JUDGMENT OF THE COURT
17 JUNE 1965[1]

Government of the Italian Republic
v Commission of the European Economic Community[2]

Case 32/64

Summary

Common Customs Tariff — Establishment — Products in list G — Silk — Italian market — Isolation — Support for the introduction of protective measures — Non-binding nature — No derogation from the EEC Treaty — Powers and obligations of the Commission

(EEC Treaty, Articles 14, 15 and 226)

Protocol No VIII, Article 2 of the agreement of 2 March 1960 regarding the establishment of a part of the Common Customs Tariff concerning products in list G (Official Journal of the European Communities of 20.12.1960, page 1855)

Article 2 of Protocol No VIII lays down a policy which the Commission must take into account without being bound by any specific legal obligation. As this provision has not laid down any positive measure of law it neither involves a departure from Article 14 or 15 of the EEC Treaty, nor substitutes for them a special rule concerning Italian silk products. Moreover, Article 2 of Protocol No VIII involves no departure from Article 226 of the EEC Treaty. While expressing 'support for the application of Article 226 of the Treaty', the Member States intended to remain within the actual framework of that Article and leave intact the discretionary power vested by it in the Commission.

In Case 32/64

GOVERNMENT OF THE ITALIAN REPUBLIC, represented by Adolfo Maresca, Minister plenipotentiary, deputy Head of the Diplomatic Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Renato Carafa, Deputy State Advocate-General, with an address for service in Luxembourg at the Italian Embassy,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Cesare Maestripieri, Legal Adviser of the European Executives, acting as Agent, with an address for service in Luxembourg at the Office of H. Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

1 — Language of the Case: German.
2 — CMLR.

Application for the annulment of Article 3 of the Decision of the Commission of the European Economic Community of 22 May 1964 published in the Official Journal of the European Communities of 4 June 1964, pp. 1373 et seq., to the extent that the authorization granted to the Italian Republic determines, by way of protective measures valid until 25 February 1965, certain customs duties on the production of various silk-based products appearing in Chapter 50 of the Italian customs tariff;

THE COURT

composed of: Ch. L. Hammes, President, A. M. Donner and R. Lecourt (Rapporteur), Presidents of Chambers, L. Delvaux, A. Trabucchi, W. Strauß and R. Monaco, Judges.

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The Common Customs Tariff concerning products in list G of Annex I to the Treaty establishing the European Economic Community was introduced by an Agreement concluded between the Member States on 2 March 1960.

Protocol No VIII annexed to this Agreement deals with silk and provides in point 2 that:

'The Member States support the application of Article 226 of the Treaty entailing the isolation, for a period of six years from the signing of the present Protocol, of the Italian market in those products appearing in Chapter 50 of the Common Customs Tariff for which such isolation appears necessary, both as regards other Member States and third countries' (Official Journal No 80 C of 20.12.60, p. 1855/60).

By Decisions of 28 February 1962 (Official Journal EC No 33 of 4.5.1962, p. 1092/62), 20 March 1963 (Official Journal EC No 53 of 5.4.1963 p. 1085/63) and 22 May 1964 (Official Journal EC No 88 of 4. 6. 1964, p. 1373/64), the Commission of the EEC authorized the Italian Republic at the request of its Government to introduce protective measures for certain products appearing in Chapter 50.

Article 3 of the Decision of 28 February 1962 provides that:

'1. For a period of one year from the date of the present Decision the Italian Republic shall be authorized to maintain the customs duties in force on 2 March 1960 in relation to Member States for woven fabrics of silk or silk waste other than noil (tariff heading 50.09 of the Italian customs tariff), excluding printed fabrics

cross-linked fabrics and other transparent fabrics; for these latter products it shall only be authorized to make tariff reductions in relation to Member States where customs duty up to 10.5% is applicable.

2. The authorization referred to in paragraph 1 shall not apply to fabrics in which at least the whole of the weft or warp is not composed of pure silk (excluding other fibres and silk waste).'

