JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

29 October 2009 *

In Case T-212/06,

Bowland Dairy Products Ltd, established in Barrowford, Lancashire (United Kingdom), represented by J. Milligan, Solicitor, D. Anderson QC and A. Robertson, Barrister,

applicant,

v

Commission of the European Communities, represented by P. Oliver, J.-P. Keppenne and L. Parpala, acting as Agents,

defendant,

APPLICATION, first, for annulment of the alleged refusal by the Commission to circulate, under the rapid alert system provided for in Article 50 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002

* Language of the case: English.

L 31, p. 1), a supplementary notification declaring that the United Kingdom's Food Standards Agency was content for the curd cheese produced by the applicant to be marketed and, second, for compensation for the loss allegedly suffered by the applicant as a consequence of that refusal,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, M. Prek (Rapporteur) and V.M. Ciucă, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 5 March 2009,

gives the following

Judgment

Legal framework

1 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law,

establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1) prescribes procedures in food safety matters.

2 Chapter IV of Regulation No 178/2002, entitled 'Rapid alert system, crisis management and emergencies', establishes a rapid alert system for food and feed ('the RASFF').

3 Article 50 of Regulation No 178/2002 provides:

'Rapid alert system

1. A rapid alert system for the notification of a direct or indirect risk to human health deriving from food or feed is hereby established as a network. It shall involve the Member States, the Commission and the [European Food Safety] Authority. The Member States, the Commission and the [European Food Safety] Authority shall each designate a contact point, which shall be a member of the network. The Commission shall be responsible for managing the network.

2. Where a member of the network has any information relating to the existence of a serious direct or indirect risk to human health deriving from food or feed, this information shall be immediately notified to the Commission under the rapid alert system. The Commission shall transmit this information immediately to the members of the network.

The [European Food Safety] Authority may supplement the notification with any scientific or technical information, which will facilitate rapid, appropriate risk management action by the Member States.

3. Without prejudice to other Community legislation, the Member States shall immediately notify the Commission under the rapid alert system of:

(a) any measure they adopt which is aimed at restricting the placing on the market or forcing the withdrawal from the market or the recall of food or feed in order to protect human health and requiring rapid action;

(b) any recommendation or agreement with professional operators which is aimed, on a voluntary or obligatory basis, at preventing, limiting or imposing specific conditions on the placing on the market or the eventual use of food or feed on account of a serious risk to human health requiring rapid action;

(c) any rejection, related to a direct or indirect risk to human health, of a batch, container or cargo of food or feed by a competent authority at a border post within the European Union.

The notification shall be accompanied by a detailed explanation of the reasons for the action taken by the competent authorities of the Member State in which the notification was issued. It shall be followed, in good time, by supplementary information, in particular where the measures on which the notification is based are modified or withdrawn.

The Commission shall immediately transmit to members of the network the notification and supplementary information received under the first and second subparagraphs.'

Background to the dispute

4 The applicant, Bowland Dairy Products Ltd, is a company governed by English law which makes fresh cheese, including curd cheese. Since 1999 it has had approval from the Pendle Environmental Health Office, the local food safety authority subject to the supervision of the Food Standards Agency ('the FSA'), to manufacture curd cheese from various milk sources.

5 On 9 June 2006, the Food and Veterinary Office ('the FVO'), a directorate within the Health and Consumer Protection Directorate-General (DG) of the Commission of the European Communities, inspected, in the presence of an FSA representative, the applicant's offices and quality control laboratory. The findings of the FVO's inspection were set out in an internal note of the Health and Consumer Protection DG of 12 June 2006, and reflected in the draft final report of the mission which the FVO carried out in the United Kingdom from 31 May to 26 June 2006.

6 On 14 June 2006, the FSA issued a rapid alert notification under the RASFF stating that the nature of the hazard was: 'Improper production of dairy product. Inappropriate testing regime for antibiotic screening'. The FSA applied the notification to '[a]ll curd cheese bearing health mark UK PE 023.EEC', that is to say all curd cheese produced by the applicant. Supplementary information was transmitted under the RASFF on 16 June 2006.

7 The applicant closed its premises from 16 to 26 June 2006.

8 On 20 June 2006, the FSA conducted an audit of the applicant's premises. In a letter sent to the Health and Consumer Protection DG on 23 June 2006 the FSA set out its concerns regarding practices observed at the applicant's plant and the measures that had been taken in that regard. The FSA concluded that the resumption of operations at the applicant's plant on the basis of the measures suggested did not present public health issues or contravene Community law.

