Mere Retailers May be Penalised for Salmonella Contaminations in Fresh Poultry

*Walther Michl**

Case C-443/13, Ute Reindl v Bezirkshauptmannschaft Innsbruck, ECLI:EU:2014:2370

1. *Fresh poultry must be free from salmonella contaminations at all the stages of distribution including the retail stage.*

2. *National law may impose a penalty on a food business operator which is active only at the distribution stage for placing salmonella-contaminated foodstuff on the market. It is for the national courts to determine whether such a penalty observes the principle of proportionality as laid down in Article 17 para. 2 of Regulation No 178/2002.*

I. Facts

The present preliminary reference procedure deals with an administrative penalty against Ms Reindl, a branch manager of Austrian food retail company MPREIS, on account of distributing fresh poultry meat failing to comply with the limit value for Salmonella Typhimurium in Annex I, Chapter I, Row 1.28 of Regulation No 2073/2005.

The peculiarity of the case is that the objectionable sample of fresh turkey breast taken during an on-the-spot check at Ms Reindl's branch was produced and vacuum-packed by another undertaking. MPREIS was involved only at the distribution stage and retailed the meat products as delivered by its suppliers. The contamination could only be ascertained in a microbiological examination.

The administrative review body concerned with Ms Reindl's appeal against the penalty essentially asked the European Court of Justice two different types of questions: firstly, must fresh poultry satisfy the limit value for Salmonella at all stages of distribution at all and, secondly, if so, does this mean that food business operators not involved in production may be fully penalised for failure to comply with said limit value under national law?

II. Judgment

Regarding the first part of the preliminary reference, the Court closely kept to the wording of the applicable provision in Annex I, Chapter 1, Row 1.28 to Regulation (EC) No 2073/2005 on microbiological criteria for foodstuffs which expressly provides that the limit value for Salmonella Typhimurium is to apply to products "placed on the market during their shelf life".[1] The concepts "placed on the market" and "shelf-life" are defined by Article 3(8) of Regulation No 178/2002 and Article 2(f) of Regulation No 2073/2005, respectively. Accordingly, the former means "the holding of food or feed for the purpose of sale [...]" and the latter describes "either the period corresponding to the period preceding the 'used by' or the minimum durability date [...]".[2] It is therefore clear that fresh poultry must be free from salmonella as long as it is lawful to sell it which includes the phase of mere retail sale. This interpretation is also backed by the paramount aim to attain a high level of protection of public health which "would be undermined if foodstuffs, containing micro-organisms in quantities which present an unacceptable risk to human health were placed on the market".[3]

With a view to the second set of questions, the Court observed at the outset that Regulation No 2073/2005 only "sets the microbiological criteria with which foodstuffs must comply at all stages in the food chain" but "does not contain any provisions relating to the rules on the liability of food business operators".[4] The ECJ therefore reverted to the general rules contained in Article 17 of Regulation 178/2002. While its first para-

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1 At para. 25 of the judgment.

2 At para. 26 of the judgment.

3 At para. 28 of the judgment.

4 At para. 33 of the judgment.

graph loosely "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", its second paragraph adds "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".[5] It follows that EU law, in principle, does "not preclude national legislation ... which penalises food business operators active only at the distribution stage".[6] "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", particularly those contained in Article 17(2) of the aforementioned Regulation.[7] So, "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".[8] The Court went on to focus on the principle of proportionality and reiterated its standing case-law that the national measure in question "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".[9] In the specific context of penalties, "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".[10] Given the significance of a high level of protection of human health, the Court stressed that the Member States enjoy a very broad discretion in that area. "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".[11] Under these circumstances, the limits to the principle of strict liability are not to be scrutinised centrally on the EU level but rather "for the national court to determine" – albeit "in the light of" the Court's case-law.[12]

III. Comment

The Court establishes an all-encompassing objective responsibility of all food business operators along the supply chain stemming from Article 17 para. 1 of Regulation No 178/2002 (1.) and distinguishes it from their subjective accountability which is by and large the exclusive domain of the Member States under Article 17 para. 2 subpara. 3 of said Regulation (2.). Unfortunately, though, it does not address the important issue of fundamental rights at all (3.). Therefore, the outcome of the case at the national level is not necessarily decided yet (4.).