Article 2 of the Decision of 20 March 1963 provides as follows:

'1. The Italian Republic shall be authorized to maintain until 28 February 1964 in relation to Member States the customs duty in force on 2 March 1960 for woven fabrics of silk or of silk waste other than noil (tariff heading 50.09 of the Italian customs tariff), excluding the fabrics referred to in paragraph 2.

2. The Italian Republic shall be authorized to apply until 28 February 1964 in relation to Member States the following customs duties for the fabrics enumerated below appearing under tariff heading 50.09 of the Italian customs tariff:

— piece-dyed fabric, 9.6%
— yarn-dyed fabric, 8.5%
— printed and cross-linked fabric, 7%
— embroidered fabric, 8%

3. The authorization referred to in the previous paragraphs shall not apply to fabrics in which at least the whole of the weft or warp is not composed of pure silk (excluding other fibres and silk waste).'

Finally, Article 3 of the Decision of 22 May 1964 provides:

'The Italian Republic shall be authorized to maintain the following customs duties until 28 February 1965 in relation to Member States for fabrics appearing in tariff heading 50.09 of the Italian customs tariff in which at least the whole of the weft or warp is composed of pure silk:

— unbleached fabric, 9.5%
— piece-dyed fabric, 7.6%
— yarn-dyed fabric, 6.8%
— printed and transparent fabric, 5.6%
— embroidered fabric, 6.5%'

By application dated 24 July 1964 lodged at the Registry on 27 July 1964 the Government of the Italian Republic claimed that the Court should:

'— order the suspension of the operation of the above provision:
— annul it.'

II — Conclusions of the parties

Subject to the express right to produce further documents and present subsequent conclusions and amendments and without prejudice to any other rights the *applicant* claims that Court should:

'after making an order to suspend the operation of the decision in question, as far as the portion in dispute is concerned, annul Article 3 thereof and order costs to be paid as the Court shall see fit'.

Subject to the express right to present further conclusions and without prejudice to any other rights the *defendant* contends that the Court should:

'declare inadmissible for want of legal interest the application of the applicant to suspend the operation of Article 3 of the Decision of the Commission of 22 May 1964 concerning the authorization granted to the Italian Republic to introduce protective measures for certain products appearing in Chapter 50 of the Italian customs tariff;
dismiss the application made by the Government of the Italian Republic for the annulment of this provision;
order the applicant to pay the costs.'

III — Submissions of the parties

A — *On the application to suspend the operation of the provision*

The *applicant* has submitted that by reason of the irreparable damage caused in the Italian silk sector by the application of the customs rates fixed by Article 3 of the contested Decision, it was obliged to make an application to suspend the operation of this provision.

The *defendant* has objected that 'in the absence of any departure therefrom authorized by the Commission, the duties applicable in trade between Member States are to be those arising from the application of the reductions provided for in Article 14 of the Treaty and from the acceleration decisions', and that 'the suspension of operation of the Decision of 22 May 1964 would thus lead to the application of these duties to the products in question, a solution which is always open to the applicant without the need to wait for the authorization of the Commission or a decision of the Court'. Thus, the defendant contends that the application fails for want of legal interest and is therefore inadmissible.

The *applicant* has replied that it has an interest in the suspension of operation of a Decision, which must lead to the continuance in force of the earlier Decision of 20 March 1963, not merely *de facto* (as has been the case for seven years with Decisions of the Commission 'which have lapsed' but have been applied until the entry into force of later Decisions) but *de jure* by virtue of a judgment of the Court and pending a decision on the substance of the case.

The *defendant* has replied, first, that proceedings under Article 226 may be complicated and that as regards the products in question the decisions of the Commission have never been delayed and, secondly, that in the absence of protective measures Member States may not unilaterally depart from mandatory Community provisions concerning the abolition of inter-Community customs duties.

