JUDGMENT OF THE COURT (First Chamber)

28 April 1994 *

In Joined Cases C-433/92 and C-434/92,

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

Bundesanstalt für landwirtschaftliche Marktordnung (BALM)

and

Otto Frick GmbH & Co. KG,

Vinzenz Murr GmbH,

on the interpretation of Article 3(2) of Commission Regulation (EEC) No 1071/68 of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal (OJ, English Special Edition 1968 II, p. 354), Article 4(4) and (5) of Commission Regulation (EEC) No 2471/77 of 8 November 1977 on the granting at a standard rate fixed in advance of private storage aid in respect of beef carcases, half-carcases and compensated quarters (OJ 1977 L 286, p. 20) and Article 4(2) and (3) of Commission Regulation (EEC) No 1405/78 of 22 June 1978 on the granting at a standard rate fixed in advance of private storage aid for beef forequarters (OJ 1978 L 170, p. 20),

* Language of the case: German.

THE COURT (First Chamber),

composed of: D. A. O. Edward, President of the Chamber (Rapporteur), R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Vinzenz Murr GmbH, by Andreas Reiners, of the Munich Bar,

— the Commission of the European Communities, by Ulrich Wölker, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, of Schön Nolte Finkelnburg & Clemm, Brussels and Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Otto Frick GmbH, represented by Karl-Chr. Scheel of the Flensburg Bar, of Vinzenz Murr GmbH and of the Commission, at the hearing on 13 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 24 February 1994,

gives the following

Judgment

1 By orders of 29 October 1992, which were received at the Court on 24 December 1992, the Bundesverwaltungsgericht (Germany) referred to the Court for a

preliminary ruling under Article 177 of the EEC Treaty a question in Case C-433/92 and five questions in Case C-434/92 on the interpretation of Article 3(2) of Commission Regulation (EEC) No 1071/68 of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal, Article 4(4) and (5) of Commission Regulation (EEC) No 2471/77 of 8 November 1977 on the granting at a standard rate fixed in advance of private storage aid in respect of beef carcases, half-carcases and compensated quarters, and Article 4(2) and (3) of Commission Regulation (EEC) No 1405/78 of 22 June 1978 on the granting at a standard rate fixed in advance of private storage aid for beef forequarters.

2 Those questions arose in proceedings between Otto Frick GmbH&Co KG ('Frick') and Vinzenz Murr GmbH ('Murr'), on the one hand, and the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of Agricultural Markets, 'the Federal Office'), on the other, with regard to the demand by the Federal Office that Frick and Murr repay all the aid granted in respect of private storage of beef and veal.

3 According to Article 3(2) of Regulation No 1071/68, the contract for private storage aid must impose the following obligations on the private storer:

'...

(a) at his own risk and expense to take the agreed quantity of the product into store and store it within the time-limits laid down;

(b) to advise the competent intervention agency of the day and place of storage and the nature and quantity of the products to be stored;

(c) to forward to that intervention agency without delay the supporting documents for the storage operations;

...

(e) to allow the intervention agency at any time to check fulfilment of the obligations undertaken.'

4 According to Article 5(1) of that regulation, 'the amount of aid shall be fixed per unit of weight ascertained on entry into store and before freezing'.

5 According to Article 4(1) of both Regulation No 2471/77 and Regulation No 1405/78,

'The contractor may, before placing them in store, cut and bone the products referred to ... in whole or in part, provided that all the meat resulting from such cutting or boning operations is placed in store.'

6 Article 4(4) and (5) of Regulation No 2471/77 and Article 4(3) of Regulation No 1405/78 provide that if the quantity of meat stored is less than 85% of the quantity for which the contract was concluded, no aid is to be paid, whereas if the quantity is equal to or greater than that percentage, but falls short of the contractual quantity, the amount of the aid is to be reduced proportionally.

7 In order to take account of the differences between meat in the unaltered state and boned meat, Article 4(3) of Regulation No 2471/77 provides as follows:

'For the purposes of this regulation, 100 kilograms of ... unboned meat ... shall be equivalent to:

(a) 77 kilograms of boned meat in the case of cutting and boning the total quantity for which the contract is concluded, or in the case of cutting and boning the same number of fore-and hindquarters;

(b) 70 kilograms of boned meat in the case of cutting and boning all the forequarters.'

