JUDGMENT OF THE COURT (Sixth Chamber)
4 July 1996 *

In Case C-296/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht Hamburg (Germany) for a preliminary ruling in the proceedings pending before that court between

Bernhard Pietsch

and

Hauptzollamt Hamburg-Waltershof

on the validity of Commission Regulation (EEC) No 2163/92 of 30 July 1992 on the levying of the additional amount provided for by Regulations (EEC) No 3429/80, (EEC) No 796/81, and (EEC) No 1755/81 adopting protective measures applicable to imports of preserved cultivated mushrooms (OJ 1992 L 217, p. 16),

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, G. F. Mancini and J. L. Murray, Judges,

* Language of the case: German.

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Bernhard Pietsch, by Ulrich Lorenz-Meyer, Rechtsanwalt, Hamburg,

— the Spanish Government, by Alberto José Navarro González, Director General of Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Service, acting as Agents,

— the Commission of the European Communities, by Klaus Dieter Borchardt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the parties at the hearing on 1 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By order of 22 September 1994, which was received at the Court on 4 November 1994, the Finanzgericht Hamburg referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question concerning the validity of

Commission Regulation (EEC) No 2163/92 of 30 July 1992 on the levying of the additional amount provided for by Regulations (EEC) No 3429/80, (EEC) No 796/81, and (EEC) No 1755/81 adopting protective measures applicable to imports of preserved cultivated mushrooms (OJ 1992 L 217, p. 16, 'the regulation at issue').

2 The question was raised in proceedings between Mr Pietsch and Hauptzollamt Hamburg-Waltershof ('the Hauptzollamt') concerning the payment of additional amounts required by the latter pursuant to the regulation at issue.

The Community rules

3 Regulation (EEC) No 3429/80 of 29 December 1980 adopting protective measures applicable to imports of preserved mushrooms (OJ 1980 L 358, p. 66), based on Article 14 of Council Regulation (EEC) No 516/77 of 14 March 1977 on the common organization of the market in products processed from fruit and vegetables (OJ 1977 L 73, p. 1), had set for the three-month period from 1 January 1981 to 31 March 1981 the import quota for preserved mushrooms from non-member countries at 7 196 tonnes. In addition, it introduced controls on imports by way of import licences and had provided, in the case where the quantities of preserved mushrooms from non-member countries released into free circulation in the Community exceeded the quantity established by that regulation, for a levy of an additional amount of ECU 175 per 100 kg net.

4 For the following three-month period from 1 April 1981 to 30 June 1981, the Commission subsequently adopted Regulation (EEC) No 796/81 of 27 March 1981 adopting protective measures applicable to imports of preserved mushrooms (OJ 1981 L 82, p. 8), also based on Article 14 of Regulation No 516/77. That regulation set the import quota at 7 618 tonnes and provided that, where that quantity was exceeded, an additional amount of ECU 175 per 100 kg net would be levied.

5 For the three-month period from 1 July 1981 to 30 September 1981, Commission Regulation (EEC) No 1755/81 of 30 June 1981 adopting protective measures applicable to imports of preserved cultivated mushrooms (OJ 1981 L 175, p. 23), also based on Article 14 of Regulation No 516/77, this time set the import quota at 5 736 tonnes and the additional amount to be levied when it was exceeded at ECU 160 per 100 kg net.

6 In its judgments of 16 October 1991 *Werner Faust* (C-24/90 [1991] ECR I-4905) and *Wünsche* (C-25/90 [1991] ECR I-4939 and C-26/90 [1991] ECR I-4961), the Court held Article 1 of Regulations Nos 3429/90, 796/81 and 1755/81 invalid as regards the level of the additional amount set, on the ground of breach of the principle of proportionality.

7 In order to comply with those judgments, the Commission adopted the regulation at issue, by which it reduced, with retroactive effect, to ECU 105 per 100 kg net the additional amount provided for in the three regulations concerning protective measures for imports carried out between 1 January 1981 and 30 September 1981.

The dispute in the main proceedings

8 It appears from the order for reference that from 5 to 11 March 1981, while Regulation No 3429/80 was applicable, Mr Pietsch applied for and obtained authorization to release into free circulation a consignment of preserved mushrooms, which, according to his declarations, came from Korea. Initially no amount was levied.

9 Various official investigations revealed that the preserved mushrooms in question had in fact been imported from Taiwan. In an amended notice of assessment the

Hauptzollamt then required Mr Pietsch to pay an additional amount of DM 365 530.06 on the basis of Regulation No 3429/89, on the ground that in the customs clearance procedure he had not produced an import licence indicating the exact origin of the goods.

