JUDGMENT OF THE COURT
OF 5 DECEMBER 1973 [1]

E. Kampffmeyer
v Einfuhr- und Vorratsstelle für Getreide und Futtermittel
(preliminary ruling requested by the Hessisches Finanzgericht)

'Turnover equalization tax'

Case 124/73

Summary

Agriculture — Common organization of markets — Cereals — Processed products — Tapioca — Denatured flour — Levy — Calculation — Turnover equalization tax levied on import — Costs of eosination — Inclusion in the calculation — Prohibition (Regulation No 19 of the Council, Article 14 (1) (A); Regulation No 55 of the Council, Article 7)

The provisions of Article 14 (1) (A) (b) of Regulation No 19 of the Council of the EEC of 4 April 1962 read in conjunction with those of Article 7 (2) of Regulation No 55 of the Council of the EEC of 30 June 1962 are to be interpreted as meaning that neither the amount of the turnover equalization tax levied on import nor the costs of eosination are to be deducted from the levy applicable to 'denatured tapioca flour', under Common Customs Tariff heading No 11.06.

In Case 124/73

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

E. KAMPFFMEYER, Hamburg,

and

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL, Frankfurt/Main,

1 — Language of the Case: German.

on the interpretation of the provisions of Article 14 of Regulation No 19 of the Council of 4 April 1962 (OJ 1962, No 30) taken together with those of Article 7 of Regulation No 55 of the Council of 30 June 1962 (OJ 1962, No 54), relating to the set-off of the turnover equalization tax and of costs involved in eosination for the purposes of calculating the levy applicable to products processed from cereals,

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. Having received from the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (hereinafter referred to as the 'EVstG') of Frankfurt/Main several import licences for 'denatured flour' the Firma E. Kampffmeyer (hereinafter referred to as 'Kampffmeyer') lodged a complaint regarding the rate of levy fixed by the EVstG in these licences, on the grounds that it had been incorrectly calculated.

In support of its claim the company maintains in its action before the Hessisches Finanzgericht that in order to calculate the levy to be applied to imported 'tapioca flour' account must be taken both of the turnover equalization tax, to the extent of 90 % of that tax, and of the costs of eosination.

The EVstG denies that this action is well founded, emphasizing, first, that the principles laid down by the Court of Justice in its Judgment of 12 May 1971 in the *Wünsche* case (Case 76/70, Rec. 1971, p. 393) do not apply to products which result from the processing of cereals, and, secondly, as regards the costs of eosination, that these had already been taken into account in the difference between the rates of the levies applicable to 'tapioca flour' and to 'denatured tapioca flour'.

Being of the opinion that this case raises a problem of interpretation of Community law the Hessisches Finanzgericht decided by order of 27

March 1973, filed at the Registry of the Court on 17 April 1973, to suspend the proceedings and to refer the following questions to the Court pursuant to Article 177 of the EEC Treaty:

'1. Is Article 14 (1) (A) (b) of Regulation No 19 of the Council of the European Economic Community of 4 April 1962 on the gradual establishment of a common organization of the market in cereals (Official Journal of the European Communities. p. 933), in conjunction with Article 7 (2) of Regulation No 55 of the Council of the European Economic Community of 30 June 1962 on the system for products processed from cereals (Official Journal of the European Communities. p. 1583), to be interpreted in such a way that from the levy for denatured tapioca flour under No 11.06 of the Common Customs Tariff, the amount of the turnover equalization tax levied on imports of denatured tapioca flour and the costs of eosination are to be deducted?

If so:

2. Under what provisions, in what form and in what amount would the turnover equalization tax taken into account in determining the threshold price for barley then have to be brought into the calculation, when the levy for denatured tapioca flour, under Article 7 (2) of Regulation No 55, has been calculated on the basis of the threshold price for barley?'