B — *On the possible wrongful acts or omissions of the Commission*

The *applicant* has brought an application for the annulment of Article 3 of the contested Decision to the extent that it determines, in percentages, certain customs duties on woven fabrics of silk.

It therefore makes the following submissions:

'— infringement of Article 2 of Protocol No VIII of 2 March 1960 concerning silk annexed to the agreement of 2 March 1960 regarding the establishment of the Common Customs Tariff for the products in list G as provided for in the Treaty establishing the European Economic Community and in accordance with Article 226 of that Treaty;

— *ultra vires* acts on the grounds of error in the conditions laid down and of manifest inconsistency;

— failure to explain why the cost of the raw material was considered in isolation;

— infringement of Articles 14 (2) and (3) and 15 (1) and (2) of the said Treaty.'

Discussion of the technical aspects of the problem essentially concerns, first, the raw material and, secondly, the methods of processing.

1. The raw material

According to the *applicant*, the Commission has made a double error in considering the cost of the raw material.

First, the Commission has taken into account the hypothetical effect of the

rationalization now taking place in the Italian silk industry.
Secondly, it has only taken into account the difference between the price of Italian silk and the price of Japanese silk.
In particular, it has calculated the average Japanese price on the basis of a single year, although the prices of this product are subject to great fluctuations.
The average price calculated on the figures for 1963 alone, which the Commission treated as the reference period, showed a difference in price of 1 450 lire per kilogram, while the same average calculated on the figures for 1961-1963 shows a difference in price of 1 695 lire per kilogram.
The basis of calculation employed by the Commission was thus inadequate.
The *defendant's* reply to this argument is that the applicant has itself acknowledged that rationalization of the sector is in progress.
Moreover, the world price of silk is basically the price of Japanese silk and 'the method followed by the Commission enables it to avoid having to consider short-term price fluctuations'.
On this point during the oral procedure the defendant stated that the prices of raw silk from Japan increased considerably in 1963.

2. Processing

(a) *The effect of overheads*

The *applicant* maintains that, even if the cost factors for the raw material put forward by the Commission are accepted, the effect of overheads cannot be disregarded.
The price of a product does not depend only on the cost of the raw material.
It is however established that, for example, as regards unbleached fabric 90 cm wide with 75 grammes of raw silk per metre the difference in the cost of the raw material between the Japanese product and the Italian product is 109 lire whilst the difference in price of the finished products is 128 lire, overheads on the Italian product being 192 lire but on the Japanese product only 173 lire.
The rate of customs duty granted by the Commission (9.5%) is based on the figure of 109 lire rather than on that of 128 lire, that is, on the cost of the raw material and not on the price of the product including overheads.
The protection afforded by this rate is thus ineffectual.
If calculation of the rates took into account the effect of overheads, the percentages would be as follows:

'unbleached cloth,	11.11% (instead of 9.5%)
piece-dyed fabric,	10.30% (instead of 7.60%)
yarn-dyed fabric,	9.20% (instead of 6.80%)
printed fabric,	7.93% (instead of 5.60%)
embroidered fabric,	9.01% (instead of 6.50%)'

This reasoning is compatible with Article 226 of the Treaty even accepting the interpretation of it given by the Commission.
It only questions the method and criteria of calculation used to determine the difference in price between Italian silk and Japanese silk on which the protective measure had to be based *in concreto*.
The applicant had never 'acquiesced' in the system adopted by the Commission.
It is only contesting the above Decision because the rates which it introduced no longer ensure the isolation of Italian sériculture and remove all content from the protective measure, the need for which has been recognized by Protocol No VIII.
Finally, the applicant Government has not considered the transport costs since the Commission has not taken them into account either for Italian or for Japanese silk.