8 Similarly, Article 4(2) of Regulation No 1405/78 (on forequarters) states that 'for the purposes of this regulation, 100 kilograms of unboned meat shall be equal to 70 kilograms of boned meat'.

The facts in Case C-433/92

9 Frick had entered into an agreement with the Federal Office for the grant of private storage aid in respect of 30 000 kg of beef for a period of six months. It received aid amounting to DM 41 693.50 for the storage of 22 157.4 kg of boned meat obtained from 29 571 kg of unboned meat, that is, an actual yield of 74.93%. Following the early removal from storage of 3 220.8 kg, the Federal Office demanded repayment of all the aid granted to Frick on the ground that, because of that removal, the threshold of 85% of the quantity to be stored under the contract, as required by Regulation No 1405/78 in order to qualify for such aid, had not been attained. According to the Federal Office, with a yield of 74.93%, the 3 220.8 kg of meat removed from storage early was equivalent to 4 298 kg of meat in the unaltered state, so that by deducting that quantity from the 29 571 kg stored initially there remained 25 273 kg of meat in the unaltered state duly stored until the end of the contractual period, a quantity falling below the threshold of 85% of the agreed quantity of 30 000 kg.

10 Frick challenges the application of the actual yield rate and claims that only the standard rate provided for in Regulation No 1405/78 should be taken. If the standard rate of 70% were applied, it maintains, the quantity of meat still in store would exceed the 85% threshold and the amount of aid would then only be reduced proportionally.

11 Frick lodged a complaint with the Federal Office, which was unsuccessful, whereupon it brought an action before the Verwaltungsgericht which annulled the contested decisions on 18 July 1985. By judgment of 26 August 1991 the

Verwaltungsgerichtshof varied that judgment in part, annulling the contested decisions only in so far as they sought repayment of all the aid and not the proportional reduction thereof.

12 The Federal Office appealed on a point of law to the Bundesverwaltungsgericht for a declaration that the minimum rate of 85% is to be calculated in relation to the actual yield achieved as a result of boning. Taking the view that the outcome of the action depended on the interpretation of Article 4(2) and (3) of Regulation No 1405/78, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In order to calculate the quantity to be placed in storage under the contract for the purposes of Article 4(3) of Commission Regulation (EEC) No 1405/78 of 22 June 1978 (OJ 1978 L 170, p. 20) should reference be made, in the case of boned meat, to the actual yield or the yield rate of 70% provided for by Article 4(2) of the regulation?'

The facts in Case C-434/92

13 Murr had obtained private storage aid in respect of 40 tonnes of beef at the rate of DM 1 330.90 per tonne for a period of six months. On the same day as it applied for aid, Murr notified the local branch of the Federal Office by telephone of its intention to start boning and cutting part of that quantity at once. Subsequently Murr confirmed that after boning and cutting 40 686 kg of meat, it had taken into store 31 367 kg of boned meat with an actual yield of 77.09%. Having established that 5 175.8 kg of boned meat had been stored before the conclusion of the contract, and that such storage had not been authorized, the Federal Office demanded repayment of all the aid. It considered that by applying to the quantity of 5 175.8 kg the actual yield rate of 77.09% and by deducting the weight so obtained, namely 6 713 kg of meat in the unaltered state, from the initial quantity of 40 686 kg, the quantity remaining in store, that is, 33 973 kg, fell below the 85% threshold imposed by the regulation concerned.

14 Murr maintains that storage of the meat may begin before the contract is concluded and that, in the present case, the Federal Office had had the opportunity to monitor the storage operations as effectively as would have been possible after conclusion of the contract, since it had been advised by telephone of Murr's intention — to which it had not objected — to cut and bone the quantity of meat under consideration on the same day as it received the application for aid. Furthermore, Murr considers, as does Frick, that only the standard yield rate which, in so far as it applies to itself, is set out in Regulation No 2471/77, namely 77%, must be taken in determining whether or not the 85% threshold has been attained. If that standard rate were applied, the 85% threshold would be slightly exceeded.

15 Murr lodged a complaint with the Federal Office, which was unsuccessful, whereupon it brought an action before the Verwaltungsgericht, which was upheld by judgment of 14 March 1985 on grounds based on the relevant procedural rules. By judgment of 9 September 1991 the Verwaltungsgerichtshof varied that judgment in part, annulling the decision of the Federal Office only in so far as it demanded repayment of all the aid and not the proportional reduction thereof.

