JUDGMENT OF THE COURT (Sixth Chamber)
25 February 1988 *

In Case 199/86,

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

Raiffeisen Hauptgenossenschaft eG, Kiel,

and

Bundesanstalt für landwirtschaftliche Marktordnung (BALM) (Federal Office for the Organization of Agricultural Markets), Frankfurt am Main

on the consequences of the Court's declaration that Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feedingstuffs (Official Journal 1977, L 67, p. 18) is invalid, especially in relation to the annulment of a demand for the provision of security made on the basis of the regulation declared invalid and the release of the security,

THE COURT (Sixth Chamber)

composed of: O. Due, President of Chamber, T. Koopmans, K. Bahlmann, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: J. Mischo
Registrar: J. A. Pompe, Deputy Registrar

* Language of the Case: German.

after considering the observations submitted in the written and oral procedure on behalf of

Raiffeisen Hauptgenossenschaft eG, the plaintiff in the main proceedings, by J. Gündisch, Rechtsanwalt,

the Commission of the European Communities, by P. Karpenstein, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 8 October 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 18 November 1987,

gives the following

Judgment

1 By an order of 22 May 1986, which was received at the Court on 31 July 1986, the Bundesverwaltungsgericht referred six questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty in order to enable the Bundesverwaltungsgericht to determine the consequences of the Court's declaration that Council Regulation No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder by intervention agencies for use in feedingstuffs is invalid, especially in relation to the annulment of a demand for the provision of security made on the basis of the regulation declared invalid and the release of the security.

2 Those questions were raised in proceedings between the Bundesanstalt für landwirtschaftliche Marktordnung (hereinafter referred to as 'the Bundesanstalt') and Raiffeisen Hauptgenossenschaft eG (hereinafter referred to as 'Raiffeisen') in which Raiffeisen sought the annulment of the Bundesanstalt's decision requiring security of DM 1 251.84 on the basis of Regulation No 563/76 and the release of that security, which was declared forfeit by decision of the Bundesanstalt.

3 In 1976, after lodging security in the amount of DM 1 251.84 with the Bundesanstalt, Raiffeisen imported and put into free circulation goods covered by Regulation No 563/76. Raiffeisen did not, however, buy skimmed-milk powder as required by the regulation, the obligation in respect of which the security had been lodged.

4 When its administrative appeal against the demand for the provision of security was rejected Raiffeisen brought an action before the Verwaltungsgericht which was pending when the Court, in its judgments of 5 July 1977 in Case 114/76 *Bela-Mühle* v *Grows-Farm* [1977] ECR 1211, Case 116/76 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1977] ECR 1247, and Joined Cases 119 and 120/76 *Ölmühle Hamburg* v *Hauptzollamt Hamburg-Waltershof* [1977] ECR 1269 replying to questions referred by a number of courts for a preliminary ruling, declared Regulation No 563/76 invalid. Raiffeisen thereupon maintained that since the regulation was invalid the requirement to buy skimmed milk and the demand for the provision of security were unlawful. It added that it had not been able to pass the burden of the security on to its customers. The Verwaltungsgericht upheld its claim.

5 The Bundesanstalt appealed against that decision on the basis of the judgment of the Court of 13 May 1981 in Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze dello Stato* [1981] ECR 1191, which had in the meantime held that an action for the recovery of such security was unfounded. The Hessicher Verwaltungsgerichtshof allowed the appeal and dismissed Raiffeisen's action on the basis of the judgment of 13 May 1981. In the meantime the Bundesanstalt had declared the security forfeit.

6 Raiffeisen appealed to the Bundesverwaltungsgericht, which by order of 22 May 1986 stayed the proceedings and referred the following questions to the Court:

'(1) Is there a rule of Community law to the effect that a demand for the provision of security which

(a) was issued pursuant to Council Regulation (EEC) No 563/76, of 15 March 1976, and

(b) has been challenged by means of national legal procedures and has therefore not become definitive

should not be annulled although it would be liable to be annulled under the provisions of national law on the ground that Council Regulation No 563/76 has been held invalid?