10 After Mr Pietsch's objection was dismissed, he brought an action before the Finanzgericht (Finance Court) Hamburg on 27 November 1984. During those proceedings, by a second amending notice of 22 November 1993, the Hauptzollamt reduced the additional amount subject to post-clearance recovery from DM 365 530.06 to DM 219 213.47 on the basis of the regulation at issue which had in the meantime entered into force.

11 Mr Pietsch then requested the Finanzgericht Hamburg to annul that second amending notice.

12 In that action, Mr Pietsch maintained, essentially, that Article 1 of the regulation at issue, by which the additional amount resulting from Regulation No 3429/80 was reduced from ECU 175 to ECU 105 per 100 kg net, was invalid. He claimed that, according to the principles set out by the Court of Justice in *Werner Faust*, cited above, even an additional amount of ECU 105 per 100 kg net, levied without distinguishing between categories, was inappropriate, disproportionate and excessive.

13 In the circumstances, the Finanzgericht decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 1 of Commission Regulation (EEC) No 2163/92 valid?'

The question referred to the Court

14 By its question the national court is asking essentially whether the level of the additional amount provided for in the regulation at issue is in conformity with the principle of proportionality.

15 According to settled case-law, by virtue of that principle measures imposing financial charges on economic operators are lawful provided that they are appropriate and necessary for meeting the objectives legitimately pursued by the rules in question. However, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued (see, in particular, the judgment in Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21).

16 The objective of the regulation at issue must therefore be examined in order to establish whether the additional amount reduced to ECU 105 per 100 kg net is appropriate and not disproportionate.

17 The regulation is based on Council Regulation (EEC) No 426/86 of 24 February 1986 on the common organization of the market in products processed from fruit and vegetables (OJ 1986 L 49, p. 1), specifically Article 18, pursuant to which, in a situation of serious market disturbance, the Commission, acting either at the request of a Member State or on its own initiative, is to decide what measures are necessary and communicate them to the Member States; such measures are to be immediately applicable.

18 It follows from the first recital in the preamble to the regulation at issue that it was adopted following the judgments of 16 October 1991 in *Werner Faust* and *Wünsche*, cited above, in which the Court declared invalid Regulations Nos 3429/80,

796/81 and 1755/81, on the ground that the level of the additional amount was set, without any distinction, for preserved mushrooms of all origins and grades, the effect of which was to increase the cost of imported preserved mushrooms, particularly those of lower quality, thus penalizing imports of lower quality mushrooms to a greater extent.

19 According to the second recital, the aim of the regulations declared invalid was to discourage imports of preserved mushrooms into the Community beyond the quantities laid down and, to achieve that objective, measures had to be applied to imports of all grades of preserved mushrooms from all third countries.

20 The third recital states that the amount should be set at a sufficiently high level to achieve the desired aim and the level should be the same for all the products in question so as not to encourage the declaration of imports, particularly of preserved mushrooms, as being of lower quality than is actually the case, given that varying the amount according to the quality of the products would, in the absence of a precise Community definition of the different grades, hamper effective control of the goods concerned.

21 Lastly, as the fourth recital indicates, the levying of an amount based on the Community cost price of preserved mushrooms was not criticized by the Court and so that it was appropriate, in order to avoid the level of the additional amount for lower grade preserved mushrooms imported from non-member countries significantly exceeding the production cost of the same type of preserved mushrooms in the Community, that the amount should be set at a level equal to the Community cost price of grade 3 preserved mushrooms.

22 In the light of the objective of the regulation at issue as thus defined, it must be held that the requirement of an additional amount where the authorized quota is exceeded was appropriate and necessary to its attainment.

23 As far as the level of that amount is concerned, it will be noted that this was reduced by Article 1 of impugned Regulation No 2163/92 to ECU 105 per 100 kg net, which, as the file shows, corresponds to 90% of the value of grade 3 preserved mushrooms.

24 The national court sets out three reasons which, it believes, affect the validity of the additional amount. It considers that the imposition of an additional amount, the level of which represents approximately 90% of the value of the goods, penalizes traders who carry out imports without an import licence. The fact that the additional amount is not differentiated according to the quality of the goods, which the Court of Justice did not consider unnecessary because there could be difficulties with an effective control of the products in question, has the same effect. Lastly, according to the national court, the validity of the additional amount is also affected by the fact that the amount corresponded to the cost price for grade 3 cultivated mushrooms, whereas Regulation No 3429/80 which was applicable at the material time, referred to preserved mushrooms in general.

