

OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 28 November 1991 *

My Lords,

1. Monetary compensatory amounts ('MCAs') are sums to be paid or charged by Member States on the importation or exportation of certain agricultural products. MCAs are designed to compensate for market distortions which may be produced by fluctuations in rates of exchange. Thus, if the currency of the Member State of importation appreciates, a sum is payable by the importer in order to compensate for the fact that the products have become cheaper in terms of that currency, whereas if it depreciates a sum is payable to the importer to compensate for the fact that the products have become more expensive. In the present case, animal feedingstuffs were imported from France into Belgium in a period in which the value of the Belgian franc had depreciated.

2. The case concerns MCAs paid or claimed on the importation of maize cakes into Belgium between 5 March 1982 and 17 May 1983. The importer, Marichal-Margrève (hereafter 'Marichal'), is the defendant company in the main proceedings. It is common ground that the imported product falls under a subheading of the Common Customs Tariff (namely 23.07 B I c)1) in respect of which a special rule applies. That rule was first introduced by Article 1 of Commission Regulation

No 495/79 of 14 March 1979 (Official Journal 1979 L 65, p. 14), and was re-enacted in the legislation applicable during the period in which the transactions at issue took place, namely Commission Regulation No 2901/81 of 7 October 1981 (Official Journal 1981 L 288, p. 1), Commission Regulation No 1071/82 of 5 May 1982 (Official Journal 1982 L 124, p. 1) and Commission Regulation No 1235/82 of 19 May 1982 (Official Journal 1982 L 142, p. 1). It should be noted however that Regulation No 2901/81 was not in fact applicable to the transactions at issue in this case, since that regulation did not fix any MCAs for imports into Belgium. Thus, no MCAs were payable in any event before Regulation No 1071/82 came into force on 6 May 1982.

3. In all three regulations in which it was re-enacted, the rule appears as note (9) to Part 1 of Annex I to the regulation. According to that provision:

'In the case of products containing products falling within heading No 07.06 or subheading No 11.04 C of the Common Customs Tariff, no monetary compensatory amount shall be granted on the "cereal" constituent. However, the amounts indicated shall apply if compensatory amounts are due to be levied.

* Original language: English.

When completing customs formalities

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— for goods being imported into a Member State the currency of which has depreciated,

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the applicant must state in the declaration provided for this purpose the complete composition of the product and the exact content by weight of non-milk constituents broken down by tariff heading.'

I shall refer to the above provision as the 'cereal content rule'.

4. Thus, the cereal content rule had the effect of reducing MCAs payable to an importer in respect of the importation of the compound feedingstuffs in question. If the product contained any of the specified constituents (namely those falling under tariff heading 07.06 or subheading 11.04 C), no MCAs were payable on any of the cereal content (whether or not that content included cereals in addition to the ones specified). Furthermore, where the cereal content was greater than 50% by weight, it appears that no MCAs were payable on any of the constituents. The explanation for this given by the Commission at the hearing was that such a product is classified as a cereal for the purpose of fixing MCAs, and hence attracts MCAs only on the cereal constituents. It can be seen, therefore, that the correct MCA could not be calculated unless

the composition of the product and in particular the weights of its non-milk constituents were known. From the second and fourth recitals to Regulation No 495/79, it appears that the rule was introduced in order to stop 'artificial trade flows', that is to say patterns of trade designed solely to attract MCAs. The fifth recital to the regulation observes that the provision 'can be applied more effectively if the operator applying for the monetary compensatory amount to be granted declares the composition of the products in question'.

5. In the present case, Marichal failed to make such a declaration of composition to the Belgian authorities when completing customs formalities at the time of importation, although it appears that information in respect of the same product was supplied, albeit for a different purpose, to the French authorities in 1978, and a copy of that earlier declaration was supplied to the Belgian authorities on 9 January 1984. In the main proceedings, the Belgian State, represented by the Minister of Economic Affairs, seeks to recover MCAs paid in respect of importations in the period 5 March 1982 to 2 February 1983, and to continue to withhold payments in respect of importations made between 8 February 1983 and 17 May 1983, in each case on the ground that Marichal failed to make the appropriate declaration. In response to a written question put by the Court, the Belgian Government explained that the amounts which had been paid had been paid without any prior verification of entitlement, in consequence of an administrative error.

