



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

18 October 2012*

(Failure of a Member State to fulfil obligations — Admissibility — Regulation No 1234/2007 — Article 115 — Annex XV — Point I(2) — Appendix to Annex XV — Part A — Sales designations ‘butter’ and ‘dairy spread’ — Sales designation ‘pomazánkové máslo’ (butter spread) — List of derogations)

In Case C-37/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 25 January 2011,

European Commission, represented by Z. Malúšková and H. Tserepa-Lacombe, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Czech Republic, represented by M. Smolek, T. Müller and J. Očková, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, acting as President of the First Chamber, A. Borg Barthet, E. Levits (Rapporteur), J.-J. Kasel and M. Safjan, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its application the European Commission asks the Court to declare that, by defining, in Paragraph 1(2)(q) of Decree No 77/2003 of the Ministry of Agriculture of 6 March 2003, ‘pomazánkové máslo’ as a milk product from soured cream enriched with milk powder or buttermilk

* Language of the case: Czech.

powder, containing at least 31% by weight of milk fat and at least 42% by weight of dry material, and by authorising such a product to be marketed under the sales designation ‘pomazánkové máslo’, the Czech Republic has failed to fulfil its obligations under Article 115 of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1) in conjunction with the first and second subparagraphs of point I(2) of Annex XV to that regulation and points 1 and 4 of part A of the appendix to that annex.

Legal context

European Union legislation

2 Regulation No 1234/2007 replaced Council Regulation (EC) No 2991/94 of 5 December 1994 laying down standards for spreadable fats (OJ 1994 L 316, p. 2), all the provisions of which it repeated. Regulation No 1234/2007 lays down rules on the use of the sales designations of butter and other spreadable fats.

3 Article 115 of that regulation, ‘Marketing standards for fats’, provides:

‘... the standards laid down in Annex XV shall apply to the following products having a fat content of at least 10% but less than 90% by weight, intended for human consumption:

(a) milk fats falling within CN codes 0405 and ex 2106;

...’

4 Article 121(c) of that regulation provides:

‘The Commission shall establish the detailed rules for the application of this Chapter, which may in particular relate to:

...

(c) as regards the standards for spreadable fats referred to in Article 115:

(i) a list of the products referred to in point (a) of the third subparagraph of point I(2) of Annex XV, on the basis of the lists sent to the Commission by the Member States;

...’

5 With respect to sales descriptions, the first and second subparagraphs of point I(2) of Annex XV to Regulation No 1234/2007 provide:

‘The sales descriptions of [spreadable fats] shall be those specified in the Appendix, without prejudice to point II(2) or point III(2) and (3) of this Annex.

The sales descriptions in the Appendix shall be reserved for the products defined therein.’

- 6 Part A of the appendix to Annex XV to Regulation No 1234/2007 describes butter as a ‘product with a milk-fat content of not less than 80% but less than 90%, a maximum water content of 16% and a maximum dry non-fat milk-material content of 2%’, and dairy spread X% as a ‘product with the following milk-fat contents’, namely ‘less than 39%’, ‘more than 41% but less than 60%’, and ‘more than 62% but less than 80%’.
- 7 The third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 provides:
- ‘However, this paragraph shall not apply to:
- (a) the designation of products the exact nature of which is clear from traditional usage and/or when the designations are clearly used to describe a characteristic quality of the product;
- ...’
- 8 Commission Regulation (EC) No 445/2007 of 23 April 2007 laying down certain detailed rules for the application of Regulation No 2991/94 and of Council Regulation (EEC) No 1898/87 on the protection of designations used in the marketing of milk and milk products (OJ 2007 L 106, p. 24) replaced Commission Regulation (EC) No 577/97 of 1 April 1997 laying down certain detailed rules for the application of Regulation No 2991/94 and of Regulation No 1898/87 (OJ 1997 L 87, p. 3) and contains, in Annex I, a list of the products benefiting from the derogation in indent (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007.

Czech legislation

- 9 Decree No 77/2003 defines the requirements applicable to milk and milk products, iced creams and edible fats and oils.
- 10 Under Paragraph 1(2) of the decree:
- ‘For the purposes of this decree, the following definitions also apply:
- ...
- (q) “butter spread” — a milk product from soured cream enriched with milk powder or buttermilk powder, containing at least 31% by weight of milk fat and at least 42% by weight of dry material’.

