



## Reports of Cases

### JUDGMENT OF THE COURT (Fourth Chamber)

13 November 2014\*

(Reference for a preliminary ruling — Approximation of laws on animal health — Regulation (EC) No 2073/2005 — Annex I — Microbiological criteria applicable to foodstuffs — Salmonella in fresh poultry meat — Failure to comply with microbiological criteria found at the distribution stage — National legislation imposing a penalty on a food business operator active only at the stage of retail sale — Compatibility with EU law — Effective, dissuasive and proportionate nature of the penalty)

In Case C-443/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Unabhängiger Verwaltungssenat in Tirol (Austria), made by decision of 1 August 2013, received at the Court on 7 August 2013, in the proceedings

**Ute Reindl**, representative of MPREIS Warenvertriebs GmbH, with liability,

v

**Bezirkshauptmannschaft Innsbruck**,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, J. Malenovský, M. Safjan, A. Prechal and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2014,

after considering the observations submitted on behalf of:

- Ms Reindl, by M. Waldmüller and M. Baldauf, Rechtsanwälte,
- the Czech Government, by M. Smolek and J. Vitáková, acting as Agents,
- the French Government, by D. Colas and C. Candat, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by D. Bianchi and G. von Rintelen, acting as Agents,

\* Language of the case: German.

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

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Commission Regulation (EC) No 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs (OJ 2005 L 338, p. 1), as amended by Commission Regulation (EU) No 1086/2011 of 27 October 2011 (OJ 2011 L 281, p. 7) ('Regulation No 2073/2005') read together with Annex I, Chapter 1, Row 1.28, to the latter regulation.
- 2 The request has been made in proceedings between Ms Reindl and the Bezirkshauptmannschaft Innsbruck (Innsbruck District Administration) (Austria) concerning a fine imposed on Ms Reindl for failing to comply with the limit value for Salmonella Typhimurium set out in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005.

### Legal context

#### *EU law*

#### Regulation (EC) No 178/2002

- 3 Article 1(1) 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 L 31, p. 1), entitled 'Aim and scope', states:

'This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market. It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.

...'

- 4 Article 3 of that regulation, headed 'Other definitions', provides:

'For the purposes of this Regulation:

...

3. "food business operator" means the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control;

...

8. "placing on the market" means the holding of food or feed for the purpose of sale, including offering for sale or any other form of transfer, whether free of charge or not, and the sale, distribution, and other forms of transfer themselves;

...'

5 Article 14 of Regulation No 178/2002, headed 'Food safety requirements', reads:

1. Food shall not be placed on the market if it is unsafe.
2. Food shall be deemed to be unsafe if it is considered to be:
  - (a) injurious to health;
  - (b) unfit for human consumption.

...

5. In determining whether any food is unfit for human consumption, regard shall be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay.

...'

6 Article 17 of that regulation, entitled 'Responsibilities', states:

'1. Food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.

2. ...

Member States shall also lay down the rules on measures and penalties applicable to infringements of food and feed law. The measures and penalties provided for shall be effective, proportionate and dissuasive.'

Regulation No 2160/2003

7 Article 1 Regulation No 2160/2003 Regulation (EC) No 2160/2003 of the European Parliament and of the Council of 17 November 2003 on the control of salmonella and other specified food-borne zoonotic agents (OJ 2003 L 325, p. 1), as amended by Regulation No 1086/2011('Regulation No 2160/2003'), entitled 'Subject matter and scope', states:

'1. The purpose of this Regulation is to ensure that proper and effective measures are taken to detect and to control salmonella and other zoonotic agents at all relevant stages of production, processing and distribution, particularly at the level of primary production, including in feed, in order to reduce their prevalence and the risk they pose to public health.

2. This Regulation shall cover:

- (a) the adoption of targets for the reduction of the prevalence of specified zoonoses in animal populations:
  - (i) at the level of primary production; and

- (ii) where appropriate for the zoonosis or zoonotic agent concerned, at other stages of the food chain, including in food and feed;

...'

