JUDGMENT OF THE COURT (Fourth Chamber)
2 August 1993 *

In Case C-87/92,

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

Hoche GmbH

and

Bundesanstalt für landwirtschaftliche Marktordnung (BALM),

on the interpretation of Articles 5(2) and 22(5) of Commission Regulation (EEC) No 262/79 of 12 February 1979 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1979 L 41, p. 1),

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris, President of the Chamber, Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Hoche GmbH, by Cornelia Kienlein, Rechtsanwältin, Nürnberg,

* Language of the case: German.

— the Bundesanstalt für landwirtschaftliche Marktordnung, by Hinrich Thieme, Rechtsanwalt, Frankfurt am Main,

— the Commission of the European Communities, by Peter Gilsdorf, Principal Legal Adviser, and Dierk Booss, Legal Adviser, acting as Agents, assisted by Walter G. Grupp, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Hoche GmbH and the Commission of the European Communities, at the hearing on 4 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 22 April 1993,

gives the following

Judgment

1 By order of 5 February 1992, which was received at the Court on 17 March 1992, the Bundesgerichtshof referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 5(2) and 22(5) of Commission Regulation (EEC) No 262/79 of 12 February 1979 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1979 L 41, p. 1).

2 Those questions were raised in proceedings between Hoche GmbH, (hereinafter 'Hoche'), having its registered office in Germany, and the Bundesanstalt für landwirtschaftliche Marktordnung (hereinafter 'the BALM'), concerning forfeiture of a security.

3 It appears from the documents before the Court that in 1980 Hoche acquired, by process of tender under the aforesaid Regulation No 262/79, a quantity of butter at a reduced price against security. After processing it into concentrated butter, Hoche sold the butter to an Italian purchaser.

4 On 2 June 1980, during transport of the butter to Italy, the German customs authorities took a 250g sample in order to check whether the processing had been carried out in accordance with the conditions laid down in Article 5 of the said Regulation No 262/79. On analysis it appeared that the product contained only 375g of beta-sitosterol per tonne instead of the required 480g and 49g of vanillin instead of the required 250g. Moreover, those substances (hereinafter 'tracer products') were not uniformly distributed throughout the sample. In 1986, therefore, the BALM informed Hoche that the security lodged in the form of a bank guarantee was forfeit.

5 Considering that the dispute raised questions as to the interpretation of Community law, the Bundesgerichtshof stayed the proceedings and by order of 7 February 1992 referred the following questions to the Court for a preliminary ruling:

'1. Is Article 5(2) of Commission Regulation (EEC) No 262/79 to be interpreted as meaning that the tracer products to be incorporated must be uniformly distributed throughout the cooled concentrated butter?

2. Is Article 22(5) of Regulation No 262/79 to be interpreted as meaning that the security is to be forfeit if the processor does not prove that the conditions of Article 5 have been fully complied with? Is it in any event for the Bundesanstalt für landwirtschaftliche Marktordung (Federal Office for the Organization of Agricultural Markets) to prove non-compliance with the conditions where the customs authorities which had previously authorized the removal of the processed product from the processing establishment took from the goods, during transport, a sample which could not be used to establish an overall result and did not announce the result of that check until after the goods were exported?

3. Having regard to the principle of proportionality, is only part of the security lodged by the processor to be forfeit under Article 22(5) of Regulation No 262/79 if the tracer products are not uniformly distributed throughout a processed batch of cooled concentrated butter or were not incorporated in a sufficient quantity, but the whole batch has been exported to Italy and there used in compliance with the regulation?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 The national court's first question is designed to ascertain whether the requirement, laid down by Article 5(2) of Regulation No 262/79, for a uniform diffusion of the tracer products referred to in that provision, applies not only to the heated concentrated butter but also to the cooled concentrated butter.

8 To answer that question it is necessary to point out first that Article 5(2) of Regulation No 262/79, in accordance with which the tracer products must be incorporated during the course of processing the butter into concentrated butter in such a way as to ensure uniform distribution, does not distinguish between the heated concentrated butter and the cooled concentrated butter.

9 Next, it follows from the sixth and seventh recitals in the preamble to Regulation No 262/79 that the purpose of the incorporation of tracer products in the butter in the course of processing it into concentrated butter is to make it possible to distinguish the intervention butter sold at a reduced price from other butter and thus prevent its being diverted from its final intended use.

10 As the Commission has rightly observed, the requirement of a uniform distribution of these tracer products makes their subsequent separation technically very difficult and costly.

11 Since there is a risk of misuse of intervention butter not only when it is being processed into concentrated butter but also at later stages, the requirement of a uniform distribution of the tracer products throughout the cooled concentrated butter

is necessary to make it possible under Regulation No 262/79 to distinguish the intervention butter sold at a reduced price from other butter until the stage of final use. It follows that this requirement is equally applicable to cooled concentrated butter.

12 The reply which must be given to the first question raised by the Bundesgerichtshof is therefore that Article 5(2) of Regulation No 262/79 must be interpreted as meaning that the tracer products referred to in that provision must be uniformly distributed not only in the heated concentrated butter but also in the cooled concentrated butter.

The second question

13 The first part of the national court's second question is designed essentially to ascertain who bears the burden of proving that the distribution of the tracer products has been carried out in a uniform manner in accordance with Article 5(2) of Regulation No 262/79.