Background to the dispute and pre-litigation procedure

- 11 ‘Pomazánkové máslo’ (butter spread) is a product similar to butter, which is used as a spread and also for making creams, spreads and pastry.
- 12 It has a minimum fat content of 31% by weight, a minimum dry material content of 42%, and a water content of up to 58%.
- 13 In view of its characteristics, it does not satisfy the requirements set out in Annex XV to Regulation No 1234/2007 for being marketed under the sales designation ‘butter’.
- 14 After an initial request for the derogation provided for in indent (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 to be applied to pomazánkové máslo was rejected, the Czech Republic informed the Commission that it no longer wished that product to be

included in the annex to Regulation No 577/97. None the less, on 14 March 2007, the Czech Republic renewed its request. Pomazánkové máslo has not, however, been included in the list in the annex to that regulation.

- 15 As the Czech Republic did not amend its legislation, the Commission on 6 June 2008 sent it a letter of formal notice, reminding it that, since pomazánkové máslo contained only 31% milk fat, it could not be marketed under the designation 'máslo' (butter), but should be designated 'mléčná pomazánka X%' (dairy spread X%), in accordance with the appendix to Annex XV to Regulation No 1234/2007.
- 16 In its reply of 6 August 2008 to the letter of formal notice, the Czech Republic accepted that pomazánkové máslo did not satisfy the criterion of a minimum milk fat content of 80%, but considered, first, that consumers distinguished clearly between that product and butter and, secondly, that the product was covered automatically by the derogation provided for in indent (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007, without the Commission having to adopt an application provision to that effect.
- 17 By letter of 3 November 2009, the Commission sent the Czech Republic a reasoned opinion, rebutting the arguments put forward by that State, and requesting it to comply with the reasoned opinion within two months of its receipt.
- 18 In the reasoned opinion, the Commission relied in particular on the fact that Regulation No 445/2007 is a mandatory form of implementation of the derogation provided for in indent (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007, so that it is not possible to apply that provision impliedly. Furthermore, the Commission observed that the Czech Republic had never contested, within the time-limits prescribed for that purpose, the rejection of its request for pomazánkové máslo to be entered in the list in Annex I to Regulation No 445/2007. Consequently, it had no longer been possible to reconsider that decision.
- 19 In its reply of 22 December 2009, the Czech Republic argued that indent (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 is a directly applicable provision under which any product fulfilling the criteria laid down can benefit from the derogation provided for in that provision, without any action by the Commission being necessary. The Czech Republic considered that pomazánkové máslo satisfied all those criteria.
- 20 As the Commission was not satisfied by that reply, it brought the present action.

The action

Arguments of the parties

- 21 As its principal argument, the Commission complains that the Czech Republic is in breach of point I(2) of Annex XV to Regulation No 1234/2007 in conjunction with points 1 and 4 of part A of the appendix to that annex.
- 22 In so far as pomazánkové máslo does not have a milk fat content of not less than 80% and a maximum water content of 16%, it cannot be marketed under a sales designation containing the word 'butter', or 'máslo' in Czech.
- 23 By allowing the use of the designation 'butter' for the spread in question, the Czech legislation compromises the objectives pursued by Regulation No 1234/2007, which aims to protect consumers from any risk of confusion as to the product they are purchasing and to ensure fair competition.

- 24 The product in question must necessarily be sold under the sales designation ‘dairy spread X%’, in accordance with the first subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 in conjunction with point 4 of part A of the appendix to that annex.
- 25 The Commission points out, moreover, that, for a product that does not satisfy the criteria laid down in point I(2) of Annex XV to Regulation No 1234/2007 in conjunction with point 1 of part A of the appendix to that annex to be marketed under the designation ‘butter’, it must be included in Annex I to Regulation No 445/2007. That is not the case with pomazánkové máslo.
- 26 A request to that effect submitted by the Czech Republic was rejected by letters of 23 September 2005 and 27 August 2007, without the rejection being contested. In those circumstances, the Czech Republic can no longer claim that the rejection was unlawful as a defence to the present action for failure to fulfil obligations.
- 27 In the alternative, the Commission recalls that the inclusion of a product in the list annexed to Regulation No 445/2007 is mandatory for the implementation, as regards that product, of the derogation provided for in Annex XV to Regulation No 1234/2007. Such an inclusion necessarily requires the intervention of the Commission, as follows from Article 121(c)(i) of that regulation.
- 28 To do that, the Commission receives requests for inclusion from the Member States and decides whether or not to include the product in question in the list provided for in Annex XV to Regulation No 1234/2007. In no case can a product be covered by that derogation simply because it fulfils, objectively, the requirements laid down in point I(2) of that annex.
- 29 In any event, that is not the case with pomazánkové máslo, since, in particular, it is not sufficiently distinct from the protected product, namely butter.
- 30 The Czech Republic submits, as its principal argument, that the present action for failure to fulfil obligations should be declared inadmissible.
- 31 According to the Czech Republic, the Commission failed to refer the matter to the management committee provided for in Article 4 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23) before rejecting its request for pomazánkové máslo to be entered in the list annexed to Regulation No 445/2007. The Commission was required to initiate the procedure for referral to that committee, as it had received a request from a Member State, especially if it was opposed to the request.
- 32 In those circumstances the Commission, by the present action, is pleading its own default against the Czech Republic, in so far as the conformity of the national legislation at issue is to be assessed in relation to an act of European Union law deriving from that institution’s unlawful conduct.
- 33 On this point, the Commission replies that compliance with the conditions of admissibility of its action may be assessed only from the point of view of Article 258 TFEU. Moreover, the subject-matter of the dispute is limited to ascertaining whether the national legislation is consistent with European Union law, namely point I(2) of Annex XV to Regulation No 1234/2007 in conjunction with point 1 of part A of the appendix to that annex.
- 34 The Czech Republic submits, in the alternative, as regards the merits of the action for failure to fulfil obligations, first, that neither the lettering used on labels for pomazánkové máslo nor any questions of distortion of competition are relevant, contrary to what the Commission submits.
- 35 Secondly, the Czech Republic never had an opportunity to contest any decision of the Commission concerning the non-inclusion of pomazánkové máslo in the list annexed to Regulation No 445/2007.