- 8 In accordance with Article 5 of Regulation No 2160/2003, the national control programmes must implement the requirements and minimum sampling rules laid down in Annex II thereto. That annex, entitled 'Control of zoonoses and zoonotic agents listed in Annex I', contains Part E relating to specific requirements for fresh meat, which provides in point 1:

'From 1 December 2011, fresh poultry meat from animal populations listed in Annex I shall meet the relevant microbiological criterion set out in Row 1.28 of Chapter 1 of Annex I to Commission Regulation (EC) No 2073/2005.'

- 9 Annex I to Regulation No 2160/2003 mentions several species of poultry, including turkeys.

Regulation No 2073/2005

- 10 Recitals 1 and 3 in the preamble to Regulation No 2073/2005 are worded as follows:

'(1) A high level of protection of public health is one of the fundamental objectives of food law, as laid down in [Regulation No 178/2002]. Microbiological hazards in foodstuffs form a major source of food-borne diseases in humans.

(2) Foodstuffs should not contain micro-organisms or their toxins or metabolites in quantities that present an unacceptable risk for human health.

(3) Regulation (EC) No 178/2002 lays down general food safety requirements, according to which food must not be placed on the market if it is unsafe. Food business operators have an obligation to withdraw unsafe food from the market. In order to contribute to the protection of public health and to prevent differing interpretations, it is appropriate to establish harmonised safety criteria on the acceptability of food, in particular as regards the presence of certain pathogenic micro-organisms.'

- 11 Article 1 of Regulation No 2073/2005, entitled 'Subject-matter and scope', provides:

'This Regulation lays down the microbiological criteria for certain micro-organisms and the implementing rules to be complied with by food business operators when implementing the general and specific hygiene measures referred to in Article 4 of Regulation (EC) No 852/2004. ...'

- 12 Article 2 of that regulation, headed 'Definitions', provides:

'(a) "micro-organisms" means bacteria, viruses, yeasts, moulds, algae, parasitic protozoa, microscopic parasitic helminths, and their toxins and metabolites;

(b) "microbiological criterion" means a criterion defining the acceptability of a product, a batch of foodstuffs or a process, based on the absence, presence or number of micro-organisms, and/or on the quantity of their toxins/metabolites, per unit(s) of mass, volume, area or batch;

(c) "food safety criterion" means a criterion defining the acceptability of a product or a batch of foodstuff applicable to products placed on the market;

(d) “process hygiene criterion” a criterion indicating the acceptable functioning of the production process. Such a criterion is not applicable to products placed on the market. It sets an indicative contamination value above which corrective actions are required in order to maintain the hygiene of the process in compliance with food law;

...

(f) “shelf-life” means either the period corresponding to the period preceding the ‘use by’ or the minimum durability date, as defined respectively in Articles 9 and 10 of Directive 2000/13/EC Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs];’

...’

13 Article 3 of Regulation No 2073/2005, headed ‘Product specification’, provides:

‘1. Food business operators shall ensure that foodstuffs comply with the relevant microbiological criteria set out in Annex I. To this end the food business operators at each stage of food production, processing and distribution, including retail, shall take measures, as part of their procedures based on HACCP [hazard analysis and critical control point] principles together with the implementation of good hygiene practice, to ensure the following:

- (a) that the supply, handling and processing of raw materials and foodstuffs under their control are carried out in such a way that the process hygiene criteria are met,
- (b) that the food safety criteria applicable throughout the shelf-life of the products can be met under reasonably foreseeable conditions of distribution, storage and use.

2. As necessary, the food business operators responsible for the manufacture of the product shall conduct studies in accordance with Annex II in order to investigate compliance with the criteria throughout the shelf-life. ...

...’

