

APPLICATION/REQUÊTE N° 14570/89

PROCOLA and others v/LUXEMBOURG

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DECISION of 1 July 1993 on the admissibility of the application

DÉCISION du 1er juillet 1993 sur la recevabilité de la requête

Article 7, paragraph 1 of the Convention *System of additional levies on milk established by the EEC. The levies, introduced by binding Community regulations with a view to stabilising milk production in the Community and applied at national level by texts of an administrative nature, do not involve a criminal matter within the meaning of this provision*

Article 26 of the Convention *In so far as only an applicant association and not its members brought proceedings at national level, the members have not exhausted domestic remedies within the meaning of the Convention*

Article 1 of the First Protocol

- a) *Payment by an applicant association to the national authorities of an additional levy on milk, pursuant to European Community regulations, constitutes a deprivation of possessions. In this case, the measure was in the public interest, provided for by law and proportionate to the aim pursued*
- b) *Allocation to an applicant association of a reference quantity above which an additional levy on milk becomes due constitutes a control of the use of property. Examination of whether the interference is lawful, in accordance with the general interest and proportionate to the aim*

(TRANSLATION)

THE FACTS

The applicants are

- a the agricultural association PROCOLA, an association formed under Luxembourg law, having its registered office in Ingeldorf, set up on 21 August 1978 and acting through its executive committee,

- b sixty-three farmers belonging to the association,

Before the Commission the applicants are represented by Mr. Fernand Entringer, a lawyer practising in Luxembourg.

The facts, as submitted by the parties, may be summarised as follows

With the aim of regulating and stabilising the market in milk products, characterised by surplus production, the Council of Ministers of the EEC decided to introduce in the Community member States, with effect from 2 April 1984, the system of additional levies on milk, commonly referred to as the 'milk quota' system, through EEC Regulations 856/84 and 857/84 of 31 March 1984

These introduced, for a period of five years, an additional levy on the quantities of milk collected over and above a guaranteed quantity (the reference quantity). Each member State was allocated a total reference quantity which it then had to apportion among producers of milk, under Formula A, or purchasers (dairies) under Formula B. The reference quantities for purchasers and producers were fixed on the basis of their deliveries or production in 1981, or in some cases 1982 or 1983, weighted by a certain percentage. Where a member State chose Formula B (purchasers), the additional levy paid by a dairy was then meant to be passed on by that dairy only to those producers who had delivered an excess quantity.

Luxembourg adopted the necessary measures for implementation of these rules in Grand-Ducal Regulations dated 3 October 1984 and 12 November 1985. It opted for Formula B and chose 1981 as the reference year.

Three of the four Luxembourg purchasers, including the applicant association, appealed against the decisions fixing their reference quantities ('quotas') under these regulations to the Conseil d'Etat, an administrative court sitting at first and final instance, which, in accordance with Article 177 of the EEC Treaty, submitted a number of preliminary questions to the Court of Justice of the European Communities (hereinafter the Court of Justice). The Court of Justice gave its ruling in a judgment of 25 November 1986.

In the light of the replies of the Court of Justice, the Conseil d'Etat, in a judgment dated 26 February 1987, held that the choice of 1981 as the reference year had led to discrimination between purchasers, contrary to Article 40 para. 3 of the EEC Treaty. Consequently, the impugned decisions were set aside and the case was referred to the Secretary of State for Agriculture so that the reference quantities could be more fairly apportioned among the four national purchasers, through grand-ducal regulations.

On 27 May 1987 the Secretary of State presented draft Grand-Ducal Regulations to that end.

On 2 July 1987 the Conseil d'Etat gave its opinion on the draft regulations proposing certain amendments while at the same time submitting a one clause bill making the regulations retroactively applicable, with effect from 2 April 1984, the date of the entry into force in the Community member States of the additional levy system.

With certain changes the Secretary of State's draft became the Grand Ducal Regulations of 7 July 1987, while the bill drafted by the Conseil d'Etat on 2 July 1987 became the Law of 27 August 1987, making these regulations retroactively applicable.

to the twelve month periods of application of the additional levy on milk which began respectively on 2 April 1984 1 April 1985 and 1 April 1986

The content of paragraph 2 of the single article of the Law of 27 August 1987 was as follows

For these periods, purchasers' reference quantities shall be reallocated on the basis of the provisions of Article 3 of the Grand Ducal Regulation of 7 July 1987 referred to above, and the basic and supplementary individual reference quantities shall be recalculated on the basis of the relevant provisions of the same regulations

In September 1987 the Secretary of State issued ministerial decrees retroactively fixing for each milk production year from 2 April 1984 the individual reference quantities of the four purchasers

