JUDGMENT OF THE COURT (Eighth Chamber)

6 October 2011 *

In Case C-382/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Unabhängiger Verwaltungssenat Wien (Austria), made by decision of 22 July 2010, received at the Court on 29 July 2010, in the proceedings

Erich Albrecht,

Thomas Neumann,

Van-Ly Sundara,

Alexander Svoboda,

Stefan Toth

v

Landeshauptmann von Wien,

* Language of the case: German.

THE COURT (Eighth Chamber),

composed of K. Schiemann, President of the Chamber, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Mazák,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2011,

after considering the observations submitted on behalf of:

— Messrs Albrecht, Neumann, Sundara, Svoboda and Toth, by A. Natterer and M. Kraus, Rechtsanwälte,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— the Netherlands Government, by C. Wissels, acting as Agent,

— the European Commission, by B. Schima and A. Marcoulli, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of paragraph 3 of Chapter IX of Annex II to Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1, and corrigendum OJ 2004 L 226, p. 3; 'the regulation').

2 The reference was made in proceedings between Messrs Albrecht, Neumann, Sundara, Svoboda and Toth, on the one hand, and the Landeshauptmann von Wien (head of government of the province of Vienna), on the other hand, regarding decisions concerning the construction of containers for self-service retail of bread and bakery products.

Legal context

European Union legislation

3 Article 1(1) of the regulation, under the heading 'Scope', provides:

'This Regulation lays down general rules for food business operators on the hygiene of foodstuffs, taking particular account of the following principles:

(a) primary responsibility for food safety rests with the food business operator;

...

(d) general implementation of procedures based on the HACCP [hazard analysis and critical control point] principles, together with the application of good hygiene practice, should reinforce food business operators' responsibility;

...'

4 Article 4(2) of the regulation, under the heading 'General and specific hygiene requirements', states:

'Food business operators carrying out any stage of production, processing and distribution of food after those stages to which paragraph 1 applies shall comply with the general hygiene requirements laid down in Annex II …'

5 Article 5(1) and (2) of the regulation, under the heading 'Hazard analysis and critical control points', provide:

'1. Food business operators shall put in place, implement and maintain a permanent procedure or procedures based on the HACCP principles.

2. The HACCP principles referred to in paragraph 1 consist of the following:

(a) identifying any hazards that must be prevented, eliminated or reduced to acceptable levels;

…'

6 In Annex II to the regulation, headed 'General hygiene requirements for all food business operators (except when Annex I applies)', Chapter I of that annex, itself headed 'General requirements for food premises (other than those specified in chapter III)' states, in paragraph 3:

'At all stages of production, processing and distribution, food is to be protected against any contamination likely to render the food unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect it to be consumed in that state.'

National legislation

7 According to the order for reference, Paragraph 39(1)(13) of the Law on food safety and consumer protection (Lebensmittelsicherheits- und Verbraucherschutzgesetz, BGBl. I, 13/2006) provides that, where an infringement of the applicable legal rules on foodstuffs is established, the Landeshauptmann is to take the necessary measures, in accordance with the nature of the infringement and taking into account the principle of proportionality, in order to eliminate any deficiency or reduce a risk while laying down, as the case may be, an appropriate time-limit and any essential requirements or conditions. Those measures may relate, inter alia, to the carrying out of structural or technical improvements or concern fittings. The cost of those measures is to be borne by the trader.

8 Under Paragraph 90(3)(1) of that law, a person who infringes Paragraphs 96 or 97 of that law commits an administrative offence which is sanctioned by the district administrative authority by a fine of up to EUR 20 000 but which may reach EUR 40 000 in case of re-offending and, where the fine is not paid, may be replaced by a prison sentence of up to six weeks.

The actions in the main proceedings and the questions referred for a preliminary ruling

9 The referring court has before it a number of actions brought by franchised traders offering bread and bakery products for sale. The competent authorities instructed those traders to construct containers for self-service retail of those products in such a way that the products in question can be removed only by technical means, such as tongs or a sliding mechanism, and items already removed from the container cannot be replaced.

10 Those requirements were imposed after checks by the authorities which established that containers had been installed in the food shops in question in the main proceedings for the purpose of self-service retail of bread and bakery products. The facts as established indicate that the covers of those containers have handles, making it possible to lift the covers with one hand while removing the product using tongs made available to the customer with the other. The customer should then replace the tongs and close the cover again.

11 According to Vienna's Landeshauptmann, the risk of those self-service retail containers is that the customer can remove and touch the foodstuffs by hand, or cough or sneeze on them. In addition, that authority pointed out that the mechanism in place does not prevent the customer from returning a product to the container. According to that authority, the exposure of those food products to sneezing by customers can cause germs or viruses to be deposited on the products. Equally, removing the food by hand can contribute to the spreading of germs.