Should Question 1 be answered in the negative:

(2) Is there a rule of Community law to the effect that security lodged pursuant to a demand which

(a) was issued on the basis of Council Regulation No 563/76, and

(b) has been challenged by means of national legal procedures and in the event annulled on the ground that Council Regulation No 563/76 is invalid

should nevertheless not be released?

Should Question 2 be answered in the affirmative:

(3) (a) Does the rule prevent the security from being released only where the security was declared forfeit before delivery of the judgment in which the Court of Justice declared Council Regulation No 563/76 invalid, or

(b) Does the rule also prevent the security from being released where the security was declared forfeit after that judgment declared Council Regulation No 563/76 invalid?

Should Question 3 (a) be answered in the affirmative:

(4) (a) May security — in this instance security lodged pursuant to Council Regulation No 563/76 — become forfeit only when the demand pursuant to which the security was lodged is no longer assailable and has therefore become definitive, or

(b) May the security become forfeit even though legal proceedings concerning the legality of the demand are still pending?

(5) (a) Do the legal consequences of the forfeiture of security ensue only if the security has been declared forfeit by decision of an authority, or

(b) Do the legal consequences of the forfeiture of the security ensue immediately upon fulfilment of the conditions governing forfeiture under the relevant legislation without its being necessary for an authority to decide that the security is forfeit?

Should Question 4 (b) be answered in the affirmative:

(6) Is there a rule of Community law determining the legal consequences which follow if the demand pursuant to which security that has already become forfeit was lodged is subsequently annulled as being unlawful?'

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

Question 1

8 Although the judgment of 13 May 1981 declared Regulation No 563/76 to be invalid, it did not state whether or not demands for the provision of security made on the basis of the regulation may be annulled.

9 There is no general principle of Community law to the effect that a demand for the provision of security made by a national authority on the basis of a Community regulation subsequently declared invalid which is challenged in good time in accordance with national law may not be annulled.

10 Nor is any such rule is to be inferred either from Regulation No 563/76, which was declared invalid, or Commission Regulation No 677/76 of 26 March 1976 laying down detailed rules for the application of the system of compulsory purchase of skimmed-milk powder provided for in Council Regulation No 563/76 (Official Journal 1976, L 81, p. 23), which set out the conditions governing the release or forfeiture of security.

11 The answer to the first question must therefore be that there is no rule of Community law to the effect that a demand for the provision of security made pursuant to Regulation No 563/76 and challenged in accordance with national law may not be annulled.

Question 2

12 The second question seeks in substance to determine whether, on the annulment of a demand for the provision of security made on the basis of Regulation No 563/76, the sum lodged as security may nevertheless under Community law not be refunded.

13 As the Court held in the aforementioned judgment of 13 May 1981, in so far as Community law does not provide otherwise, disputes relating to the refund of

amounts collected on behalf of the Community fall within the jurisdiction of national courts and should be settled by those courts by applying their own national law, both procedural and substantive.

14 It must therefore be determined whether Regulation No 563/76 or Regulation No 677/76 laying down detailed rules for the application of Regulation No 563/76, as they were applied before Regulation No 563/76 was declared invalid, contain provisions affecting the refund of sums received on the basis of the annulled demand.

15 It should be observed first of all that Regulation No 677/76 assumes that Regulation No 563/76 is valid and in consequence simply sets out the conditions on which security validly lodged should be released. It is not therefore possible to determine on the basis of Regulation No 677/76 whether security lodged on the basis of Regulation No 563/76 should be released in the event of the latter being declared invalid.

