

Reference for a preliminary ruling from the Finanzgericht Baden-Württemberg (Germany) lodged on 22 September 2008 — Swiss Caps AG v Hauptzollamt Singen

(Case C-411/08)

(2008/C 327/18)

Language of the case: German

Referring court

Finanzgericht Baden-Württemberg

Parties to the main proceedings

Applicant: Swiss Caps AG

Defendant: Hauptzollamt Singen

Questions referred

1. Is Rule 5 of the General Rules for the Interpretation of the Combined Nomenclature (Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 — Combined Nomenclature (CN))⁽¹⁾ to be interpreted as meaning that capsule casings which consist of granulated starch and contain substances for supplementing the diet are to be regarded as packing material?
2. If the reply to the first question is in the negative:
Is heading 1515 of the Combined Nomenclature to be interpreted as meaning that granulated starch capsule casings containing 580 mg of concentrated wheat-germ oil determine the character of the goods in such a way that the goods are excluded from heading 1515 of the Combined Nomenclature?

⁽¹⁾ OJ 1987 L 256, p. 1.

Appeal brought on 22 September 2008 by Lafarge SA against the judgment delivered by the Court of First Instance (Third Chamber) on 8 July 2008 in Case T-54/03 Lafarge SA v Commission of the European Communities

(Case C-413/08 P)

(2008/C 327/19)

Language of the case: French

Parties

Appellant: Lafarge SA (represented by: A. Winckler, F. Brunet, E. Paroche and H. Kanellopoulos, avocats)

Other parties to the proceedings: Commission of the European Communities, Council of the European Union

Form of order sought

- Set aside the judgment of the Court of First Instance of the European Communities of 8 July 2008 in Case T-54/03 *Lafarge SA v Commission* and, granting the form of order sought at first instance, consequently annul, on the basis of Article 229 of the EC Treaty, Article 61 of the Statute of the Court of Justice and Article 17 of Council Regulation No 17/62⁽¹⁾, now Article 31 of Council Regulation No 1/2003⁽²⁾, Commission Decision No 2005/471/EC of 27 November 2002⁽³⁾, in so far as it imposed a fine on the appellant;
- in the alternative, set aside in part the judgment of the Court of First Instance in Case T-54/03 *Lafarge SA v Commission* and, granting the form of order sought at first instance, consequently reduce the amount of the fine imposed by the Commission on the appellant in Decision No 2005/471/EC of 27 November 2002;
- order the Commission to pay the costs.

Pleas in law and main arguments

The appellant relies on six grounds in support of its appeal.

By its first ground, the appellant company submits that the Court of First Instance distorted the sense of the facts presented for its assessment, in so far as it held that the Commission had been able validly to establish the very existence of the infringements by reference to a context in which information was, allegedly, unlawfully exchanged on a world-wide basis, which resulted in restricting competition and stabilising the plaster-board market.

By its second ground, the appellant pleads infringement of the rules governing the burden of proof, the principle of presumption of innocence and its corollary, the *in dubio pro reo* principle, in that the Court of First Instance considered that the Commission had established that the appellant had participated in a single, complex, continuous infringement, without there even being any evidence capable of establishing the existence and duration of the infringement.

By its third ground, the appellant contends that the Court of First Instance infringed the obligation to state adequate grounds and the principle of equal treatment, in so far as it confirmed the Commission's view that a number of items of evidence was sufficient for the purpose of establishing that the appellant had committed the infringement, whereas that same evidence had been regarded as insufficient for the purpose of establishing the same infringement on the part of a competing company.

By its fourth ground, the appellant submits that the Court of First Instance infringed the principles of proportionality and equal treatment, in so far as it failed to review the starting amount of the fine imposed, which was set by the Commission without taking account of Lafarge's turnover or its market share by comparison with those of its competitors.

By its fifth ground, the appellant contends that the Court of First Instance committed a number of errors of law and infringed its duty to state adequate grounds, in so far as it held that the Commission was justified in increasing the fine imposed on the appellant on the ground of repeated infringement, whereas there was no legal basis or any definitive finding in that regard capable of justifying such an increase. In so doing, the Court of First Instance also infringed the general principle that penalties must have a proper legal basis as well as the principles of legal certainty and the sound administration of justice.

Lastly, by its sixth and final ground, the appellant submits that the Court of First Instance erred in law by finding that the Commission was justified in increasing the starting amount of the fine by way of a deterrent, whereas it should have taken account of the final amount of that fine in order to determine whether it was appropriate to increase the fine on such a basis.

(¹) Council Regulation No 17 of 7 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ English Special Edition 1959-1962, p. 87).

(²) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

(³) Commission Decision of 27 November 2002 in Case COMP/E-1/37.152 — Plasterboard (OJ 2005 L 166, p. 8).

Reference for a preliminary ruling from the Verwaltungsgericht Berlin (Germany) lodged on 23 September 2008 — Yasar Erdil v Land Berlin

(Case C-420/08)

(2008/C 327/20)

Language of the case: German

Referring court

Verwaltungsgericht Berlin

Parties to the main proceedings

Applicant: Yasar Erdil

Defendant: Land Berlin

Question referred

Can a Turkish national whose legal status is derived from the second indent of the first paragraph of Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey and who has lived in Germany since his birth in 1989 rely on the special protection

against expulsion under Article 28(3)(a) of Directive 2004/38/EC (¹) of 29 April 2004?

(¹) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77). (Corrigendum to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 229, p. 35)).

Reference for a preliminary ruling from the Conseil d'Etat (Belgium) lodged on 26 September 2008 — Enviro Tech (Europe) LTD v Belgian State

(Case C-425/08)

(2008/C 327/21)

Language of the case: French

Referring court

Conseil d'Etat

Parties to the main proceedings

Applicant: Enviro Tech (Europe) Ltd

Defendant: Belgian State

Questions referred

Question 1:

— In so far as it classifies nPB as a highly flammable substance (R11) on the basis of a single test carried out at a temperature of – 10 °C, does Directive 2004/73/EC (¹) comply with Framework Directive 67/548/EEC (²), in particular with point A.9 of Annex V to that directive which lays down the methods for determining flash points?

— Does Directive 2004/73/EC comply with Framework Directive 67/548/EEC, in particular with point 4.2.3 of Annex VI to that directive, in so far as it classifies nPB as a category 2 substance which is toxic for reproduction (R60), first, without clear results in appropriate animal studies where toxic effects have been observed to provide a strong presumption that human exposure to the substance may result in developmental toxicity and, secondly, on the basis of tests in which toxicity was detected only in animals subjected to a concentration of 250 ppm, that is to say 11 times the maximum and 40 times the average of the concentration of nPB to which a person is exposed when handling the product?