The applicant association appealed to the Conseil d'Etat against each of these decisions, asking it to set them aside

The applicant association claimed that both it and its suppliers had suffered losses because its reference quantity for the milk production years in question had been too low In support of its appeal the applicant association pleaded, firstly the unlawfulness of the retroactive application of the regulations of 7 July 1987, and secondly the failure to comply with certain provisions of EEC law

In a judgment dated 6 July 1988 the Conseil d'Etat declared the appeals admissible in form but ill founded as to their merits

The Conseil d'Etat held in particular

Whereas, while it is true that as a general rule a law makes provision only for the future, it is permissible for the legislator to give retroactive effect to a legislative decision in so far as this is not forbidden by the Constitution whereas, having regard to the annulment decision given by the Litigation Committee on 26 February 1987, Luxembourg was obliged to fill in the legal vacuum created by that decision in order to avoid failing to comply with the binding obligations resulting from the Treaty of Rome,

Whereas Community regulations are directly applicable under Article 189 of that Treaty whereas, consequently, Luxembourg was obliged to legislate on the question of milk levies for the periods from 2 April 1984 to 31 March 1987 whereas only the national legislator, with the approval moreover of the Community authorities had the power to do so

Whereas, in any event, the penalties attached to any failure on the part of the purchasers to comply with the quotas during the first, second and third periods are no higher than those which would have been payable under the former legislation, whereas the difference, amounting to approximately 35 million francs, has been paid by the State, with the agreement of the Community authorities, so that the retroactive effect of the milk quotas, far from causing the petitioner prejudice, has on the contrary been beneficial to it;

Whereas a plea of unlawfulness cannot stand against a legislative decision, and this plea must accordingly be rejected "

Four of the five members of the Litigation Committee deciding the applicant association's appeal had previously taken part in the drafting of the Conseil d'Etat's opinion on the Secretary of State's draft regulations and in the preparation of the bill making these regulations retroactive

Functions and organisation of the Conseil d'Etat

The Luxembourg Conseil d'Etat has three functions

- a legislative function, which consists in giving its opinion on bills and draft regulations,
- a judicial function, as the administrative court of first and last instance,
- a function which consists in giving occasional advice on questions referred to it by the Government

The organisation of the Conseil d'Etat has been the subject of a number of laws. Its present organisation goes back to the Law of 8 February 1961, as amended by the Law of 26 July 1972. Under Article 1 of this law the Conseil d'Etat is composed of 21 judges, 11 of whom form the Litigation Committee. The 11 members of the Litigation Committee are *ex officio* members of the Conseil d'Etat, a body which participates in the preparation of legislation and regulations.

Under Article 20 para 1 of the 1972 Law the general assembly of the Conseil d'Etat never adopts a decision unless at least ten of its members are present. Moreover, under Article 22 para 2 of the same law, the members of the Litigation Committee may not take part in deliberations concerning cases in which they have already been involved in any capacity other than that of a member of the Conseil d'Etat.

COMPLAINTS

The applicants allege the violation of Articles 6 para. 1 and 7 para. 1 of the Convention and of Article 1 of Protocol No 1.

1 The applicants maintain in the first place that, on account of its organisation and its functions, the Conseil d'Etat is not an independent and impartial tribunal capable of fairly deciding the cases concerning administrative law it is called upon to try

The applicants consider that those members of the Litigation Committee required, when examining an individual appeal, to give a ruling on the legality of regulations on which they have already given their opinion as members of the Conseil d'Etat prior to the adoption of such regulations do not give judgment impartially

They further consider that, on account of its close links with the legislative and executive authorities, the Conseil d'Etat is not an independent tribunal within the meaning of Article 6 para 1

2 The applicants also allege a violation of Article 7 para 1 of the Convention, in that, as a result of the retroactive application of the provisions fixing the quotas, the applicant association found itself liable to a fine for surplus production (the additional levy) which it had to pass on to its members, whereas the fine in question should have been zero rated because of the non existence of the relevant legislation, which had been annulled by the Conseil d'Etat

3 Lastly, they consider that the additional levy constituted a deprivation of their possessions, within the meaning of Article 1 of Protocol No 1, which affected legitimately acquired property, namely the milk sent for processing and the money paid for the sale of that milk, contrary to the conditions laid down in that Article

THE LAW (Extract)

1 The applicant association and the sixty-three applicant members of the association allege a violation of Articles 6 para 1 and 7 para 1 of the Convention and of Article 1 of Protocol No 1

The Government first plead the inadmissibility of the application in so far as submitted by the sixty-three members of the association. They were not party to the proceedings before the Conseil d'Etat and have accordingly not exhausted domestic remedies within the meaning of Article 26 of the Convention