2. Firma Kampffmeyer, represented by Walter Röll, of Hamburg, the Federal Republic of Germany, represented by Martin Seidel, as agent, and the Commission of the European Communities, represented by its legal adviser Peter Kalbe, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

The parties to the main action and the Commission of the European Communities made their oral observations 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 Protocol on the Statute of the Court of Justice may be summarized as follows:

A — Observations submitted by Firma E. Kampffmeyer

1. *As regards the inclusion in the calculation of the turnover equalization tax,* Firma E. Kampffmeyer first sets out the conclusions which it believes may be drawn from the case law of the Court on this subject, particularly the Judgment in Case 76/70. In the company's opinion it transpires from this Judgment that the German equalization tax had the prohibited effect of a charge having an effect equivalent to a customs duty, once the internal price upon which, for the purposes of the levy, the external price for the imported product is aligned was fixed so as to include amongst those marketing costs taken into account a sum corresponding to the equalization tax. The levy thus calculated, in order not to lead to the prohibited effect of a charge having equivalent effect, should be reduced by the amount of marketing costs necessarily falling upon the importer. This interpretation is in line with the system enshrined in Regulation No 19/62. It also corresponds to that of Regulation No 55/62, which merely contained rules for the implementation

of Regulation No 19/62 with regard to processed products and which introduced a levy based on the same principles and with the same objectives as those laid down for the levy introduced by Regulation No 19/62.

Moreover, it transpires from Article 7 (2) of Regulation No 55/62, as well as from the fourth recital of its Preamble, that the authors of the Regulation considered 'denatured tapioca flour' to be a product in competition with barley for fodder and which should therefore reach the national market at a price which corresponded — taking account of the difference in its starch content and other qualitative differences which govern its use — to the target price for barley. It also emerges from these rules that the rate of levy had been fixed with reference to the evaluation made by the Council on the basis of the above criteria, which, therefore, should be sufficient to achieve the desired alignment of prices.

In order to enable Regulation No 55/62 to pursue its objective, which was to impose a levy on denatured tapioca flour only where the latter could be considered to be in competition with barley for fodder and where the levy was strictly necessary for the protection of national or Community producers of barley for fodder, the Council's evaluation should have been made on the basis of an identical criterion for all the Member States. In other words, the Council's evaluation could not attain its objective, which was to impose levies that were neither excessive nor inadequate, unless it equalized prices at a given stage of the marketing process. Without this proviso, the evaluation would necessarily have been arbitrary.

Accordingly the only relevant question is that of determining the stage of the internal marketing process which is to form the basis of this evaluation, or which those concerned can and must consider as such. Unlike Regulation No 19/62, Regulation No 55/62 contains no express provisions on this point. However, in the absence of any indication to the contrary, and bearing in mind the close parallels between the two Regulations, it is justifiable to suppose that Regulation No 55/62 was drafted on the basis of the same marketing stage as that considered by Regulation No 19/62. If this is the case, the Council can only have made the evaluation with a view to aligning the price of the products at issue on the wholesale buying stage for barley for fodder, bearing in mind the relevant differences in quality and subsequent use. In fact Regulation No 19/62 as well as Regulations Nos 13/64 and 14/64 fixed the threshold price for the products concerned with reference to the wholesale buying stage.

Producers of barley, whether Community or national, sold and still sell their production to the wholesale trade. The sale price, including transport costs, is identical with the purchase price paid at the wholesale stage for cereals. This price includes all costs and taxation to which barley for fodder is subject, as well as all the marketing costs incurred up to the wholesale stage. Accordingly, for the period under consideration, this price would also include the turnover tax levied directly or indirectly on home-grown barley for fodder. This being the case, the amount of the levy calculated for tapioca flour which had undergone eosination also included all marketing costs and taxation incurred by the home-grown product with which it was in competition. In order that the equalization tax levied on imports into the Federal Republic of Germany should not have the effect of a further levy it was accordingly necessary once more to reduce the amount of the levy, first established by calculation, by the amount of the equalization tax, computed at a flat-rate if necessary.

However, the present state of German legislation would not enable the computation of the amount of tax to be deducted from the levy to be made at a flat-rate. Kampffmeyer concludes its observations on this point by submitting

that the question referred should be answered as follows:

'Articles 14 of Regulation No 19/62 and 7 of Regulation No 55/62, which are relevant to the calculation of the amounts of the levies on products used in the processing industry (Article 1 (d) read in conjunction with the Annex to Regulation No 19/62) are to be interpreted as meaning that the national court has the power to reduce the levy by the amount of the equalization tax, if levied, if the national legislature has not made an overall reduction, based on the appropriate flat-rate evaluation.

The provisions enacted up to the present time by the Federal Republic of Germany have not resulted in a sufficient reduction of the levies.'