14 Annex I to Regulation No 2073/2005, in Chapter 1, entitled ‘Food safety criteria’, provides in Row 1.28:

‘1.28 Fresh poultry meat	<i>Salmonella typhimurium</i> <i>Salmonella enteritidis</i>	5	0	Absence in 25 g	EN/ISO 6579 (for detection) White-Kaufmann-Le Minor scheme (for serotyping)	Products placed on the market during their shelf-life
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(20) This criterion shall apply to fresh meat from breeding flocks of *Gallus gallus*, laying hens, broilers and breeding and fattening flocks of turkeys.

(21) As regards monophasic *Salmonella typhimurium* only 1,4, [5],12:i:- is included.’

*Austrian law*

15 Paragraph 5(1) and (5) of the Federal Law on Safety and other Requirements for Foodstuffs, Commodities and Cosmetics with a view to ensuring Consumer Protection (Bundesgesetz über Sicherheitsanforderungen und weitere Anforderungen an Lebensmittel, Gebrauchsgegenstände und kosmetische Mittel zum Schutz der Verbraucherinnen und Verbraucher (BGBl. I, 13/2006 in the version of the BGBl. I, 80/2013, 'the LMSVG') provides:

'1. Foodstuffs shall not be placed on the market which are

(1) unsafe pursuant to Article 14 of Regulation (EC) No 178/2002, that is to say, injurious to health or unfit for human consumption,

...

(5) Foodstuffs are

1. injurious to health if they are such as to endanger or harm health;

2. unfit for human consumption if their usability in accordance with their intended purpose is not guaranteed;

...'

16 Paragraph 90(1) of the LMSVG provides:

'Any person who places on the market

1. foodstuffs which are unfit for human consumption ...

...

shall be guilty ... of an administrative offence and shall be punished by the district administrative authority by the imposition of a fine not exceeding EUR 20 000, in the case of a repeat offence by the imposition of a fine not exceeding EUR 40 000, and in the case of failure to pay by imprisonment for a period not exceeding six weeks as a substitute for a fine that could not be collected.

...'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

17 Ms Reindl is the manager of a branch of MPREIS Warenvertriebs GmbH ('MPREIS'), a company trading in the food retail sector. As a result, she is responsible for compliance by that branch with all the applicable rules in the food sector.

18 On 29 March 2012, during an on-the-spot check at that branch, a food safety body took a sample of vacuum-packed fresh turkey breast produced and packed by another undertaking. As regards that sample, MPREIS was involved only at the distribution stage.

19 The sample underwent microbiological examination by the Austrian Food Safety Agency Innsbruck. In its expert report, that agency concluded that contamination by *Salmonella Typhimurium* was detectable and that, therefore, the sample was both 'unfit for human consumption' within the

meaning of Paragraph 5(5)(2) of the LMSVG and ‘unsafe’ within the meaning of Article 14(2)(b) of Regulation No 178/2002. The criterion of food safety adopted by that agency in its expert report is that laid down in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005.

- 20 On the basis of that report, the Bezirkshauptmannschaft Innsbruck brought proceedings against Ms Reindl for failing to comply with Paragraph 5(5)(2) of the LMSVG. The Bezirkshauptmannschaft Innsbruck held that Ms Reindl was liable for failing to comply with the limit value for Salmonella Typhimurium in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005, and ordered her to pay a fine in accordance with Paragraph 90(1)(1) of the LMSVG.
- 21 On appeal against the decision of the Bezirkshauptmannschaft Innsbruck, the Unabhängiger Verwaltungssenat in Tirol is unsure as to the extent of the liability of food business operators which are active only at the distribution stage.
- 22 In those circumstances the Unabhängiger Verwaltungssenat in Tirol decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:
- ‘1. Is Article 1 of [Regulation No 2073/2005] to be understood as meaning that fresh poultry meat must satisfy the microbiological criterion set out in [Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005] at all stages of distribution?
  2. Are food business operators active at the food distribution stage also subject in full to the regime under Regulation (EC) No 2073/2005?
  3. Must the microbiological criterion set out in [Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005] also be observed at all stages of distribution by food business operators not involved in production (being involved exclusively at the distribution stage)?’