The applicants submit that if the claims lodged by the sixty-three members of the association "in case this proved necessary" were to be adjudged inadmissible, this would not affect the application of the association itself

The Commission recalls that under Article 26 of the Convention a matter may not be referred to it until all domestic remedies have been exhausted. It notes that only the applicant association applied to have the decrees issued by the Secretary of State set aside and that its sixty-three members did not join the proceedings before the Conseil d'Etat

Consequently, the latter have not exhausted, within the meaning of Article 26 of the Convention, the domestic remedies which were open to them in Luxembourg law

It follows that this part of the application must be declared inadmissible, pursuant to Article 27 para. 3 of the Convention.

2. The applicant association complains that a "fine for surplus production" was imposed on it retroactively, and in that connection alleges a violation of Article 7 para. 1 of the Convention, which provides as follows.

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Government maintain that the additional levy is intended to help stabilise the milk products market, and that it is an intervention measure of an administrative rather than penal nature.

The applicant association replies that, while that is in fact the case at the macro-economic level, this aspect should not obscure the micro-economic situation, and the effect of the levy on purchasers and producers, whose economic possibilities it limits

The Commission essentially agrees with the Government. It notes that the additional levy was introduced by mandatory Community regulations as part of the Common Agricultural Policy, that the texts whereby it has been applied in Luxembourg are of an administrative nature and that it is intended to control milk production throughout the Community as a whole.

That being the case, it does not concern a criminal matter within the meaning of Article 7 para. 1 of the Convention.

Consequently, this complaint must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention

3 The applicant association also considers that the additional levy it has to pay constitutes a deprivation of its right to ownership of its legitimately acquired possessions, namely the milk sent for processing and the money paid for the sale of that milk. It relies on Article 1 of Protocol No 1, which is worded as follows

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties

The Government maintain that the Article cited above does not make the right of ownership absolute, and that the provisions in question constitute a modification of that right in accordance with the general interest referred to in paragraph 2 of the Article

The applicant association observes that although restrictions may be placed on use of the right of ownership, through the procedures prescribed by law, these restrictions have to apply to the future rather than the past

The Commission recalls that Article 1 of Protocol No 1 "comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property, it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions, it appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose, it is contained in the second paragraph" (Eur Court H R , Sporrang and Lonroth judgment of 23 September 1982, Series A no 52, p 24, para 61, see also the Lithgow judgment of 8 July 1986, Series A no 102, p 46, para 106)

The Commission considers that the applicant association's allegations in fact relate to two separate complaints, between which it is necessary to distinguish

Payment of the additional levy by the applicant association to the national authorities can be construed as a deprivation of possessions within the meaning of the first paragraph of Article 1 of Protocol No 1

Consequently, the Commission must consider whether this deprivation of possessions satisfied the conditions laid down by the second sentence of that paragraph

It notes in this connection that the measure in question was prescribed by law, i.e. by provisions of Community law directly applicable in Luxembourg and by the Grand Ducal Regulations of 7 July 1987, that the aim pursued by the Community, namely control of milk production, can be described as being in the general interest, in so far as it is intended to stabilise the milk products market, and that the means employed to achieve that aim as defined above, are proportionate to it. Indeed, the Commission points out that the applicant association is itself a direct beneficiary, as an operator conducting transactions in the milk products market, of the stabilisation of that market

In addition, the Commission observes that, under the Formula B system chosen by Luxembourg, the additional levy paid by dairies is passed on by them to producers who have exceeded their quotas

Consequently, the Commission considers that the conditions laid down by the second sentence of Article 1 of Protocol No 1 have been met in this case

It follows that this complaint is manifestly ill founded within the meaning of Article 27 para 2 of the Convention

- Allocation to the applicant association of a reference quantity above which an additional levy becomes due can also be construed as control of the use of property within the meaning of paragraph 2 of Article 1 of Protocol No 1, the property in question consisting, in that case, of the quantities of milk purchased by the applicant association from its members for processing and resale

The Commission recalls in this connection that under the provision in question the scrutiny it exercises consists in examining the proportionality of a control measure to the aim sought to be achieved (cf, in particular, No 10741/84, Dec 13 12 84, D R 41 p 226) The Commission considers that the same argument must apply, *mutatis mutandis*, in this case, which concerns a measure for the control of property prescribed by law in accordance with the general interest It further considers that the system in issue, namely the imposition of an additional levy on quantities of milk collected over and above a guaranteed quantity, is proportional to the aim sought to be achieved

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para 2 of the Convention