2. *As regards the inclusion in the calculation of costs of eosination,* Kampffmeyer notes firstly that the above comments are substantially relevant to this final question. In the company's view, it cannot be objected that the setting off of the costs of eosination against the levy is incompatible with the general character of the levy system. Tapioca flour which has undergone eosination is a specific product, which is systematically subjected to this treatment. Accordingly, the resulting costs may also be calculated at a flat-rate, the average fluctuating between 2 and 4 DM per metric ton. There is no reason however why the lower figure should not be employed.

The setting off of eosination costs against the levy could only be excluded if these costs have already been taken into account in fixing the levy applicable to tapioca flour which has undergone eosination. Kampffmeyer states that on the information available to it it is unable to ascertain whether this was in fact the case.

B — Observations submitted by the Federal Republic of Germany

1. *As regards the inclusion in the calculation of the turnover equalization tax,* the Federal Republic of Germany sets out the objectives of the levy introduced by Regulation No 19/62 and states that the economic machinery for the stabilization of prices was not calculated in the same way for all the products which are governed by this Regulation. It notes, having outlined the method of calculation used in relation to basic products, that as regards processed products, including denatured tapioca flour, the calculation of the levy was carried out according to particular rules, set out in Article 14 of Regulation No 19/62 and in Regulation No 55/62. In fact, it had not been possible to calculate the levy for processed products on the basis of the same criteria as for the basic products in view of the absence of a clearly defined market, with representative prices and qualities which would allow comparisons to be made between the various prices to be taken into consideration for the fixing of the levy. The levy to be applied to processed products was made up of two components, one 'fixed' — which in the case of denatured tapioca flour was almost zero — and the other 'variable'. Pursuant to 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 to be applied to 40 kg of barley.

According to this method of calculation marketing costs, including the equalization tax, could not therefore have been taken into consideration if they had already formed part of the calculation of the levy to be applied to the basic product which had formed the basis for the fixing of the variable component. The amount of the levy had in fact been precisely fixed, the amount of the variable component having been calculated with reference to the levy for the product most similar to the processed product. It could only have been amended in the circumstances set out at Article 7 (2) (2) of Regulation No 55/62.

This system of calculation means that the equalization tax could not therefore

be taken into account in calculating the levy to be applied to the product at issue.

Taking the case law of the Court as a starting point, the Federal Republic notes firstly that the equalization tax is not a charge having an effect equivalent to a customs duty and is not illegal from the point of view of the Treaty. Furthermore it does not appear from the Judgment of the Court in Case 76/70 that the equalization tax must 'also' be taken into account in calculating the levy to be applied to the processed products listed in the Annex to Regulation No 19/62. In this Judgment the Court in fact restricted itself to an interpretation of Article 4 of the above Regulation. This provision was solely concerned with the fixing of the threshold price for the basic products mentioned therein, and laid down no rule for the calculation of the levy to be applied to the processed products mentioned in the Annex above referred to.

2. *As regards the inclusion in the calculation of the costs of eosination,* the Federal Republic of Germany is of the opinion that since Article 7 (2) and (3) (b) of Regulation No 55/62 fixed levies which are very much lower than those applicable to non-denatured tapioca flour, the costs of eosination or other methods of denaturing have already been taken into account. They could not accordingly be taken into account a second time for the fixing of the levy to be applied.

Finally, the Federal Republic submits that since the answer to be given to the first question is in the negative the second question does not require to be answered.

C — *Observations submitted by the Commission*

Taking firstly the problem of *the turnover equalization tax,* the Commission recalls that the common organization of the market in cereals, instituted by Regulation No 19/62, provided in particular for the raising of a levy on the import of barley and tapioca flour into the Member States. The levy to be applied to tapioca flour produced outside the Community which is covered by the term 'processed products' in Article 1 (d) and in the Annex to Regulation No 19/62 was not calculated, as was the case for barley, according to Articles 10 and 4 of the said Regulation, but according to Article 14. This levy was made up of two components, one 'variable' (see in particular Article 14 (1) (A) (b)) and the other 'fixed' (Article 14 (1) (B)). It was for the Member States to calculate these components and the levy to be applied in each case, and they had to conform to criteria set out in Regulation No 55/62 in respect of products processed from cereals, in particular those contained in Articles 2, 3, 4 and 7. Neither these provisions nor other provisions of Regulation No 19 nor of other legislation adopted for its implementation either directly or indirectly required or authorized the Member States to include in the levy, or to deduct from it, the turnover equalization tax levied on imports of tapioca flour on the basis of the dutiable value of the various imports. Of course the Member States were empowered to fix for example the threshold prices from which the levy was calculated, but it was not possible for them to deviate from the rules laid down for this calculation by a Regulation which was binding on them under Article 189 of the Treaty. The wording of the provisions of Regulation No 55/62 left the Member States no room for the exercise of their own discretion, beyond the mathematical execution of the required calculations.