### **The questions referred for a preliminary ruling**

#### *The first question*

- 23 By its first question, the referring court asks essentially whether Annex II, E(1), to Regulation No 2160/2003 must be interpreted as meaning that fresh poultry meat from the animal populations listed in Annex I to that regulation must satisfy the microbiological criterion set out in Annex I, Chapter 1, Row 1.28, to Regulation (EC) No 2073/2005 at all stages of distribution, including retail sale.
- 24 It must be recalled that, pursuant to Annex II, E(1), to Regulation No 2160/2003, from 1 December 2011, fresh poultry meat from animal populations listed in Annex I thereto are to satisfy the relevant microbiological criterion set out in Row 1.28 of Chapter 1 of Annex I to Commission Regulation No 2073/2005.
- 25 In that connection, it must be observed that Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005 expressly provides that that criterion is to apply to ‘[p]roducts placed on the market during their shelf-life’.
- 26 The concepts ‘placed on the market’ and ‘shelf-life’ are defined by Regulations No 178/2002 and No 2073/2005 respectively. Thus, Article 3(8) of Regulation No 178/2002 defines the concept of ‘placed on the market’ as the holding of food or feed for the purpose of sale, including offering for sale or any other form of transfer, whether free of charge or not, and the sale, distribution, and other

forms of transfer themselves. Article 2(f) of Regulation No 2073/2005 defines 'shelf-life' as 'either the period corresponding to the period preceding the 'use by' or the minimum durability date, as defined respectively in Articles 9 and 10 of Directive 2000/13.

- 27 It is clear from reading those definitions that the concept of products 'placed on the market during their shelf-life' refers to foodstuffs such as the fresh poultry meat product at issue in the main proceedings which are held for the purpose of sale, distribution or other forms of transfer, during a period before to their 'use by' date or their minimum durability date.
- 28 Moreover, if there was no requirement for fresh poultry meat, such as that at issue in the main proceedings, to comply with the microbiological criterion defined in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005 at all stages of distribution, including retail sale, one of the fundamental objectives of food law, which is to attain a high level of protection of public health, to which recital 1 in the preamble to Regulation No 2073/2005 refers, would be undermined if foodstuffs, containing micro-organisms in quantities which present an unacceptable risk to human health were placed on the market.
- 29 It follows that, both from the wording of Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005 and the objective pursued by food law that the micro-biological criterion is applicable to a fresh poultry meat product such as the product at issue in the main proceedings at the distribution stage.
- 30 Therefore, the answer to the first question is that Annex II, E(1), to Regulation No 2160/2003 must be interpreted as meaning that fresh poultry meat from the animal populations listed in Annex I to that regulation must satisfy the microbiological criterion mentioned in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005 at all the stages of distribution, including the retail sale stage.

*The second and third questions*

- 31 By its second and third questions, which it is appropriate to examine together, the referring court asks essentially whether EU law and, in particular, Regulations No 178/2002 and No 2073/2005, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which penalises a food business operator active only at the food distribution stage for the placing on the market of a food stuff on account for the failure to comply with the microbiological criterion mentioned in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005.
- 32 It must be observed that Article 3(1) of Regulation No 2073/2005 states that the food business operators must ensure that foodstuffs comply with the relevant microbiological criteria set out in Annex I at each stage of food production, processing and distribution, including the retail sale stage
- 33 However, although Regulation No 2073/2005 sets the microbiological criteria with which foodstuffs must comply at all stages in the food chain, that regulation does not contain any provisions relating to the rules on the liability of food business operators.
- 34 In that connection, it is appropriate to refer to Regulation No 178/2002. Article 17(1) thereof provides that food business operators at all stages of production, processing and distribution within the businesses under their control must ensure that foods satisfy the requirements of food law relevant to their activities.
- 35 Article 17(2) of Regulation No 178/2002 provides that Member States must lay down the rules on measures and penalties applicable to infringements of food law. The measures and penalties provided for must be effective, proportionate and dissuasive.