6. The Court of First Instance of Verviers (Belgium) has accordingly referred the following questions to the Court for a preliminary ruling:

1. Does it follow from the rules of Community law, in particular Commission Regulation (EEC) No 495/79 of 14 March 1979, that an economic operator loses irretrievably all entitlement to monetary compensatory amounts if, when completing customs import formalities carried out in a Member State the currency of which has depreciated, in respect of compound feedingsuffs falling within subheadings 23.07 B I a)1 or 2, 23.07 B I b)1 or 2, or 23.07 B I c)1 or 2 of the Common Customs Tariff, he did not properly complete the customs declaration prescribed for the grant of monetary compensatory amounts, having omitted the particulars required by Regulation (EEC) No 495/79, namely the complete composition of the product and the exact content by weight of non-milk constituents broken down by tariff heading?

7. Regulation No 495/79 does not make express provision for the consequences of failing to make the required declaration. Further rules governing entitlement to MCAs are however provided by Commission Regulation No 1371/81 of 19 May 1981, laying down detailed rules for the administrative application of monetary compensatory amounts (Official Journal 1981 L 138, p. 1). Section B of Title II of that regulation (Articles 5 and 6) is headed 'Import', and Article 6 provides as follows:

'At the time of completion of the customs import formalities, the person concerned shall declare on the document prescribed for that purpose all such particulars as are necessary for determining the monetary compensatory amount, in particular:

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2. If the reply to the first question is in the negative, does it follow from the rules of Community law that the operator in question may rectify the matter subsequently by supplying the prescribed information to the national authorities which are responsible for calculating and granting the monetary compensatory amounts in question?

(d) insofar as it is necessary for determining the monetary compensatory amount, particulars of the composition of the products.'

Section E of Title II (Articles 16 and 17) is headed 'Payment'. Article 16(1) provides that:

It should be noted that the six subheadings mentioned in the first question are each subheadings to which the cereal content rule applied at the relevant times, although as I have already mentioned it appears that the imported products in the present case all fell under subheading 23.07 B I c)1.

'The monetary compensatory amount to be granted on import shall be paid only on submission of a copy of the import entry and, where applicable, any relevant attached documents, indicating the particulars referred to in Article 6 and that the products have been imported ...'.

Article 17 provides that:

'1. Payment of monetary compensatory amounts to be granted shall be made only on receipt of a written request from the person concerned ...

2. Except in cases of *force majeure*, entitlement to the grant of monetary compensatory amounts shall be lost unless the relevant documents are submitted within the 12 months following the day on which the customs authorities accepted the import entry or the export declaration.

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8. From those provisions, it appears that an importer is only entitled to claim MCAs if he submits, within 12 months of acceptance of entry, a copy of the documents attached to the import entry which indicate the particulars referred to in Article 6. Thus, where details of the composition of the products are necessary for determining MCAs, the importer must submit a copy of the document attached to the import entry which indicates those particulars. It follows that, where the cereal content rule applies, a copy of the declaration prescribed by that rule must be submitted. On a strict and literal reading of Regulation No 1371/81, therefore, an importer who has failed to make such a declaration at the time of customs entry will be unable to qualify for payment of MCAs, since he will be unable to submit a prescribed document.

9. Thus, the making of the appropriate declaration at the time of import is a formal requirement for the receipt of MCAs. It is clear, none the less, that the observance of that formality should be not be regarded as an absolute condition for the receipt of MCAs unless such observance is necessary for an effective supervision of the transactions in question: see Case 46/82 *Germany v Commission* [1983] ECR 3549, paragraph 10 of the judgment. It is therefore necessary to consider whether control of the cereal content of the products would be equally effective if the operator were permitted to supply the same information subsequent to importation.

