JUDGMENT OF THE COURT
OF 28 NOVEMBER 1973 [1]

Codrico NV
v Hoofdproduktschap voor Akkerbouwprodukten
(preliminary ruling requested by the College van Beroep voor het Bedrijfsleven)

Case 138/73

Summary

Agriculture — Cereals — Rice — Export refunds — Processed products — Classification — Fats — Fat content — Examination — Absence of Community Rules — Probative value — To be assessed by the national court

(Regulation No 2410/70 of the Commission, Article 1; Regulation No 1052/68 of the Council, Article 11)

Article 1 of Regulation No 2410/70, read in conjunction with Article 11 of Regulation No 1052/68, involves that in the absence of Community rules on the subject the national court is competent to assess the probative value of tests performed with a view to ascertaining the fat content of the products listed at the Annex to Regulation No 2410/70 under tariff headings 11.02-A-V-(a) and 11.02-A-V-(b).

In Case 138/73

Reference to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven for a preliminary ruling in the action pending before that court between

CODRICO NV, Rotterdam,

and

HOOFDPRODUKTSCHAP VOOR AKKERBOUWPRODUKTEN, The Hague,

on the interpretation of Article 1 of Regulation No 2410/70 of the Commission of 27 November 1970, fixing the refunds to be applied to the export of products processed from cereals and from rice (OJ L 260, 1. 12. 1970, p. 21)

1 — Language of the Case: Dutch.

taken together with Article 11 of Regulation No 1052/68 of the Council of 25 July 1968, on the import and export system for such products (OJ L 179, 25. 7. 1968, p. 8).

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, C. Ó Dálaigh (Rapporteur), 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. By Regulation No 1052/68 of 23 July 1968 the Council laid down rules concerning levies or refunds on imports or exports in trade with third countries of products processed from cereals and from rice mentioned in Article 1 (d) of Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals (OJ No 117, p. 2269), and in particular the products at issue in the main action, described as follows: '11.02-A-V,' 'Cereal groats and cereal meal: of maize, of a fat content:

(a) not exceeding 1·5 % by weight

(b) other.'

Article 11 of Regulation No 1052/68, which is relevant to this matter, under the heading of general provisions and by way of checking the identity of products provides that 'the methods used for assessing the ash content, the fat content, the starch content, the denaturing process and any other method of analysis necessary for the application of this Regulation shall be determined in accordance with the procedure laid down in Article 26 of Regulation No 120/67/EEC and Article 26 of Regulation No 359/67/EEC'.

On the basis of criteria laid down in Regulation No 1052/68, the Commission introduced Regulation No 2410/70 of 27 November 1970 determining refunds on exports of products processed from cereals and from rice. Article 1 of this Regulation, insofar as relevant to this matter, reads: 'Refunds on exports of the products referred to in Article 1 (d) of Regulation No 120/67/EEC... which are subject to Regulation (EEC) No

1052/68 shall be fixed as indicated in the Annex to this Regulation'.

This Annex fixes the refunds at

1. 4 694 units of account per 100 kg for products under subheading 11.02-A-V-(a): 'Cereal groats and cereal meal: of maize, of a fat content in the dry matter not exceeding 1·3 % by weight and of a crude fibre content in the dry matter not exceeding 0·8 % by weight'.

2. 3 990 units of account per 100 kg for products under subheading 11.02-A-V-(b): 'Cereal groats and cereal meal: of maize, of a fat content in the dry matter exceeding 1·3 % and not exceeding 1·7 % by weight and of a crude fibre content in the dry matter not exceeding 1 % by weight'.

2. In response to an application made by the plaintiff in the main action, the defendant in the main action granted an advance fixing certificate, on 28 December 1970, for a refund relating to the export to third countries of 1 500 000 kg net of maize meal under subheading 11.02-A-V-(a).