Moreover, to leave the equalization tax out of account in fixing the levy does not make Regulation No 55/62 an anomaly in relation to the system, but results from the planning and objectives of the levy system instituted by Regulation No 19/62.

In respect of the cereals listed at Article 4 of Regulation No 19 the levy was

intended in principle to compensate completely the difference between world market prices and guaranteed home prices. It ought to have raised the world price for imported cereals within the importing Member State to the level of the target price, but not above it. It was thereby intended, on the one hand, that imported cereals could not be sold at prices below the target price on the relevant internal market, and, on the other hand, that internal prices should be protected against fluctuations in world prices and stabilized at the level of the basic target price.

However, as regards the other basic cereals within the meaning of Article 1 of Regulation No 19, produced within the Community but not listed at Article 4 of that Regulation and being in general of lesser economic importance within the Member States, such a thorough-going price guarantee was not necessary, nor was it envisaged. Equally, such a guarantee was not necessary with regard to products processed from cereals listed at Article 1 (d) and in the Annex to Regulation No 19, in particular manioc flour (tapioca flour) which is not grown anywhere in the Community. However, although it was also necessary here to raise the import price by means of levies, in order to avoid competition based on prices from substitute products in relation to the main national products, there was no reason, in particular for tapioca flour, why home sales prices should not have been raised above a specified level. Thus, in respect of these products, there was no overriding reason why, in fixing the levy, the turnover equalization tax, the effect of which is to raise the national sale price of tapioca flour, should have been taken into account.

Turning next to the problem of the *inclusion in the calculations of costs of denaturing,* the Commission notes that Article 7 of Regulation No 55/62 itself took sufficient account of the various possibilities for subsequent use, as well as the relative values of denatured tapioca flour and of non-denatured tapioca flour. The Regulation did not provide that further account should be taken of these costs; indeed, it was not necessary to do so. Moreover in this case, as well as in that of the equalization tax, to find in favour of the applicant would be to depart from the levy system and jeopardize the general method of calculation in favour of a particular case and without the least justification. Furthermore, to reduce the levy by the amount of the costs incurred by the importer in a Member State for the purposes of total or partial denaturing of the imported product would amount to the grant of a denaturing premium, which could in no respect be represented as being in the public interest within the Community.

Accordingly, in view of the fundamental difference between the objective and the structure of the levy raised on tapioca flour by comparison with the levy on those cereals listed at Article 4 of Regulation No 19/62, Article 7 of Regulation No 55/62 cannot be interpreted as requiring the deduction of the equalization tax or of the costs of eosination incurred individually by the importer. The inclusion in the calculation of costs paid individually could only be an exceptional solution and could therefore only be justified, even on the grounds of fairness, if it was firmly based in substantive law. Such a basis does not exist in Community law, nor can it be deduced from the Judgment of the Court of Justice in Case 76/70, since this is only concerned with the calculation of threshold prices as laid down at Article 4 of Regulation No 19/62.

The Commission submits that the first question should be answered to the effect that 'pursuant to Regulation No 19, the levy to be applied to denatured tapioca flour should not have been reduced by the amount of the turnover equalization tax levied on imports'.

In the Commission's view the second question would accordingly be 'devoid

of purpose'. The levy on barley — from which the levy at issue is calculated — did indeed take account of the equalization tax on this product, but this tax has nothing to do with the equalization tax on tapioca flour.

Grounds of judgment

1 By order dated 27 March 1973, filed at the Registry of the Court of Justice on 17 April 1973, the Hessisches Finanzgericht, pursuant to Article 177 of the EEC Treaty, referred two questions on the interpretation of certain 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 for products processed from cereals (OJ 1962, No 34).