10. In the Order for Reference, the referring court suggests that the customs authorities had notice of the importer's intention to claim MCAs, and should have realized that the composition of the imported products was relevant to that claim. According to that view, the absence of a declaration made at the time of import did not preclude any necessary checks being carried out, since the authorities had the opportunity of taking and retaining a sample of the product which could then be used to verify any subsequent declaration. The referring court also suggests that it was the responsibility of the customs authorities to draw any applicable formalities to the attention of the importer.

11. The Commission, on the other hand, submits that any reasonably diligent operator should have been aware of the requirements in question. The Commission also points out that, given the large number of operations which have to be processed by

the customs authorities, the declaration of composition made by the operator functions as a necessary warning signal. Thus, the authorities cannot be expected to set in train any sampling procedures in circumstances where they are not alerted to the fact that such procedures may be necessary. The Commission suggests, furthermore, that in the absence of a sample taken at the time of entry, verifying the composition of the product would be both more difficult and less reliable.

12. It seems to me that the Commission's submissions have much force. If an importer makes a declaration of content, the customs authorities are alerted to the fact that the accuracy of such a declaration may be relevant to a claim for MCAs, and can accordingly put into operation any sampling procedures which are in place. In the absence of such a declaration, it would fall to the authorities to notice that the information was relevant. Given the large numbers of products of all types which are dealt with by the customs authorities, that would in my opinion be to require an excessive degree of vigilance on the part of possibly hard-pressed officials. The importer, in contrast, has a narrower range of products to deal with, and can reasonably be expected to have knowledge of the special requirements governing each.

13. It seems to me that there is much force, equally, in the Commission's argument that a subsequent control of product composition would be both more difficult and less effective than a system of declaration and sampling at the time of import. It is true that the constituents of a product can, in principle, be ascertained from information provided by the manufacturer, just as, in

theory at least, a sample of the product can be taken after the time of importation, as long as the consignment has not yet been consumed. In either case, however, the process of verification would be likely to be both more costly and less reliable than adherence to the system prescribed by the legislation. It seems to me, therefore, that adherence to the prescribed formalities is indeed essential for the effective supervision of the transactions in question.

14. Finally, as the Commission points out, it is clear that an operator cannot rely on the principle of the protection of legitimate expectations in order to retain amounts which have been mistakenly paid by the national authorities in breach of a precise provision of Community law: see Case 316/86 *Hauptzollamt Hamburg-Jonas v Kricken* [1988] ECR 2213, paragraphs 23-24 of the judgment.

15. In my opinion, therefore, the first question referred should be answered in the affirmative, and there is accordingly no need to consider the second question. If however, contrary to my view, it were possible to rectify the omission after the goods had been imported, it is clear that that could only be done by the importer supplying the prescribed information to the responsible authorities within 12 months of acceptance of import entry: see Article 17(2) of Regulation No 1371/81, cited above at paragraph 7. In the present case, therefore, where information was not supplied until 9 January 1984, entitlement to MCAs would be lost in respect of any imports made before 9 January 1983.

Conclusion

16. I am accordingly of the opinion that the questions referred by the Court of First Instance of Verviers should be answered as follows:

The provisions of note (9) to Part 1 of Annex I to, respectively, Commission Regulation No 2901/81 of 7 October 1981, Commission Regulation No 1071/82 of 5 May 1982 and Commission Regulation No 1235/82 of 19 May 1982, as originally introduced by Commission Regulation No 495/79 of 14 March 1979, read in conjunction with Commission Regulation No 1371/81 of 19 May 1981, must be interpreted as meaning that an importer irremediably loses all entitlement to monetary compensatory amounts if, when completing customs import formalities in respect of compound feedingstuffs falling within subheadings of the Common Customs Tariff to which those provisions apply, he fails to make the declaration prescribed by those provisions.