9 On 26 June 2006, the FSA authorised the applicant to resume curd cheese production, which it did on the same date.

10 Further discussion of the FVO's conclusions of 9 June 2006 and the FSA's audit ensued between the Health and Consumer Protection DG and the FSA, and a meeting was held on 4 July 2006.

11 By email of 19 July 2006, Mr F. of the FSA sent the Commission the following draft supplementary notification, indicating that the FSA would be grateful to receive comments or suggestions:

'The UK authorities conducted a full audit of Bowland Dairy Products Ltd on 20 June 2006. Following the audit two batches of curd cheese made with milk identified as being unfit for human consumption were returned to the UK from Germany and destroyed under supervision on 27 June.

In addition, the need for corrective actions was identified, and improvements to the HACCP [Hazard Analysis and Critical Control Points] procedures, quality controls and intake milk specifications have been implemented as a result.

Accordingly, the UK authorities are content that curd cheese from Bowland may be marketed.'

12 By email of 20 July 2006, the Commission replied to the FSA in the following terms:

'Dear Mr [F.],

We have been also happy yesterday to re-explain the [Health and Consumer Protection DG] position on antibiotic milk and the watery milk. We will consider to propose to the Member States after summer break a legal instrument to clarify what should be done with these 2 raw materials and how they should be controlled when used to produce cheese.

For your draft RASFF message, I thank you very much for consulting us. Concerning the last sentence "the UK authorities are content that curd cheese from Bowland may be marketed", we understand that it is your position but it is not the [Health and Consumer Protection DG] position. I understand from our conversation from yesterday that Bowland since 26 June (date where Bowland started to operate again) continue to use milk for which level of antibiotic has not been confirmed as below the [maximum recommended limit] and watery milk where absence of chemical product has not been confirmed by appropriate tools. So it is impossible for [the Health and Consumer Protection DG] to endorse the statement in your draft message.

Only if you confirm that these 2 sources of milk are not used to produce curd cheese, we can give our approval to your draft text.

Another possibility is that we pass your message into the RASSF but I will accompany it by a [Health and Consumer Protection DG] message saying that "the Commission services are not content that curd cheese from Bowland may be marketed".

With my best regards

[E. P.]'

13 By email of 23 August 2006 to Mr P., Mr Y. of the FSA asked the Health and Consumer Protection DG to circulate under the RASFF a notice couched in the same terms as that sent in draft on 19 July 2006. On the same day, the United Kingdom authorities notified the same message to the RASFF contact point in the Commission.

14 On 24 August 2006 the Commission circulated that notice under the RASFF. It also circulated a notice from its services containing the draft minutes of the meeting of 4 July 2006 and indicating the disagreement of the Health and Consumer Protection DG with the authorisation granted to the applicant by the FSA ('the notice of 24 August 2006').

Procedure and forms of order sought by the parties

15 The applicant brought the present action by an application lodged at the Registry of the Court of First Instance on 11 August 2006.

16 By separate document lodged at the Registry on the same date, the applicant applied for interim measures, seeking inter alia an order to suspend the contested decision contained in the email of 20 July 2006 and an order that the Commission circulate under the RASFF the FSA's supplementary notification.

17 On 25 August 2006, the applicant sent to the Court of First Instance a copy of a letter which it had sent the same day to the Health and Consumer Protection DG in which it stated that it would request the Court of First Instance to treat its application for interim measures and its main action as directed not only against the email of 20 July 2006, but also against the notice of 24 August 2006.

18 By order of 12 September 2006 in Case T-212/06 R *Bowland Dairy Products* v *Commission*, not published in the ECR, the President of the Court ordered the Commission to withdraw the notice of 24 August 2006 until an order was made terminating the proceedings for interim relief. The Commission complied with that order on 13 September 2006.

19 By letter of 24 October 2006, the applicant withdrew its application for interim measures and its claim for annulment. Nevertheless, it stated that it was maintaining the application in so far as it relates to compensation for the loss it allegedly suffered.

20 By order of 29 November 2006, the President of the Court ordered that Case T-212/06 R be removed from the register.

21 In response to a request by the Commission, which was submitted by separate document on 28 March 2007 and not contested by the applicant in its written observations of 30 April 2007, the Court decided on 19 June 2007, as a measure of organisation of procedure, that the question of the amount of compensation would not be addressed until it had been determined whether or not the European Community was liable for the loss alleged by the applicant.