The plaintiff in the main action, a Dutch cereal-exporting company, exported 638 500 kg of maize meal to Norway on 3 February 1971. The forms relating to this transaction referred to 'subheading 11.02-A-V-(a) of the Common Customs Tariff,' and stated that the product had a maximum fat content of 1·3 % and a maximum crude fibre content of 0·8 %. On the basis of this information the defendant in the main action then provisionally fixed the refund due in connection with this export in the amount of 114 738·45 florins.

The results of an analysis made by the 'Rijkslandbouwproefstation' (State Laboratory for agricultural products) of a sample taken by an official of the Dutch fiscal administration on the day of the export showed that the sample contained a fat content of 1·5 % and a crude fibre content of 0·5 %, both calculated in the dry matter.

At the request of the plaintiff in the main action a fresh analysis was made by the 'Rijkslandbouwproefstation', giving virtually identical results. The defendant in the main action, notified by letter dated 12 October 1971 from the fiscal administration of the results of these two analyses, considered that the relevant lot of 638 500 kg of maize meal was in reality covered by the description given at subheading 11.02-A-V-(b).

In making its analysis the 'Rijkslandbouwproefstation' had estimated the fat content by the method later mentioned in the Annex to the Second Commission Directive of 18 November 1971 establishing Community methods of analysis for the official control of feedingstuffs (OJ No 279, 20. 12. 1971, p. 7). The analysis made by the plaintiff in its own laboratory of samples taken on the day of the export in the presence of the official of the fiscal administration was conducted according to the method described at 'Annex 5' to the Bundeszollblatt No 4', and was the method used by the German customs.

Estimated by this method the fat content in the dry matter of the relevant lot of maize meal varied from 1·212 % to 1·24 %.

Upon arrival in Norway the product was again analysed, by the 'Statens Landbrukskjemiske Kontrollstasjon' (State Laboratory for the examination of agricultural products) at Oslo, which ascertained that the fat content in the dry matter did not exceed 1·3 %. This analysis was made by the method described in the document entitled 'Fettbestimmung in Getreide und Mahlprodukten' (Calculation of the fat content of cereals and milled products) and called the 'Soxhlet' method.

On the basis of data supplied by the fiscal administration the defendant then fixed the refund due in relation to the export in question definitively at 98 456·70 florins.

3. It is against this decision that the plaintiff in the main action appealed to the College van Beroep.

During the proceedings the plaintiff maintained that the product which it had manufactured could not be compared to animal feedingstuffs. Moreover the plaintiff stated that the reason for employing the method published at Annex 5 to the 'Bundeszollblatt No 4' in order to ascertain the fat content was that the scientific knowledge necessary for an examination of its activities was purely German.

4. The College van Beroep decided to stay proceedings pursuant to Article 177 of the EEC Treaty and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does the correct interpretation of Article 1 of Regulation (EEC) No 2410/70 of the Commission of 27 November 1970 — read in conjunction with Article 11 of Regulation No 1052/68 of the Council of 23 July 1968 — involve that so long as no effect has been given to the provision in Article 11 of Regulation No 1052/68, in conjunction with Article 26 of Regulation No 120/67, for the determination of a method of assessing the fat content for the application of Regulation No 1052/68, the fat content of products mentioned in the Annex to Regulation No 2410/70 under tariff headings 11.02-A-V-(a) and 11.02-A-V-(b) must be determined according to the method for the assessment of crude fat described in the Annex to the Second Commission Directive of 18 November 1971 establishing Community methods of analysis for the official control of feedingstuffs?

2. Must the last-mentioned method be adopted exclusively or may also other methods — e.g. the method adopted by the plaintiff as described in Annex 5 to Bundeszollblatt No 4, mentioned in this judgment, or the method adopted by the 'Statens Landbrukskjemiske Kontrollstasjon' of Oslo as described in the document mentioned in this judgment entitled 'Fettbestimmung in Getreide und Mahlprodukten' — be adopted?'

5. The judgment of the College van Beroep was lodged at the Registry of the Court on 30 May 1973.

The Commission, represented by R. C. Fischer, its legal adviser, submitted written observations on 28 August 1973 in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon 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.