14 In that respect, it is sufficient to note that pursuant to Article 22(5) of Regulation No 262/79 the security is forfeit, totally or in part, where it is found that the conditions laid down in Article 5 of the regulation have not been met.

15 It follows that it is for the competent national authority to establish the infringement and adduce proof of non-compliance with the conditions laid down in Article 5.

16 The second part of the national court's second question is designed to ascertain whether the taking of a sample in the circumstances described in the order for reference can constitute proof of non-compliance with the requirements of Article 5.

17 In that respect it is necessary to point out that, according to Article 21 of Regulation No 262/79, the Member State in whose territory the operations take place is required, throughout the processing of the butter and the incorporation of the tracer products referred to in Article 5(1) and (2), to carry out frequent inspections without notice, covering *inter alia* the composition of the products obtained.

18 That provision does not, admittedly, expressly refer to an inspection such as the one in this case, which involved taking a sample during transport of the concentrated butter, the results of which were communicated only after export.

19 It does not necessarily follow, however, that the inspection carried out in those circumstances is to be deemed unlawful or that it is not permissible to take account of its results.

20 It must be emphasized that the Community legislature did not lay down provisions regulating in detail all the methods of control, and has thus left the Member States at liberty to regulate them in accordance with their own legal system and on their own responsibility by choosing the most appropriate solution (Joined Cases 146/81, 192/81 and 193/81 *BayWa* v *BALM* [1982] ECR 1503, paragraph 20).

21 It is therefore for the national court to determine whether under its national law the taking of a sample during transport of the concentrated butter and the results of its analysis make it possible to establish an infringement of the conditions laid down in Article 5(2) of Regulation No 262/79.

22 The reply to be given to the second question raised by the Bundesgerichtshof is therefore that Article 22(5) of Regulation No 262/79 must be interpreted as meaning that on the one hand, it is for the competent national authority to prove that

the conditions laid down in Article 5 of the regulation have not been fulfilled and, on the other hand, that it is for the national court to determine, in accordance with its national law, whether the taking of a sample during the transport of the concentrated butter and the results of the analysis of that sample may be used to establish such an infringement.

The third question

23 The national court's third question is designed to ascertain whether Article 22(5) of Regulation No 263/79 infringes the principle of proportionality.

24 In order to give a reply to this question it should be borne in mind that, as observed in paragraph 9 of this judgment, the purpose of the incorporation of the tracer products and their uniform distribution throughout the butter is to enable the intervention butter to be identified in order to verify that it has not been diverted from its final intended use. Moreover, the eighth recital in the preamble to Regulation No 262/79 expressly states that, in view of the size of the price reduction granted when an award is made, it is necessary to require that processing securities be lodged in order to guarantee that the butter will be used as prescribed. Finally, it may be seen from Article 22(5) of Regulation No 262/79 that the purpose of a processing security is to guarantee compliance with the requirements of Article 5 of the regulation.

25 From all those provisions it follows that the security in question was instituted specifically to ensure that the purchaser complied with one of his principal obligations, namely to incorporate in the butter ingredients selected according to its final intended use and thus make it possible to distinguish it from other butter.

26 The Court has consistently held that if an obligation is to be deemed to be a principal obligation the observance of which is of fundamental importance to the proper functioning of a Community system, breach of that obligation may,

without infringing the principle of porportionality, be penalized by total forfeiture of the security (Case 21/85 *Maas* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1985] ECR 3537).

27 Moreover, it should be observed that the principle of proportionality is applied under Article 22(5) of Regulation No 262/79, the first subparagraph of which provides for forfeiture of only that part of the security corresponding to the batch in respect of which the purchaser has not fulfilled his processing obligation, whereas the second subparagraph provides for partial forfeiture of the security in the event of a shortfall of tracer products of less than 20% of the proportion prescribed under Article 5(2) of the regulation.

28 In those circumstances, the fact that, in accordance with the first subparagraph of Article 22(5) of Regulation No 262/79, the intervention agency declared forfeit that part of the security corresponding to the batch in respect of which the purchaser did not fulfil his processing obligation otherwise than in circumstances of *force majeure* does not amount to a breach of the principle of proportionality.

29 The reply to be given to the third question raised by the Bundesgerichtshof is therefore that Article 22(5) of Regulation No 262/79 is not contrary to the principle of proportionality.

Costs

30 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 (Fourth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof, by order of 5 February 1992, hereby rules:

1. **Article 5(2) of Commission Regulation No 262/79 of 12 February 1979 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs, must be interpreted as meaning that the tracer products referred to in that provision must be uniformly distributed not only in the heated concentrated butter but also in the cooled concentrated butter.**

2. **Article 22(5) of the said Regulation No 262/79 must be interpreted as meaning that on the one hand it is for the competent national authority to prove that the conditions set out in Article 5 of that regulation have not been fulfilled and, on the other hand, that it is for the national court to determine, in accordance with national law, whether the taking of a sample during the transport of the concentrated butter and the results of its analysis may be used to establish such an infringement.**

3. **Article 22(5) of the said Regulation No 262/79 is not contrary to the principle of proportionality.**

Kakouris Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 2 August 1993.

J.-G. Giraud C. N. Kakouris

Registrar President of the Fourth Chamber