- 36 The Commission's letters of 23 September 2005 and 27 August 2007 cannot be categorised as 'acts' within the meaning of Article 263 TFEU. Also, in view of the procedural errors which characterised the adoption of those acts, they are necessarily non-existent.
- 37 Thirdly, the derogation for traditional designations provided for in point (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 implicitly allows the use of the designation 'butter' without prior authorisation, since the product at issue satisfies the criterion laid down in that provision, namely traditional usage of the designation in question. The list annexed to Regulation No 445/2007 is therefore not mandatory in nature.
- 38 Fourthly, the Czech Republic contests the criteria for the application of the derogation in point (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 used by the Commission.
- 39 The Commission submits, first, that the letters of 23 September 2005 and 27 August 2007 indicated clearly that the request for the inclusion of pomazánkové máslo in the list annexed to Regulation No 445/2007 was rejected, and they were therefore acts against which an action may be brought within the meaning of Article 263 TFEU.
- 40 It submits, next, that it was not obliged to initiate the management procedure provided for in Articles 4 and 7 of Decision 1999/468, since it had adopted a decision not to enter pomazánkové máslo in that list.
- 41 Finally, it observes that the derogation laid down in point (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 cannot be made use of by products that can be substituted for the products whose designations are protected by that regulation.

Findings of the Court

Admissibility

- 42 It should be recalled, as a preliminary point, that before the Commission brought the present proceedings for failure to fulfil obligations the Czech Republic had made several requests for pomazánkové máslo to be entered in the list in Annex I to Regulation No 445/2007, which were rejected.
- 43 In this respect, the Czech Republic submits, in the first place, that the decision rejecting its request for pomazánkové máslo to be included in that list is vitiated by procedural error, so that by its action for failure to fulfil obligations the Commission is attempting to rely against it on unlawful conduct. In the second place, accepting the present action for failure to fulfil obligations as admissible would damage the integrity of the system of remedies established by the FEU Treaty.
- 44 It must be noted, first of all, that the Commission bases its action on an infringement by the Czech Republic of the provisions of Regulation No 1234/2007.
- 45 The Czech Republic is therefore wrong in submitting that the Commission, by its action, is attempting to rely on its own default. The Czech Republic does not dispute that pomazánkové máslo does not satisfy the requirements laid down by part A of the appendix to Annex XV to Regulation No 1234/2007 for it to be marketed under the sales designation 'butter'. It is similarly common ground that the list in Annex I to Regulation No 445/2007 does not include the product called 'pomazánkové máslo'.

- 46 In any event, it should be recalled that the system of remedies established by the Treaty distinguishes between the actions mentioned in Articles 258 TFEU and 259 TFEU, which are aimed at a declaration that a Member State has failed to fulfil its obligations, and the actions mentioned in Articles 263 TFEU and 265 TFEU, which are aimed at reviewing the lawfulness of acts or failures to act of the European Union institutions. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot therefore properly plead the unlawfulness of a decision addressed to it as a defence to an action for failure to fulfil obligations based on its failure to comply with that decision. The position could be different only if the act in question contained such particularly serious and manifest defects that it could be categorised as a non-existent act (see judgment of 1 June 2006 in Case C-207/05 *Commission v Italy*, paragraphs 40 to 43, and Case C-177/06 *Commission v Spain* [2007] ECR I-7689, paragraphs 30 and 31).
- 47 Consequently, first, the Czech Republic cannot to any purpose, in the present action for failure to fulfil obligations, put forward arguments challenging the lawfulness of the Commission's decision not to enter the product concerned in the list in Annex I to Regulation No 445/2007.
- 48 It was for the Czech Republic to contest the lawfulness of that decision by means of the action provided for in Article 263 TFEU, within the time-limit laid down by that provision, and to put forward, in that context alone, arguments to call into question the lawfulness of the decision.
- 49 Secondly, it is settled case-law that the seriousness of the consequences of a finding that an act of a European Union institution is non-existent means that, for reasons of legal certainty, such a finding must be reserved for altogether extreme situations (see Case C-475/01 *Commission v Greece* [2004] ECR I-8923, paragraph 20).
- 50 In the present case, even if the view were taken that the Commission did not follow the procedure laid down by Regulation No 1234/2007 when adopting the decision not to enter pomazánkové máslo in the list in Annex I to Regulation No 445/2007, such a procedural error cannot call into question the very existence of that decision.
- 51 It must in any event be stressed that the alleged non-existence of the Commission's decision not to make the entry cannot have any effect whatever on a situation in which the Czech Republic is failing to fulfil its obligations, since a finding of non-existence cannot, a priori in the circumstances described in paragraph 45 above, take the place of a decision of the Commission to include pomazánkové máslo in that list.
- 52 The Commission's action must therefore be considered admissible.