II — Written observations submitted to the Court by the Commission of the European Communities

The Commission considers that the fact that up to the present time no method of analysis has been laid down pursuant to Article 11 of Regulation No 1052/68, in particular for the purpose of assessing the fat content of the product at issue, is explained by the extent of the preparatory technical studies and discussions which would be necessary, since they would have to take account of the difficulties which one or other of the Member States might experience in adopting new methods of analysis. The Commission recalls that since that time a number of Community methods of analysis for the official control of animal feedingstuffs have been determined pursuant to the Council Directive of 20 July 1970 on the introduction of Community methods of sampling and analysis for the official control of feedingstuffs, based upon Articles 43 and

100 of the Treaty establishing the EEC (OJ L 170, 3. 8. 1970, p. 2).

The use of these methods of analysis is obligatory for all official controls of animal feedingstuffs and must therefore be used to the exclusion of all others in applying Regulations Nos 1052/68 and 2410/70 to the import and export of animal feedingstuffs, at least until such time as another method of analysis is determined pursuant to the provisions of Article 11 of the first of the above-mentioned Regulations (which, in the view of the Commission, is unlikely ever to happen). As regards the assessment of the fat content, these methods are laid down at No 4 of the Annex to the Second Commission Directive of 18 November 1971 establishing Community methods of analysis for the official control of feedingstuffs (OJ L 279, 20. 12. 1971, p. 7). Article 2 of this Directive requires that the Member States shall, not later than 1 January 1973, bring into force the laws, regulations or administrative provisions necessary to comply with the provisions of the said Directive.

The Commission notes that prior to 1 January 1973 there was no Community legislation prescribing any method of analysis for the assessment of fat content in application of Regulations Nos 1052/68 and 2410/70 to animal feedingstuffs and that, in these circumstances, it was incumbent upon the Member States, which are obliged generally to take all necessary steps to secure the application of Community legislation, to determine the methods of analysis to be adopted for the application of the first of these Regulations. In the event the Member States were at liberty either to require the use of a single method of analysis or to indicate or permit different methods, provided, of course, that they all enabled identical and valid results to be obtained.

The question whether, in this case, the method of analysis employed by the Dutch authorities coincided with the method laid down by law and whether other valid methods also existed depends on Dutch law and cannot be answered in the context of these proceedings before the Court.

However, the question whether the method or methods prescribed or permitted by the Netherlands were valid methods is a matter of Community law. The method adopted by the Dutch authorities was incontestably valid, in view of the fact that it was sanctioned by the Commission in its Directive. But since the College van Beroep did not question the validity of the two other methods employed in this case it is not necessary, in the context of these proceedings before the Court, to consider the possible advantages and disadvantages of these different methods.

The Commission emphasises that the methods of analysis in question were those available before 1 January 1973, when the Second Directive of the Commission came into force within the Member States, and that during the period covered by this case — December 1970 to February 1971 — this Directive had not even been issued. Since its entry into force the methods of analysis it lays down must also be employed for the purposes of the application to animal feedingstuffs of Regulation No 1052/68 and the implementing provisions determined thereunder, provided always that a different method is not established pursuant to Article 11 of the said Regulation.

Still more generally, the Commission states that the Community methods of sampling and analysis determined or to be determined pursuant to the Council Directive of 20 July 1970 apply to all official controls of animal feedingstuffs provided for in the context of the common organization of agricultural markets or in any other context, except where specific Community provisions require the use of different methods.

The Advocate-General delivered his opinion on 15 November 1973, the parties having decided not to submit oral observations.

Grounds of judgment

1 By decision of 29 May 1973, lodged at the Registry of the Court on 30 May 1973, the College van Beroep voor het Bedrijfsleven put two questions to the Court, pursuant to Article 177 of the EEC Treaty, on the interpretation of Article 11 of Regulation No 1052/68 of the Council of 23 July 1968 on the import and export system for products processed from cereals and from rice (OJ L 179, 25. 7. 1968, p. 8), and of Article 1 of Regulation No 2410/70 of the Commission of 27 November 1970 fixing the refunds to be applied to the export of such products (OJ L 260, 1. 12. 1970, p. 21).