2 The first question asks whether the provisions of Article 14 (1) (A) (b) of Regulation No 19/62 in conjunction with those of Article 7 (2) of Regulation No 55/62 are to be interpreted in such a way that from the levy for 'denatured tapioca flour' (Tapiokamehl) under No 11.06 of the Common Customs Tariff, the amount of the turnover equalization tax levied on imports of denatured tapioca flour and the costs of eosination are to be deducted.

In the event of this question being answered in the affirmative, the Court is requested to state under what provisions, in what form and in what amount the turnover equalization tax taken into account in determining the threshold price for barley would then have to be brought into the calculation, when the levy for 'denatured tapioca flour', under Article 7 (2) of Regulation No 55/62, has been calculated on the basis of the threshold price for barley.

3 These questions are concerned with the calculation of the levy to be applied to 'denatured tapioca flour', covered by the term 'processed products' in Article 1 (d) and in the Annex to Regulation No 19/62.

This levy, calculated pursuant to Article 14 of the said Regulation, was made up of two components, one variable, the other fixed.

As regards processed products which do not contain the basic products listed in Article 1 (a), the variable component of the levy was fixed, pursuant to Article 14 (1) (A) (b), taking account of market conditions for processed products manufactured from the above-mentioned basic products and which are most similar thereto.

For this purpose Article 7 (2) laid down that, for the processed products listed in the Annex to Regulation No 19/62, under the Common Customs Tariff heading No 11.06, including 'tapioca flour', the variable component for 100 kg of each of these products is equal, Article 2 (4) notwithstanding, to the levy to be applied to 40 kg of barley, where the processed product has been subjected to a denaturing process.

Under the terms of paragraph (3) (b) of the same Article the fixed component of the levy to be applied to such products, which include 'denatured tapioca flour', was fixed at zero.

4 The result of these provisions is that, contrary to the system instituted by Article 10 (2) of Regulation No 19/62, where the levy may be varied in proportion to the differences which exist between c.i.f. prices and threshold prices, the system instituted by Article 14 of the same Regulation and by Article 7 of Regulation No 55/62 provides for the application of a levy, the amount of which is calculated with reference to predetermined criteria, namely, on the one hand, the levy applicable to barley, and on the other hand, the fixed rate which was established by the authors of the Regulation.

In the context of this system, of which the chief characteristic is a levy the calculation of which is fixed in its entirety by Community Regulations, it is not therefore open to the Member States to vary the amount of the levy, by means of calculations which are not laid down by the authors of the Regulations, and for example to deduct from the said amount the turnover equalization tax.

Such a deduction would alter the rate of the fixed and variable components of the levy, as directly or indirectly calculated by Regulation No 55/62.

Furthermore, as regards the inclusion in the calculation of the costs of eosination, Article 7 (2) and (3) (b) of Regulation No 55/62 provided for a levy on 'denatured tapioca flour' different from that fixed by paragraphs (1) and (3) (a) of the same Article for the same processed products which had not undergone a denaturing process.

The outcome of these Regulations is that the levy system established by Article 7 already took account of differences which exist in the processed product as regards quality and subsequent use, whether the product had undergone a denaturing process or not.

Therefore the costs of eosination could not be set off against the levy to be applied pursuant to Article 7 (2) and (3) (b) of Regulation No 55/62.

5 Accordingly the first question should be answered to the effect that the provisions of Article 14 (1) (A) (b) of Regulation No 19/62 read in conjunction with those of Article 7 (2) of Regulation No 55/62, are to be interpreted as meaning that neither the amount of the turnover equalization tax levied on import nor the costs of eosination are to be deducted from the levy applicable to 'denatured tapioca flour', under Common Customs Tariff heading No 11.06.

6 The first question having been answered in the negative the second question does not arise.

Costs

7 The costs incurred by the Federal Republic of Germany and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and 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,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of Firma E. Kampffmeyer 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 Hessisches Finanzgericht by order of that court dated 27 March 1973, hereby rules:

The provisions of Article 14 (1) (A) (b) of Regulation No 19 of the Council of the EEC of 4 April 1962 read in conjunction with those of Article 7 (2) of Regulation No 55 of the Council of the EEC of 30 June 1962 are to be interpreted as meaning that neither the amount of the turnover equalization tax levied on import nor the costs of eosination are to be deducted from the levy applicable to 'denatured tapioca flour', under Common Customs Tariff heading No 11.06.

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)