Substance

- 53 It should be recalled, as a preliminary point, that the Czech Republic concedes that pomazánkové máslo does not satisfy the criteria laid down in point I(2) of Annex XV to Regulation No 1234/2007 in conjunction with point 1 of part A of the appendix to that annex for it to be marketed under the designation 'butter'. It is also common ground that that product is not included in the list in Annex I to Regulation No 445/2007, which enumerates the products that are not subject to restrictions concerning reserved designations because their exact nature is clear from traditional usage and/or their designation is clearly used to describe a characteristic quality of the product.
- 54 The Czech Republic considers, however, that the derogation in point (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 is to apply without prior authorisation where the product in question satisfies the criteria laid down in that provision.

- 55 That interpretation cannot be accepted, however.
- 56 First, it follows from recital 51 in the preamble to Regulation No 1234/2007 that Regulation No 2991/94 defined the marketing standards for milk products with a clear and distinct classification accompanied by rules on designation, which, in line with the objectives of Regulation No 1234/2007, should be maintained.
- 57 In this connection, it should be noted that, according to the seventh recital in the preamble to Regulation No 2991/94, that regulation aims to establish a uniform classification of spreadable fats, in which the derogation provided for in point (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 is necessarily an exception.
- 58 Secondly, Article 121(c)(i) of Regulation No 1234/2007 expressly empowers the Commission to establish the detailed rules for the application of the derogations to the rules laid down by the regulation, and in particular to draw up a list of the products to which that derogation applies, on the basis of the lists sent by the Member States.
- 59 In this respect, recital 4 in the preamble to Regulation No 1234/2007 states that, in order to identify clearly the scope of the derogations referred to in Regulation No 2991/94, an exhaustive list of the designations concerned should be drawn up, together with a description of the products to which they refer.
- 60 Consequently, it follows from all the above factors that the Czech Republic cannot argue that products which satisfy the requirements of point (a) of the third subparagraph of point I(2) of Annex XV to Regulation No 1234/2007 can benefit from the derogation laid down by that provision without a prior decision of the Commission finding those requirements to be satisfied.
- 61 If the Czech Republic's argument were followed, it would call into question both the competence of the Commission, as delegated to it by the Council of the European Union by virtue of Article 121(c)(i) of Regulation No 1234/2007 for the purpose of adopting the detailed rules for the application of that regulation, and also the effectiveness of that regulation, in so far as it aims to standardise the usage of marketing designations in order to preserve competition and protect consumers.
- 62 Accordingly, it follows from all the above considerations that the action brought by the Commission must be considered well founded.
- 63 It must therefore be held that, by authorising pomazánkové máslo (butter spread) to be sold under the designation 'máslo' (butter) even though that product has a milk fat content of less than 80% and water and dry non-fat milk-material contents of more than 16% and 2% respectively, the Czech Republic has failed to fulfil its obligations under Article 115 of Regulation No 1234/2007 in conjunction with the first and second subparagraphs of point I(2) of Annex XV to that regulation and points 1 and 4 of part A of the appendix to that annex.

Costs

- 64 Under Article 69(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. As the Commission has sought an order for costs against the Czech Republic and the Czech Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by authorising pomazánkové máslo (butter spread) to be sold under the designation 'máslo' (butter) even though that product has a milk fat content of less than 80% and water and dry non-fat milk-material contents of more than 16% and 2% respectively, the Czech Republic has failed to fulfil its obligations under Article 115 of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) in conjunction with the first and second subparagraphs of point I(2) of Annex XV to that regulation and points 1 and 4 of part A of the appendix to that annex;**
2. **Orders the Czech Republic to pay the costs.**

[Signatures]