1. Comprehensive Objective Responsibility under Article 17 of Regulation No 178/2002

Article 17 para. 1 of Regulation No 178/2002 stipulates the objective responsibility of all actors in the food chain from the production up to the retail sale to safeguard the compliance of the foodstuff under their control with all applicable provisions of the European food law[13] – in the present case the microbiological criteria set out in Annex I, Chapter 1, Row 1.28 to Regulation (EC) No 2073/2005. Yet the provision does not tell what concrete measures the food business operators have to take in order to live up to their responsibility.[14] Some scholars – particularly in

5 At paras. 33 and 34 of the judgment.

6 At para. 36 of the judgment.

7 At para. 37 of the judgment.

8 At para. 38 of the judgment.

9 At para. 39 of the judgment.

10 At para. 40 of the judgment.

11 At para. 42 of the judgment.

12 At para. 43 of the judgment.

13 Kurt-Dietrich Rathke, "C 101 Art. 17", in Walter Zipfel and Kurt-Dietrich Rathke (eds), *Lebensmittelrecht Kommentar,* Vol. 2, 150th ed. (Munich: C. H. Beck, 2012), at marginal number 5.

14 Dietrich Gorny, "Verordnung (EG) Nr. 178/2002", in Gerhard Dannecker et al. (eds), *LFGB, Kommentar zu weiteren zentralen lebens- und futtermittelrechtlichen Vorschriften,* Vol. 2, 20th ed. (Hamburg: Behr's, 2012), at marginal number 316.

the German-speaking area – have suggested a gradual approach: the duties of the different food business operators ought to vary according to the factual influence they have on the safety of the product, e.g. the producers should have a far more extensive obligation to monitor and to examine the foodstuffs than the retailers.[15] Given that the product at issue was vacuum-packed and not visibly spoiled, Ms Reindl should arguably have been let off the hook.[16] However, the judgment *in casu* implicitly rejects that approach and establishes a comprehensive and purely objective kind of responsibility which is independent from any individual fault or guilt[17] and merely lays the foundation for addressing administrative measures to the entity under whose control the irregular foodstuff is. Thus, the concept of objective responsibility corresponds with the preventive function of the law which lies at the heart of the Member States' monitoring and enforcing activities under Article 17 para. 2 subpara. 1 of Regulation No 178/2002.

2. Wide Discretion for Member States Regarding Subjective Responsibility and Penalties

By contrast, Article 17 para. 2 subpara. 3 of Regulation No 178/2002 activates the punishing function of the law. It is concerned with penalising individual business operators for their subjective failure to comply with the requirements of EU food law.[18] The Court's interpretation of this provision in the second part of its judgment fleshes out the corridor between the minimum prescribed and the maximum allowed penalties. The one end is marked by the principles of effectiveness and dissuasiveness while the other end is determined by the principle of proportionality. The key result of the case is that the Member States enjoy a very wide discretion for striking a fair balance between these opposing factors. The Court even accepts a strict liability regime because of the exceptionally high value of human health. This is entirely in line with the ECJ's previous case-law under which the competent authorities are allowed to take very far-reaching measures to attain the desired standard of health protection as long as their risk assessment has some scientific basis.[19] Reading para. 40 in the context of the following findings of the Court, the only substantial limit seems to be that the national authorities must take into account the nature and the degree of seriousness of the infringement when establishing the concrete amount of the penalty.

3. Open Questions Regarding Fundamental Rights

Perhaps surprisingly, the Court did not address the role of fundamental rights for the case – despite their great importance in the context of measures imposing penalties. By and large, the constellation of the present case is very similar to that of the Court's seminal Åkerberg Fransson decision: EU law demands an effective and dissuasive penalty in a so-called "mandating rule"[20] but does not provide for the details which are hence determined by national law alone.[21] Under those circumstances, the Charter of Fundamental Rights and the basic rights guaranteed on Member States level are simultaneously applicable.[22] Yet, differently from its previous decision, the ECJ did not derive any guidelines for the behaviour of the national authorities from the Charter. Thus,

15 Cf. e.g. Alfred Hagen Meyer, "Art. 17 BasisVO", in Alfred Hagen Meyer and Rudolf Streinz (eds.), *LFGB, BasisVO, HCVO Kommentar,* 2nd ed. (Munich: C. H. Beck, 2012), at marginal number 8; Werner Schroeder and Markus Kraus, „Das neue Lebensmittelrecht – Europarechtliche Grundlagen und Konsequenzen für das deutsche Recht", Europäische Zeitschrift für Wirtschaftsrecht 2005, at pp. 423 *et sqq.,* at p. 425; Andreas Wehlau, *LFGB Kommentar* (Cologne: Heymanns, 2010), „Vorbemerkung zu § 58", at marginal number 69.