- 36 It follows that EU law and, in particular, Regulations No 178/2002 and No 2073/2005 must be interpreted as meaning that, in principle, they do not preclude national legislation, such as that at issue in the main proceedings, which penalises food business operators active only at the distribution stage for placing on the market foodstuffs which fail to comply with the microbiological criteria mentioned in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005.
- 37 However, by laying down rules on the sanctions applicable in the event of failure to comply with the microbiological criterion, the Member States are bound to observe conditions and limits laid down by EU law, including that laid down, in the present case, by Article 17(2) of Regulation No 178/2002, which requires penalties to be effective, proportionate and dissuasive.
- 38 According to settled case-law, whilst the choice of penalties remains within their discretion, Member States must ensure that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see to that effect, judgment in *Lidl Italia*, C-315/05, EU:C:2006:736, paragraph 58, and *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraphs 65 and the case-law cited).
- 39 In the present case, the measures imposing penalties permitted under the national legislation at issue in the main proceedings must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, judgment in *Urbán*, Case C-210/10, EU:C:2012:64, paragraph 24 and the case-law cited).
- 40 In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken of, inter alia, the nature and the degree of seriousness of the infringement which the penalty seeks to sanction and of the means of establishing the amount of the penalty (see judgment in *Equoland*, C-272/13, EU:2014:2091, paragraph 35).
- 41 Legislation, such as that at issue in the main proceedings, providing for a fine if food stuffs unfit for human consumption are placed on the market, may help to attain the fundamental objective of food law, that is, a high level of protection of human health, as set out in paragraph 28 of the present judgment.
- 42 Even if the system of penalties in the case in the main proceedings is a system of strict liability, it must be recalled that, according to the case-law of the Court, such a system is not, in itself, disproportionate to the objectives pursued, if that system is such as to encourage the persons concerned to comply with the provisions of a regulation and where the objective pursued is a matter of public interest which may justify the introduction of such a system (see judgment in *Urbán*, EU:C:2012:64, paragraph 48 and the case-law cited).
- 43 It is for the national court to determine, in the light of that information, whether the penalty at issue in the main proceedings observes the principle of proportionality referred to in Article 17(2) of Regulation No 178/2002.
- 44 Having regard to all the foregoing, the answer to the second and third questions is that EU law, in particular Regulations No 178/2002 and 2073/2005, must be interpreted as meaning that, in principle, it does not preclude national law, such as that at issue in the main proceedings, which imposes a penalty on a food business operator active only at the distribution stage for placing a foodstuff on the market, on account of the failure to comply with the microbiological criterion laid down in Annex I,

Chapter 1, Row 1.28, to Regulation No 2073/2005. It is for the national court to determine whether the penalty at issue in the main proceedings observes the principle of proportionality referred to in Article 17(2) of Regulation No 178/2002.

### **Costs**

- <sup>45</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Annex II, E(1), to Regulation (EC) No 2160/2003 of the European Parliament and of the Council of 17 November 2003 on the control of salmonella and other specified food-borne zoonotic agents, as amended by Commission Regulation (EU) No 1086/2011 of 27 October 2011, must be interpreted as meaning that fresh poultry meat from the animal populations listed in Annex I to that regulation, must satisfy the microbiological criterion mentioned in Annex I, Chapter 1, Row 1.28, to Commission Regulation (EC) No 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs, as amended by Regulation No 1086/2011, at all the stages of distribution including the retail sale stage.**
2. **EU law, in particular 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 and Regulation No 2073/2005, as amended by Regulation No 1086/2011, must be interpreted as meaning that, in principle, it does not preclude national law, such as that at issue in the main proceedings, which imposes a penalty on a food business operator which is active only at the distribution stage for placing foodstuff on the market, on account of the failure to comply with the microbiological criterion laid down in Annex I, Chapter 1, Row 1.28, to Regulation No 2073/2005, as amended by Regulation No 1086/2011. It is for the national court to determine whether the penalty at issue in the main proceedings observes the principle of proportionality referred to in Article 17(2) of Regulation No 178/2002.**

[Signatures]