16 The Federal Office appealed, and Murr cross appealed, on a point of law to the Bundesverwaltungsgericht which considered that the outcome of the action depended on the interpretation of Article 3(2) of Regulation No 1071/68 and of Article 4(4) and (5) of Regulation No 2471/77, whereupon it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must it be inferred from Article 3(2) of Regulation (EEC) No 1071/68 of the Commission of 25 July 1968 (OJ, English Special Edition 1968 (II), p. 354) that the private storer may not begin the process of storing the agreed quantity until after the storage contract has been concluded?

2. If Question 1 is answered in the affirmative, with what activity (weighing of the meat to be stored before boning and cutting, boning and cutting, reweighing of the boned and cut meat, freezing or placing of the goods in the cold

storage room) does the storage process for the purposes of Article 3(2) of Regulation No 1071/68 begin?

3. If Question 1 is answered in the affirmative, does the requirement that the meat should not be taken into store until after the contract has been concluded constitute such an essential contractual obligation (primary obligation) that an infringement of that obligation entails loss of entitlement to aid for the quantity of meat concerned, or is it a secondary obligation of an essentially administrative nature whose infringement does not justify such a severe penalty?

4. If Question 3 is in principle answered in the affirmative, is entitlement to aid also lost if the early storage does not begin until the day on which the private storer's aid application is received by the competent authority and the storer notified the local office of that authority by telephone on the same day of its intention to take the goods into store, without the local office expressing any reservations concerning the early storage? In that connection is it relevant whether the meat was frozen before, or not until after, conclusion of the contract?

5. In order to calculate the quantity to be placed in storage under the contract for the purposes of Article 4(4) and (5) of Commission Regulation (EEC) No 2471/77 of 8 November 1977 (OJ 1977 L 286, p. 20) should reference be made, in the case of boned meat, to the actual yield or to the yield rates set out in Article 4(3) of the regulation?'

Joinder of Cases C-433/92 and C-434/92

17 Since the only question referred to the Court in Case C-433/92 is the same as the fifth question referred to the Court in Case C-434/92, the President of the Court, by order of 25 November 1993, ordered that the cases be joined for the purposes of the oral procedure and the judgment in accordance with Article 43 of the Rules of Procedure.

The questions specific to Case C-434/92

Question 1

18 The first question referred by the Bundesverwaltungsgericht seeks to ascertain whether storage of the agreed quantity may begin only after the storage contract has been concluded.

19 As the Advocate General emphasized in his Opinion of 24 February 1994, since Regulation No 1071/68 does not contain any clear statement in that regard, it follows from Article 3(2)(b), (c) and (e) read in conjunction with one another that entry into store must take place after the conclusion of the contract. If entry into store takes place before the contract is concluded, inspection can only be carried out subsequently, at the risk of affecting its reliability.

20 The answer to the first question must therefore be that Article 3(2) of Regulation No 1071/68 is to be interpreted as meaning that a private storer may not begin the process of storing the agreed quantity until after the storage contract has been concluded.

Question 2

21 In its second question, the national court asks with which activity the storage process begins for the purposes of Article 3(2) of Regulation No 1071/68.

22 It appears from Article 5(1) of Regulation No 1071/68 that entry into store takes place after weighing and before freezing. That solution allows the intervention agency to carry out any inspection deemed necessary.

23 The answer to the second question must therefore be that the activity with which the storage process begins for the purposes of Article 3(2) of Regulation No 1071/68 is the placing of the meat to be stored in the cold storage room before freezing takes place.

Question 3

24 The third question referred by the national court seeks to ascertain whether a contractor who has taken a consignment into store before the contract was concluded loses all entitlement to aid in respect of that consignment and, therefore, whether the obligation to store the meat only after the contract has been concluded is a primary obligation, infringement of which may entail loss of entitlement to aid, or merely a secondary obligation, essentially of an administrative nature, which does not justify such a penalty.

25 Storage must be carried out in compliance with certain conditions designed to ensure its effectiveness and to enable the intervention agency to carry out its inspection and to prevent irregularities and fraud.