16 Article 5 of Regulation No 563/76 provides expressly that 'in the case of contracts concluded before the date of entry into force of this regulation, the successive buyers of products referred to in Articles 2 and 3, or of protein products processed therefrom, shall bear the burden of the costs arising under the arrangements laid down in this regulation.' As the Court has already held in its judgment of 13 May 1981, that provision implies a unilateral amendment if need be of commercial contracts previously entered into in order, as the fifth recital to the regulation indicates, equitably to share the burden of the compulsory purchase of skimmed-milk powder among all the traders. It follows that traders subject to the obligation to purchase skimmed-milk powder and for that reason exposed to the risk of losing their security should not suffer any loss owing to the charge imposed because in the case of contracts prior to the entry into force of the regulation the charge was automatically passed on to the successive buyers. That system implied that in the case of contracts made after the entry into force of the regulation the same result was achieved by the operation of the market and freedom of contract. As the amount of the securities to be provided broadly corresponded to the burden arising from the obligation to purchase, the financial effect of their loss was, in the case of traders electing to forego the security, itself equal to that to which the performance of the obligation to purchase would have led in their case.

17 Consequently, in the case of contracts concluded before the entry into force of Regulation No 563/76 there is a rule of Community law resulting from Article 5 of Regulation No 563/76 to the effect that there is no right to the release of security lodged on the basis of that regulation.

18 On the other hand, in the case of contracts concluded after the entry into force of Regulation No 563/76 provisions of national law which allow a trader who has decided not to pass on the amount of the security but has challenged the demand for the provision of security to claim its repayment are not contrary to any rule of Community law.

19 The answer to the second question must therefore be that where protein products acquired under Regulation No 563/76 have been resold on the basis of contracts made before that regulation entered into force, there is a rule of Community law to the effect that the amount of the security lodged pursuant to a demand made on the basis of that regulation may not be repaid even if the demand was challenged in accordance with national law and annulled on the ground that the regulation was invalid. Where, on the other hand, such products bought subject to the provision of security have been resold under contracts made after the entry into force of the said regulation and the demand for security was challenged in accordance with national law and annulled on the ground that the regulation was invalid, no rule of Community law prevents repayment of the security.

Question 3

20 The third question seeks in substance to determine whether, in the event that the answer to the second question is in the affirmative, the repayment of the security depends on whether it became forfeit before or after the aforementioned judgments of the Court of 5 July 1977 declaring Regulation No 563/76 invalid.

21 Neither the fact that security lodged pursuant to Regulations Nos 563/76 and 677/76 has become forfeit nor the time of its forfeiture is relevant under Community law to the repayment of the security.

Questions 4, 5 and 6

22 In view of the answer given to Question 3 there is no need to reply to Questions 4, 5 and 6.

Costs

23 The costs incurred by the Commission of the European Communities, which has submitted 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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 22 May 1986, hereby rules:

(1) There is no rule of Community law to the effect that a demand for the provision of security made pursuant to Council Regulation No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feedingstuffs, which was declared invalid by the judgment of the Court of 13 May 1981, may not, if challenged in accordance with national law, be annulled.

(2) Where protein products acquired under Regulation No 563/76 have been resold on the basis of contracts made before that regulation entered into force, there is a rule of Community law to the effect that the amount of the security lodged pursuant to a demand made on the basis of that regulation may not be repaid even if the demand was challenged in accordance with national law and annulled on the ground that the said regulation was invalid. Where, on the other hand, such products bought subject to the provision of security have been resold under contracts made after the entry into force of the said regulation and the demand for security was challenged in accordance with national law and annulled on the ground that the regulation was invalid, no rule of Community law prevents repayment of the security.

(3) Neither the fact that security lodged pursuant to Regulations Nos 563/76 and 677/76 has become forfeit nor the time of its forfeiture is relevant under Community law to the repayment of the security.

Due Koopmans

Bahlmann Kakouris O'Higgins

Delivered in open court in Luxembourg on 25 February 1988.

J.-G. Giraud
Registrar

O. Due
President of the Sixth Chamber