25 The question whether that level of additional amount exceeds what is permissible under the principle of proportionality must therefore be examined.

26 On this point Mr Pietsch claims that, even when reduced, the additional level was set at a level such that no importer would ever import voluntarily preserved mushrooms from non-member countries. In his view, the additional amount should have been set at a level corresponding to the difference between production costs in the Community and the price of imported mushrooms, including customs duties.

27 That argument cannot be accepted. As the second recital of its preamble states, the objective of the regulation at issue is to discourage, and thereby considerably limit, imports into the Community beyond the quantities laid down. Such an objective could not have been achieved by an additional amount set at a level which would merely have allowed the difference between production costs in the Community

and the price of imported mushrooms to be equalized. The Commission was therefore entitled to set at its discretion an additional amount higher than that considered appropriate by Mr Pietsch.

28 The Spanish Government and the Commission, on the other hand, maintain, first, that the additional amount should be set at a higher level to achieve the objective of the regulation.

29 In this regard, it must be stated that, although the Commission has some discretion in setting the level of the additional amount, it is not entitled to set it at such a high level that it amounts to a prohibition. The aim of the regulation is not to prohibit all imports beyond the quantities set but to protect the Community market in mushrooms from disruption due to excessive imports from non-member countries.

30 Secondly, the Spanish Government and the Commission contend that, when the regulation at issue was adopted, the principle of proportionality was complied with, since the additional amount was this time calculated on the basis of the Community cost price of grade 3 mushrooms, rather than grade 1 mushrooms, as in Regulation No 3429/80, which had been held invalid. Since the invalidity of Article 1 of that regulation resided in the fact that setting the additional amount on the basis of the cost price of grade 1 mushrooms put importers of mushrooms of lower categories at a clear disadvantage and that, in the regulation at issue, the additional amount was in future to be calculated on the basis of the Community cost price of grade 3 mushrooms, the cause of invalidity had been removed.

31 That argument cannot be accepted. As the judgment in *Werner Faust* makes clear, the impact on lower grade mushrooms of calculating the additional amount on the basis of the cost price of grade 1 mushrooms was not the only reason for holding Article 1 of Regulation No 3429/80 invalid. At paragraph 30 of the judgment,

the Court, having examined the various causes of invalidity of the provision, concluded that its invalidity 'followed from all of the foregoing considerations', central to which was the principle of proportionality, as it is in the present case.

32 Thirdly, the Spanish Government and the Commission claim that the regulation at issue complied with the principle of proportionality because it reduced the charge for importers from approximately 150% of the value of the goods to approximately 90%. According to them, such a level of additional amount is appropriate to ensure the attainment of the objective of the regulation, which is to discourage imports of mushrooms above the quantities indicated. Consequently, the setting of the additional amount at the level adopted in the regulation at issue does not penalize importers.

33 That argument cannot be accepted either.

34 Even reduced to that level, an additional amount of ECU 105 per 100 kg net represents, as the Advocate General points out in point 66 of his Opinion, in comparison with the Community cost price of grade 1 mushrooms, about two thirds of that value. That amount indisputably constitutes a charge which, as the Commission accepts in its written observations, considerably increases the cost of importing mushrooms. Such a charge, albeit reduced, substantially increases the cost of imported mushrooms and is thus equivalent to a substantive prohibition. In setting the additional amount at a level beyond that necessary to attain the above-mentioned objective, the Commission clearly exceeded its discretionary powers and disregarded the principle of proportionality.

35 Consequently there is no need to examine the other reasons set out by the national court and the reply to the question raised must be that it follows from all of the foregoing considerations that Article 1 of the regulation at issue is invalid as regards the level of the additional amount set.

Costs

36 The costs incurred by the Spanish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber)

in answer to the question referred to it by the Finanzgericht Hamburg by order of 22 September 1994, hereby rules:

Article 1 of Commission Regulation (EEC) No 2163/92 of 30 July 1992 on the levying of the additional amount provided for by Regulations (EEC) No 3429/80, (EEC) No 796/81, and (EEC) No 1755/81 adopting protective measures applicable to imports of preserved cultivated mushrooms is invalid as regards the level of the additional amount set.

Kakouris Mancini Murray

Delivered in open court in Luxembourg on 4 July 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber