JUDGMENT OF THE COURT (Second Chamber)
20 September 1988 *

In Case 217/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven (Administrative court of last instance in matters of trade and industry) for a preliminary ruling in the proceedings pending before that court between

(1) **John Friedr. Krohn (GmbH & Co.) KG,** Hamburg,

(2) **Van Es Douane-agenten BV,** Rotterdam,

and

Hoofdproduktschap voor Akkerbouwprodukten (Central Board for Agricultural Products), The Hague,

on the validity of two notices sent by the Commission to the Netherlands authorities on the issue of import licences under an annual tariff quota for manioc originating from countries which are not GATT contracting parties,

THE COURT (Second Chamber)

composed of: O: Due, President of Chamber, K. Bahlmann and T. F. O'Higgins, Judges,

Advocate General: J. Mischo
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Krohn and Van Es, by L. J. van Lennep and E. H. Pijnacker-Hordijk,

* Language of the Case: Dutch.

the Commission of the European Communities, by R. C. Fischer, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 5 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 June 1988,

gives the following

Judgment

1 By order of 12 June 1987, which was received at the Court Registry on 14 July 1987, the College van Beroep voor het Bedrijfsleven (hereinafter referred to as 'the College van Beroep') referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the validity of decisions contained in notices sent by the Commission of the European Communities to the Netherlands authorities concerning the issue of import licences under an annual tariff quota.

2 The questions were raised in proceedings brought by Krohn, an international manioc trader, and Van Es, its customs agent, against the Hoofdproduktschap voor Akkerbouwprodukten (hereinafter referred to as 'the Hoofdproduktschap'), the national authority responsible for issuing import licences.

3 Council Regulation (EEC) No 604/83 of 14 March 1983 on the import system applicable in 1983 to 1986 to products falling within subheading 07.06 A of the Common Customs Tariff and amending Regulation (EEC) No 950/68 on the Common Customs Tariff (Official Journal 1983, L 72, p. 3) subjected imports of manioc originating in non-member countries, for the years 1983 to 1986, to an import levy fixed at a maximum of 6% *ad valorem*, within the limits of a number of annual tariff quotas.

4 For certain non-member countries which were not GATT contracting parties, including China, a tariff quota for 1983 was laid down by Regulation No 604/83 itself, and the quotas for the next three years were to be fixed subsequently by the Council on a proposal from the Commission.

5 Article 2 of Commission Regulation (EEC) No 3656/83 of 23 December 1983 laying down detailed rules for the application of the import arrangements applicable to the products in question (Official Journal 1983, L 361, p. 32) provides:

'1. Applications for import licences for each of the years 1984, 1985 and 1986 may be lodged with the authorities of the Member States from mid-December provided that their period of validity commences during the following January.

2. Member States shall notify the Commission by telex of the names of importers, the quantities applied for and their origin, not later than the Thursday of the week following the week in which the application was made.

3. Not later than the Friday of the week following the week of notification referred to in paragraph 2 the Commission shall, where necessary in proportion to the applications, fix the quantities for which licences are to be issued for each country or group of countries mentioned in Article 1 of Regulation (EEC) No 604/83.

4. . . .'

6 Council Regulation (EEC) No 758/86 of 10 March 1986 (Official Journal 1986, L 72, p. 1) which fixed the tariff quota for 1986 at 200 000 tonnes, in accordance with the proposal submitted by the Commission in November 1985, entered into force on 16 March 1986.

7 In the mean time, the Commission had definitively approved from 1 January to 11 February 1986 the advance issue by the national authorities of import licences for a total quantity of 130 000 tonnes.

8 On 19 February 1986 applications for import licences forwarded by the national authorities since 11 February for an aggregate amount of 87 020.261 tonnes were pending before the Commission; that quantity, together with the 130 000 tonnes covered by the licences already authorized and issued, thus exceeded the 200 000 tonnes proposed by the Commission to the Council.

9 By telex message of 20 February 1986, the Commission therefore replied to the national authorities that no further import licences could be granted until the Council had adopted the regulation fixing the tariff quota for 1986.

10 On the basis of that notice the Hoofdproduktschap rejected two applications for licences for imports of manioc originating in China submitted by the plaintiffs in the main proceedings, which the Hoofdproduktschap had forwarded to the Commission on 13 and 20 February 1986. The security which had been lodged was released. The plaintiffs in the main proceedings thereupon challenged the decisions rejecting their applications before the College van Beroep.

11 After the entry into force of Council Regulation No 758/86 fixing the quota for 1986 at 200 000 tonnes, the Commission informed the national authorities, by telex message of 21 March 1986, that in order to ensure equal access for all importers to the 70 000 tonnes for which licences had not yet been issued it would apply the apportionment rule laid down in Article 2 (3) of Regulation No 3656/83. It also stated that it was extending until 24 March 1986 the time-limit for the confirmation of applications for import licences which had already been forwarded to it and the submission of new applications.

12 The plaintiffs in the main proceedings confirmed their two applications for licences and submitted two more to the Hoofdproduktschap, which, by telex message of 24 March 1986, notified to the Commission those four applications and those of other importers.

