 161 kilogrammes of maize.

Moreover, Article 7 (3) (a) determined the fixed component of the levy applicable to the product in question at 1.70 units of account.

3 It appears from these provisions that, contrary to the system instituted by Article 10 (2) of Regulation No 19/62, where the levy may vary according to

the differences existing between the c.i.f. and the threshold prices, the system established by Article 14 of this same Regulation and Article 7 of Regulation No 55/62 provides for the application of a levy, the amount of which is calculated by reference to pre-established criteria, i.e. the levy which effectively applies to maize starch on the one hand and the fixed rate indicated by the legislature on the other.

In this system, whereby there is a levy all the elements of which are fixed by Community rules, it is not possible for Member States to vary the amount of the levy by the expedient of criteria of calculation not provided for by the legislature and to deduct the turnover equalization tax, where appropriate, from the said amount.

Such a deduction would affect the rate of the fixed and variable components of the levy, which Regulation No 55/62 has directly or indirectly calculated.

4 Therefore Articles 14 of Regulation No 19/62 and 7 of Regulation No 55/62 must be interpreted as meaning that the amount of the turnover equalization tax imposed on import may not be deducted from the levy.

Costs

5 The costs incurred by the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before a national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 40 and 177;
Having regard to Regulation No 19 of the Council of the EEC of 4 April 1962;
Having regard to Regulation No 55 of the Council of the EEC of 30 June 1962;

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 question referred to it by the Hamburg Finanzgericht by order of that court dated 16 March 1973, hereby rules:

Articles 14 of Regulation No 19 of the Council of the EEC of 4 April 1962 and 7 of Regulation No 55 of the Council of the EEC of 30 June 1962 must be interpreted as meaning that the amount of the turnover equalization tax imposed on the import of the processed products referred to in Article 1 (d) and in the Annex to Regulation No 19/62 may not be deducted from the levy.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 5 December 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER

(see Case 119/73, p. 1381)