26 The answer to the third question must therefore be that the requirement that storage should not begin until after the storage contract has been concluded constitutes a primary obligation, infringement of which entails in principle loss of entitlement to the grant of aid for the quantity of meat concerned.

Question 4

27 The national court asks whether, in the light of the answer to the third question, entitlement to the grant of aid is lost even where the authorities had the opportunity to check entry into store as effectively as if it had duly taken place after conclusion of the storage contract.

28 The Bundesverwaltungsgericht, the Commission and Murr agree on the fact — which it is for the national court alone to assess — that since Murr had informed the local branch of the Federal Office of its intentions, the latter had the opportunity either to check the proposed entry into store as effectively as would have been possible after the storage contract had been concluded, or to object to early storage, which it did not.

29 In those circumstances, the refusal to grant any aid on the ground that a small proportion of the meat had been taken into store before the contract was formally concluded does not appear to be justified in relation to the objectives set out in paragraph 25 above and would accordingly be disproportionate.

30 The answer to the fourth question must therefore be that entitlement to storage aid for meat is not lost where the private storer has notified the intervention agency by telephone of his intention to take the agreed quantity into store early, without the agency expressing any reservations, and that operation has not affected the possibility for the agency effectively to supervise compliance by the private storer with his obligations.

The question common to both cases

31 The only question in Case C-433/92 and the fifth question in Case C-434/92 ask the Court to state which conversion method — the actual rate or the standard rate — is to be applied in the case of boned meat in determining the minimum quantity which must be stored in order to qualify for aid.

32 The Commission, relying on Article 4(1) of Regulations Nos 2471/77 and 1405/78, according to which the storer must place in store all the meat actually resulting from the boning and cutting operation, considers that the actual yield rate obtained by boning and cutting must be applied.

33 However, Article 4(3) of Regulation No 2471/77 and Article 4(2) of Regulation No 1405/78 lay down a conversion method 'for the purposes of this regulation ...', which is not subject to any exceptions.

34 The application of the yield rate actually obtained by boning or cutting the meat is not contemplated by any provision of the regulations concerned.

35 Although Article 4(1) of Regulations Nos 2471/77 and 1405/78 requires all the meat resulting from those operations to be stored, the fact remains that according to Article 5(1) of Regulation No 1071/68, which lays down detailed rules for the grant of the aid, the amount of aid is fixed solely according to the weight ascertained on entry into store before freezing.

36 Accordingly, Article 4(1) of Regulations Nos 2471/77 and 1405/78 cannot be interpreted as derogating by implication from the principle laid down in Article 4(3) and Article 4(2) of those regulations respectively, as regards the conversion method.

37 The answer to the question must therefore be that, in calculating, in the case of boned meat, the quantity to be taken into consideration as regards entitlement to storage aid, the standard rates provided for in Article 4(3) of Regulation No 2471/77 and in Article 4(2) of Regulation No 1405/78 must be applied.

Costs

38 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Bundesverwaltungsgericht by orders of 29 October 1992, hereby rules:

1) Article 3(2) of Commission Regulation (EEC) No 1071/68 of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal must be interpreted as meaning that a private storer may not begin the process of storing the agreed quantity until after the storage contract has been concluded.

2) The activity with which the storage process begins for the purposes of that provision is the placing of the meat to be stored in the cold storage room before freezing takes place.

3) The requirement that storage should not begin until after the storage contract has been concluded constitutes a primary obligation, infringement of which entails in principle loss of entitlement to the grant of aid for the quantity of meat concerned.

4) **However, entitlement to aid is not lost where the private storer has notified the intervention agency by telephone of his intention to take the agreed quantity into store early, without the agency expressing any reservations, and that operation has not affected the possibility for the agency effectively to supervise compliance by the private storer with his obligations.**

5) **In calculating, in the case of boned meat, the quantity to be taken into consideration as regards entitlement to storage aid, the standard rates provided for in Article 4(3) of Commission Regulation (EEC) No 2471/77 of 8 November 1977, on the granting at a standard rate fixed in advance of private storage aid in respect of beef carcases, half-carcases and compensated quarters, and in Article 4(2) of Commission Regulation (EEC) No 1405/78 of 22 June 1978, on the granting at a standard rate fixed in advance of private storage aid for beef forequarters, must be applied.**

Edward Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 28 April 1994.

R. Grass
Registrar

D. A. O. Edward
President of the First Chamber