2 It appears from the decision making the reference that these questions were raised in the context of proceedings concerning the assessment of the fat content of maize meal exported from Rotterdam to Norway, for which an advance fixing certificate had been granted for the purposes of refunds on exports to third countries.

3 The first question asks whether the correct interpretation of Article 1 of Regulation No 2410/70 — read in conjunction with Article 11 of Regulation No 1052/68 — involves that, so long as no effect has been given to the provision in Article 11 of Regulation No 1052/68, in conjunction with Article 26 of Regulation No 120/67, for the determination of a method of assessing the fat content for the application of Regulation No 1052/68, the fat content of products mentioned in the Annex to Regulation No 2410/70 under tariff headings 11.02-A-V-(a) and 11.02-A-V-(b) must be determined according to the method for the assessment of crude fat described in the Annex to the Second Directive of the Commission of 18 November 1971 relating to the determination of Community methods of analysis for the official control of feedingstuffs (OJ L 279, 20. 12. 1971, p. 7).

4 The second question asks whether the last-mentioned method must be used exclusively or whether other methods may also be adopted, for example that adopted by the plaintiffs in the main action, or that applied by the laboratory to which his Norwegian customer had recourse.

5 Article 11 of Regulation No 1052/68 lays down that, for its application, the methods to be used for assessing the fat content of products processed from cereals and rice will be established.

6 These provisions have not yet been introduced.

7 The Second Commission Directive of 18 November 1971 states that the laws, regulations or administrative provisions necessary to comply with the provisions of the said Directive should be introduced within the Member States on 1 January 1973 at the latest.

8 The main action is concerned with the period from December 1970 to February 1971, during which this Directive had not yet been issued.

9 Accordingly, in the absence of any Community rules on this subject, it is for the national court to assess the probative value of tests made on the products at issue.

10 Moreover, it is for the national court to say whether the case is concerned with animal feedingstuffs, or, as the plaintiff in the main action maintains, with products which cannot be compared with such feedingstuffs.

Costs

11 The costs incurred by the Commission of the European Communities, which has 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, a step in the action pending before a 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 opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulations (EEC) No 1052/68 of the Council of 23 July 1968 and No 2410/70 of the Commission of 27 November 1970;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, 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 questions referred to it by the College van Beroep voor het Bedrijfsleven, in accordance with the decision of that court dated 29 May 1973, hereby rules:

Article 1 of Regulation No 2410/70, read in conjunction with Article 11 of Regulation No 1052/68, involves that in the absence of Community rules on the subject the national court is competent to assess the probative value of tests performed with a view to ascertaining the fat content of the products listed at the Annex to Regulation No 2410/70 under tariff headings 11.02-A-V-(a) and 11.02-A-V-(b).

Lecourt	Donner	Sørensen	
Monaco	Mertens de Wilmars	Pescatore	Ó Dálaigh

Delivered in open court in Luxembourg on 28 November 1973.

A. Van Houtte	R. Lecourt
Registrar	President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 NOVEMBER 1973

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the College van Beroep voor het Bedrijfsleven of the Netherlands. The plaintiff in the proceedings before that Court is a Dutch exporter of cereal products. The defendant is the authority responsible in the Netherlands for, among other things, the assessment of refunds due under Community legislation on the export of cereal products. The dispute between the plaintiff and the defendant is about the amount of refund due on a shipment effected by the plaintiff on 3 February 1971 of 638 500 kg of maize meal to Norway. Essentially the question is whether the maize meal comprised in that shipment had a fat content (referred to dry matter) of less or of more than 1·3 %. If the fat content exceeded that percentage the refund to which the plaintiff is entitled is smaller than if it did not.