22 The case was assigned to the Third Chamber. Upon a change in the composition of the Chambers of the Court of First Instance, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present case was consequently assigned. Since the Judge-Rapporteur was unable to sit in the present case, the President of the Court reassigned the case to the Fifth Chamber by decision of 7 January 2008.

23 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing on 5 March 2009.

24 In the application, the applicant claimed that the Court should annul the decision in the email of 20 July 2006. Next, in the letter of 25 August 2006, the applicant stated that the notice of 24 August 2006 would also be covered by its application for annulment. The claim for annulment was subsequently withdrawn by letter of 24 October 2006.

25 The applicant claims, in its reply, that the Court should:

— order the Commission to pay damages in the amount of the loss that it suffered as a result of the email of 20 July 2006 and the notice of 24 August 2006, with interest;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the application as being in part inadmissible and in any event unfounded;

— order the applicant to pay the costs.

Law

27 It should be pointed out at the outset that, during the written procedure, the applicant withdrew its claim for annulment of the decision in the email of 20 July 2006 and the notice of 24 August 2006, which was confirmed at the hearing. Consequently, the Court will consider only the claim for damages.

Arguments of the parties

28 The applicant criticises the Commission for attaching conditions to the circulation of the FSA's supplementary notification by requiring the FSA to confirm that the applicant was not using antibiotic milk or watery milk in its production of curd cheese or, alternatively, that its circulation be accompanied by a message from the Health and Consumer Protection DG stating that the Commission's services considered that the curd cheese produced by the applicant could not be marketed.

29 The applicant submits in particular that the email of 20 July 2006 constitutes a definitive refusal by the Commission to circulate the FSA's supplementary notification unless it was accompanied by a counter-notification showing the Commission's disagreement. The definitive nature of that refusal is demonstrated by the fact that the email of 20 July 2006 replies to the FSA's email of 19 July 2006 which cannot, in the applicant's submission, be perceived as anything other than a request to circulate. The applicant further submits that the Court should treat the present action as seeking compensation for the loss caused not only by the email of 20 July 2006 but also by the notice of 24 August 2006, even though the notice was circulated under the RASFF after the application was lodged.

30 First, in that connection, the applicant contends that the effect of the notice of 24 August 2006 is identical to that of the email of 20 July 2006 and that the grounds of objection and relief sought in relation to the two documents are also identical.

31 Second, the applicant refers to the order in *Bowland Dairy Products* v *Commission*, referred to in paragraph 18 above, requiring the Commission, as an interim measure, to withdraw the notice of 24 August 2006 until an order terminating the proceedings for interim relief was made. The applicant submits that, in the light of Article 242 EC and Article 104 of the Rules of Procedure of the Court of First Instance, the President of the

Court of First Instance could not have ordered the withdrawal of the notice of 24 August 2006 unless he considered it to fall within the scope of the application.

32 The Commission maintains that the email of 20 July 2006 does not constitute a refusal to circulate the FSA's supplementary notification since on that date it had not received a definitive request to do so. The FSA's email of 19 July 2006 constituted mere consultation on the draft supplementary notification.

33 The Commission also contends that the scope of the action does not extend to the notice of 24 August 2006 given that the notice was circulated after the application was lodged. It contends that to broaden the initial scope of the action by a letter to the Commission is an unorthodox procedure manifestly inconsistent with the Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance.

Findings of the Court

34 First, it should be noted that the first paragraph of Article 21 of the Statute of the Court of Justice, which, pursuant to the first paragraph of Article 53 of that Statute, is applicable to the procedure before the Court of First Instance, provides that '[a] case shall be brought before the Court by a written application addressed to the Registrar' and that '[t]he application shall contain … the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based'.

35 Likewise, Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance provides that an application of the kind referred to in Article 21 of the Statute of the Court of Justice is to state the subject-matter of the proceedings, a summary of the pleas in law on which the application is based and the form of order sought by the applicant.

36 Although Article 48(2) of the Rules of Procedure authorises, in certain circumstances, new pleas in law to be introduced in the course of proceedings, that provision cannot in any circumstances be interpreted as authorising the applicant to bring new claims before the Court and thereby to modify the subject-matter of the proceedings (see Case T-3/99 *Banatrading* v *Council* [2001] ECR II-2123, paragraph 28 and the case-law cited).