16 Cf. Andreas Wehlau, *LFGB Kommentar* (Cologne: Heymanns, 2010), „Vorbemerkung zu § 58", at marginal numbers 97 *et sqq.*

17 Kurt-Dietrich Rathke, "C 101 Art. 17", in Walter Zipfel and Kurt-Dietrich Rathke (eds.), *Lebensmittelrecht Kommentar,* Vol. 2, 150th ed. (Munich: C. H. Beck, 2012), at marginal number 5.

18 Ibid., at marginal number 7.

19 Cf. e.g. Case C-601/11 P, France v Commission, ECLI:EU:C:2013:465,at marginal number 143, regarding EU legislation, and Case C-24/00, Commission v France [2004] ECR I-1277, at marginal numbers 67 *et sqq.*, regarding national legislation restricting the free movement of goods.

20 Daniel Sarmiento, "Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013), at pp. 1267 *et sqq.,* at p. 1280 *et seq.*

21 Case C-6174/10, Åklagare v Hans Åkerberg Fransson, ECLI:EU:C:2013:105, at paras. 25 *et sqq.*

22 Ibid., at para. 29; for greater detail cf. Daniel Sarmiento, "Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013), at pp. 1267 *et sqq.,* at pp. 1294 *et sqq.* The Court's approach is subject to severe criticism, cf. Filippo Fontanelli, "The Implementation of European Union Law By Member States Under Article 51(1) of the Charter of Fundamental Rights", 20 The Columbia Journal of European Law (2014), at pp. 193 *et sqq.*

the rather weak, abstract proportionality test remains the only limit to the Member States' actions although it should make a difference if the principle of proportionality is tied to a concrete fundamental right that could tilt the balance in favour of the individual or not.[23] Suggesting that the Court did not simply overlook the matter, it seems to backtrack a little on the scope of the Charter. The solution could be that the use of the fundamental rights of the EU is a mere offer to national courts – above all in legal systems where no tradition of judicial review exists.[24] However, if the preliminary reference does not contain a question on the Charter, the ECJ will not tackle the issue on its own terms.

Therefore, there is still plenty of room for the application of the national fundamental rights. Within the broad leeway afforded to the Member States the courts are called upon to exercise their discretion so as to ensure the best available human rights protection. They must not hide behind the ECJ and the primacy of EU law; to the contrary – they are in a very strong position which allows and demands from them to coordinate the various applicable fundamental rights standards in the light of Article 53 of the Charter of Fundamental Rights so long as the primacy, unity and effectiveness of compelling provisions of EU law remains unchallenged.[25]

4. Consequences for the Decision at the National Level

Consequently, the outcome of the case at the national level is not finally determined by EU law. It is only clear that the abstract principle of proportionality as laid down in Article 17 para. 2 subpara. 3 of Regulation No 178/2002 does not prevent the Member States from introducing a system of strict liability. However, such a system can still be challenged under national constitutional law. Moreover, all single impositions of penalties are subject to judicial review with a view to the minimum requirements of the European proportionality test and national fundamental rights. In the end, Austrian law will decide whether and to what extent Ms Reindl can be punished although nothing indicates that the contamination occurred within her sphere of influence.

23 Opinion of Advocate General Cruz Villalón in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland et al., ECLI:EU:C:2013:845, at para. 89.

24 Walther Michl, "Constitutional Activism of the European Court of Justice? On Rising Tensions Between Karlsruhe and Luxembourg After *Åkerberg* Fransson", 31 Ritsumeikan Law Review (2014), pp. 143 *et sqq.*, at p. 150; Daniel Thym, "Die Reichweite der EU-Grundrechte-Charta – Zu viel Grundrechtsschutz?", Neue Zeitschrift für Verwaltungsrecht 2013, pp. 889 *et sqq.*, at p. 896.

25 Cf. ECJ, Case C-399/11, Stefano Melloni v Ministerio Fiscal, ECLI:EU:C:2013:107, at para. 60. For greater detail see Daniel Sarmiento, "Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013), at pp. 1267 *et sqq.*, at p. 1289 *et sqq.*; Aida Torres Pérez, "*Melloni* in Three Acts: From Dialogue to Monologue", 10 EuConst (2014), pp. 308 *et sqq.*, at pp. 315 *et sqq.*