12 Before the referring court, the applicants in the main proceedings state that the containers in question were imported from Germany where they are used, in their hundreds or even thousands, by food retailers. To date, the German authorities never

regarded those containers as incompatible, inter alia, with the requirements of paragraph 3 of Chapter IX of Annex II to the regulation. The applicants in the main proceedings also state that the customers were expressly asked not to return goods to the containers.

13 The referring court adds that expert reports originating in both Germany and Austria indicate that those containers do not pose hygiene problems.

14 Considering that the outcome of the dispute before it requires an interpretation of paragraph 3 of Chapter IX of Annex II to the regulation, the Unabhängiger Verwaltungssenat Wien decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What are the criteria which determine unfitness of foodstuffs for human consumption under paragraph 3 of Chapter IX of Annex II to [the regulation]? Does such unfitness already exist where a foodstuff offered for sale could conceivably have been touched or sneezed upon by a would-be purchaser?

(2) What are the criteria which determine injuriousness of foodstuffs to health under paragraph 3 of Chapter IX of Annex II to [the regulation]? Does such injuriousness already exist where a foodstuff offered for sale could conceivably have been touched or sneezed upon by a would-be purchaser?

(3) What are the criteria which determine contamination of a foodstuff of such a kind that it would be unreasonable to expect it to be consumed in that state within the meaning of paragraph 3 of Chapter IX of Annex II to [the regulation]? Does such contamination already exist where a foodstuff offered for sale could conceivably have been touched or sneezed upon by a would-be purchaser?'

Consideration of the questions referred

15 By its questions, which should be examined together, the referring court asks, in essence, whether paragraph 3 of Chapter IX of Annex II to the regulation must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, with regard to containers used for self-service retail of bread and bakery products, the fact that a potential purchaser could conceivably have touched the foodstuffs offered for sale by hand or sneezed on them makes it possible, on that basis alone, to hold that those foodstuffs were not protected against any contamination likely to render them unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect them to be consumed in that state.

16 In that regard, it should be stated that paragraph 3 lays down a general hygiene rule with which the food business operators referred to in Article 4(2) of the regulation are obliged to comply by virtue of that provision.

17 The abovementioned paragraph 3, read in conjunction with Article 4(2) of the regulation, thus obliges those operators, at all stages of production, processing and distribution, to protect food against any contamination likely to render it unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect it to be consumed in that state.

18 With regard to the context of those provisions, which must inter alia be considered in order to interpret them (see, to that effect, Case C-116/10 *Feltgen and Bacino Charter Company* [2010] ECR I-14187, paragraph 12 and case-law cited), Article 5 of the regulation must be taken into account, as correctly stated by the applicants in

the main proceedings, the Czech and Netherlands Governments and the European Commission.

19 Under Article 5(1) of the regulation, food business operators are to put in place, implement and maintain a permanent procedure or procedures based on the HACCP principles. Among those principles is that contained in Article 5(2)(a) of the regulation, which requires identification of any hazards that must be prevented, eliminated or reduced to acceptable levels.

20 As is apparent, inter alia, from Article 1(1)(a) and (d) of the regulation, the obligation laid down in Article 5(1) thereof expresses the European Union legislature's objective of allocating primary responsibility for food safety to food business operators.

21 Paragraph 3 of Chapter IX of Annex II to the regulation must be interpreted in such a way that Article 5 of the regulation is not deprived of effectiveness.

22 It follows that, in a situation such as that in the main proceedings, where the competent authorities do not appear to have concluded that there was actual contamination, it cannot be concluded that food business operators have infringed the abovementioned paragraph 3 on the basis only of the finding that a potential purchaser could conceivably have touched the foodstuffs by hand or sneezed on them, without considering the measures taken by those operators under Article 5 of the regulation in order to prevent, eliminate or reduce to acceptable levels the hazard which the contamination referred to in paragraph 3 of Chapter IX of Annex II to the regulation

may present and without determining that the measures taken in that regard were insufficient in the light of all the available relevant data.

23 In that last regard, in particular, it cannot be concluded that those measures were insufficient without duly taking into consideration the possible expert evidence submitted by those operators to show that such containers, used for self-service retail, do not pose hygiene problems.

24 Consequently, the answer to the questions referred is that paragraph 3 of Chapter IX of Annex II to the regulation must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, with regard to containers used for self-service retail of bread and bakery products, the fact that a potential purchaser could conceivably have touched the foodstuffs offered for sale by hand or sneezed on them does not make it possible, on that basis alone, to hold that those foodstuffs were not protected against any contamination likely to render them unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect them to be consumed in that state.

Costs

25 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Paragraph 3 of Chapter IX of Annex II to Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, with regard to containers used for self-service retail of bread and bakery products, the fact that a potential purchaser could conceivably have touched the foodstuffs offered for sale by hand or sneezed on them does not make it possible, on that basis alone, to hold that those foodstuffs were not protected against any contamination likely to render them unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect them to be consumed in that state.

[Signatures]