13 By telex message of 25 March 1986, the Commission informed the Hoofdproduktschap that all the applications forwarded to it could be granted only subject to an apportionment coefficient of 4.191315%.

14 The plaintiffs in the main proceedings then brought an action against the decisions of the Hoofdproduktschap applying the aforementioned coefficient, claiming that the Commission's notices of 20 February and 21 March 1986 had not observed the time-limits laid down in Article 2 of Regulation No 3656/83 or the principle laid down in Article 2 (3) to the effect that applications for licences must be considered in the order in which they were submitted. As soon as the quota had been fixed, the remainder of the quota still available should have first been used to satisfy the outstanding applications, if necessary pro rata, and the fresh applications should only have been considered once that had been done. The notices also contravened the prohibition of discrimination and the principle of legal certainty.

15 The College van Beroep therefore decided to stay the proceedings until the Court had given a ruling in response to the following questions:

'(1) Is the Commission's notice to the defendant of 20 February 1986 contrary to Community law, in particular Regulation (EEC) No 3656/83, the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty and the principle of legal certainty?

(2) Is the Commission's notice to the defendant of 21 March 1986 contrary to Community law, in particular Regulation (EEC) No 3656/83, the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty and the principle of legal certainty?'

16 Reference is made to the Report for the Hearing for a fuller account of the facts, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The notice of 20 February 1986

17 On 20 February 1986 the Commission was unable either to proceed with advance allocation of the quota, the amount proposed to the Council having been exceeded, or to apply the apportionment rule contained in Article 2 (3) of Regulation No 3656/83, since the amount of the quota had not yet been definitively fixed by the Council.

18 Furthermore, it is clear that the notice of 20 February 1986 in no way prejudged the final apportionment of the quota still available among all the confirmed outstanding applications and fresh applications.

19 In addition, the plaintiffs in the main proceedings themselves conceded in the observations which they submitted to the Court that when the quota which the Council may logically be expected to fix has practically been used up, it is not reasonable to continue to grant aplications until such time as the Council has actually fixed the quota in question.

20 It follows that the Commission's notice of 20 February 1986 is not contrary to the rules of Community law mentioned by the College van Beroep.

The notices of 21 and 25 March 1986

21 For the purposes of the College van Beroep's second question, it is necessary also to consider the validity of the Commission's notice of 25 March 1986 giving effect to the principles set out in the notice of 21 March 1986 whereby fresh applications for import licences were to be allowed and the remainder of the quota available was to be apportioned amongst all the applications, both the outstanding applications which had been confirmed and the fresh applications.

22 Whilst the Commission is not open to criticism for allowing fresh applications to be lodged so as to cover the eventuality of not all the outstanding applications being confirmed, once the quota was definitively fixed by the Council it was nevertheless under an obligation, in allocating the remainder of the quota, to give priority to the outstanding applications which had been confirmed, applying the apportionment rule if necessary.

23 After the entry into force of Regulation No 758/86, the outstanding applications which had been confirmed should, pursuant to Article 2 (3) of Regulation No 3656/83, have been accorded priority over the fresh applications by reference to the date on which they were first notified to the Commission.

24 There is no foundation for the argument put forward by the Commission at the hearing that to give priority in the allocation of the remainder of the quota to the outstanding applications which had been confirmed would have forced the Commission to reconstruct *ex post facto* the chronological order in which the national authorities would have sent licence applications to it each week from 20 February to 21 March if the Commission had not suspended the advance allocation of the expected quota.

25 Having before it both the outstanding applications which had been confirmed and the fresh applications forwarded to it by the national authorities as at 24 March 1986, the Commission was in a position, without having to carry out any such reconstruction, to give priority in allocating the remainder of the quota to the outstanding applications which had been confirmed.

26 The reply to the questions of the College van Beroep must therefore be that the Commission's notices of 21 and 25 March 1986 are contrary to Article 2 (3) of Regulation No 3656/83 and that the decision contained in the latter notice is therefore invalid.

27 Since the notices of 21 and 25 March 1986 have been declared invalid, it is unnecessary for the Court to consider them in the light of the prohibition of discrimination and the principle of legal certainty.

Costs

28 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in reply to the questions submitted to it by the College van Beroep voor het Bedrijfsleven by decision of 12 June 1987, hereby rules:

(1) Consideration of the first question has disclosed no factor of such a kind as to affect the validity of the Commission's notice of 20 February 1986;

(2) The Commission's notices of 21 and 25 March 1986 are contrary to Article 2 (3) of Commission Regulation No 3656/83 laying down detailed rules for the application of the import arrangements in 1984, 1985 and 1986 for products falling within subheading 07.06 A of the Common Customs Tariff and originating in non-member countries other than Thailand, and the decision contained in the latter notice is therefore invalid.

Due Bahlmann O'Higgins

Delivered in open court in Luxembourg on 20 September 1988.

J.-G. Giraud
Registrar

O. Due
President of the Second Chamber