37 Second, it is settled case-law that in order for the Community to incur non-contractual liability, a number of conditions must be satisfied, namely: the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between the alleged conduct and the damage complained of. If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions (see Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80; and the judgment of 19 July 2007 in Case T-344/04 *Bouychou* v *Commission*, not published in the ECR, paragraph 33 and the case-law cited).

38 It follows from that case-law that the defendant institution's act or conduct said to be the cause of the alleged loss forms part of the subject-matter of an action for damages and must be specified in the application. For the same reason, the form of order sought in such an action must be understood as referring to compensation for the loss allegedly caused by the act or conduct complained of in the application.

39 Third, it should be noted that Article 50(1) of Regulation No 178/2002 establishes the RASFF which involves, as members of the network, the Member States, the Commission and the European Food Safety Authority (EFSA), the Commission being responsible for managing the network. In the context of that network, the Member States are to notify the Commission of the measures listed in (a) to (c) of the first subparagraph of Article 50(3), in addition to supplementary information, pursuant to the second paragraph of Article 50(3), in particular where the measures on which the

notification is based are modified or withdrawn. The Commission must immediately transmit to members of the network the notification and supplementary information received under the first and second subparagraphs of Article 50(3). However, as a member of the network, the Commission may also transmit to the other members of the network, under Article 50(2) of Regulation No 178/2002, any information it has relating to the existence of a serious direct or indirect risk to human health deriving from food or feed.

40 It is apparent from those provisions that the competent authority of the Member State concerned has sole responsibility for drafting the notifications under Article 50(3) of Regulation No 178/2002, and also for transmitting them to the Commission for communication to the other members of the network.

41 It is admittedly conceivable that, even in a case which is a matter for the national authorities, the Commission may express an opinion, which has no legal effects, however, and is not binding upon those authorities (Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299, paragraph 16, and order of the Court of Justice in Case 151/88 *Italy* v *Commission* [1989] ECR 1255, paragraph 22; Case T-160/98 *Van Parys and Pacific Fruit Company* v *Commission* [2002] ECR II-233, paragraph 65). Accordingly, a claim for damages based on the fact that the Commission expressed such an opinion is inadmissible (order of the Court of First Instance of 8 September 2006 in Case T-92/06 *Lademporiki and Parousis & Sia* v *Commission*, not published in the ECR, paragraph 26; see also, to that effect, *Sucrimex and Westzucker* v *Commission*, paragraphs 22 and 25).

42 In the present case, it should be noted that the email of 20 July 2006 was sent to the FSA in response to its email of 19 July 2006. It is apparent from the latter that the FSA wished to receive comments and suggestions from the Commission, including suggestions as to the alternative wording of the notification. In addition, the FSA emphasised that it

intended to issue the notification under the RASFF as soon as possible, and that to that end it wished to receive an early response from the Commission.

43 Accordingly, the email of 20 July 2006 merely expresses the Commission's opinion in response to a request to that effect from the FSA. Thus, in accordance with the case-law referred to in paragraph 41 above, it is necessary to declare inadmissible, and to dismiss, the claim for damages which is based on the fact that the Commission expressed its opinion, at the FSA's request, on the text of a notification of supplementary information, within the meaning of the second subparagraph of Article 50(3) of Regulation No 178/2002, which the FSA intended to transmit to the Commission for communication to the other members of the network.

44 As regards the applicant's request that the notice of 24 August 2006 should also be taken into consideration in support of its claim for damages, it follows from the considerations and the case-law referred to in paragraphs 34 to 36 above that that request must also be dismissed as inadmissible, since it effectively modifies the subject-matter of the proceedings and the form of order initially sought (see also, to that effect, *Banatrading* v *Council*, paragraph 36 above, paragraph 29).

45 Contrary to what the applicant claims, that finding cannot be called into question by the fact that, by the order in *Bowland Dairy Products* v *Commission* referred to in paragraph 18 above, the President of the Court of First Instance ordered that the notice of 24 August 2006 be withdrawn. In that regard, it is sufficient to note that the order was made in the context of interim proceedings and does not in any way prejudge the outcome of the main proceedings.

46 It follows from all the foregoing that the action for damages must be dismissed as inadmissible.

Costs

47 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the application for interim measures, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action as inadmissible;

2. Orders Bowland Dairy Products Ltd to pay the costs, including those relating to the interim proceedings.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 29 October 2009.

[Signatures]