The *defendant* has replied, first, that by referring expressly to Article 226 the authors of Protocol No VIII wished to ensure the isolation of the Italian silk market in accordance with the conditions laid down therein.
They have, moreover, provided for this isolation to take place when it 'appears necessary'.
The wording of Article 226 shows that the discretionary power in Article 226 is exercised within well-defined limits.
Once the exact origin of the difficulties is established, the Commission cannot take other extraneous factors into consideration and cannot extend in any way the protective measures without exceeding the limits of what is strictly necessary.
On this point the Commission has referred to the opinion of Mr Advocate-General Lagrange in Case 13/63 and the case-law of the Court in Case 13/63 and in Joined Cases 73 and 74/63.
That the price of the silk produced in Italy is higher than the world price is a result of the Italian system of sericulture and the cottage-industry methods employed until very recently in the unwinding of the cocoons.
The Italian Government has recognized that improvements were possible in this field and has passed laws with a view to improving the output of the domestic silkworm industry.
The increasing importance of Italian exports of woven fabrics of silk is proportional to the import of raw silk into that country.
This showed that when the Italian processing industry is supplied with raw material at the world price its prices are competitive at least as regards those of the processing industries of the Member States.
Thus, as regards Italian undertakings, there is no reason to take into account any cost factors higher than those incurred by undertakings in other Member States, apart from the raw material.
To return to the example given by the applicant Government, it can be seen that the rate of 9.5% exactly offsets the charge borne by woven fabrics of silk of Italian origin as compared with fabrics woven in the Member States from Japanese silk. Having regard to the nature of the overheads, it has not been proved that they vary necessarily according to the cost of the new material. In fact the applicant has produced no evidence to support the statement that the processing of Italian silk is more costly than the processing of Japanese silk.
If then the Commission, in making its calculations in order to determine the level necessary to ensure the protection of Italian silk, had assessed the processing costs borne by the Italian industries at a higher level than those borne by the industries of other Member States it would not have complied with the conditions laid down in Article 226 of the Treaty and would have rendered its Decision liable to a possible application under Article 173.
Finally, the defendant has stated:
'that it is for the applicant to prove that the protective measures authorized by the Commission were or are insufficient to attain the required objective. Such evidence has neither been given nor offered. Without thereby accepting a reversal of the burden of proof, the defendant submits to the Court the following information concerning Italian imports of woven fabrics of silk from other Member States (Schedule 4): these imports amounted to 76 metric tons in 1960 and fell to 40 metric tons in 1961 and 1962 and 44 metric tons in 1963. This is evidence that the level of the duties authorized by the Commission plainly met its objective.'

(b) *Protection of the processing industries*

The *applicant* has maintained that, even disregarding the exact cost of the raw material and the effect of the overheads,

one must take account of the need to protect the processing industries for silk-based products.

The applicant states that:

'This is tantamount to saying that the function of the customs duty is not only to protect domestic industries from competition by foreign industries which benefit from special and more favourable conditions (natural and structural or of some other kind) but is also in a general way to ensure, albeit within certain limits, a preference for the domestic product.'

. . . . . .

'As regards relations between Italy and the other countries of the Community this preference must disappear during the final period of the Common Market (that is, at the end of the present integration process), but at the present stage of application of the Treaty it is impossible to ignore the right of each Member State to maintain a certain preference in proportion to the obligations which it derives from the Treaty itself.'

According to the applicant the customs duty in dispute must not be regarded as being intended to cover the higher cost of the raw material alone but also to protect the processing industries. In fact, not to take into account the costs of processing amounts to a removal, before the date laid down, of all the protection afforded to those industries.

Each State has the right to protect its processing industries.

This is evidenced by the fact that the Community Executives took into consideration the processing industries in the field of agriculture as well as certain customs tariffs in other Member States.

The protection afforded to the processing industry is not a 'premium' paid to that industry, since if the rate of customs duty were intended to cover only the difference between the costs of the raw material, Italy would be obliged to apply Article 15 of the Treaty which would remove all protection from the sector in question before the date fixed by the Treaty.

The *defendant* has replied by referring to the arguments already developed concerning the effect of overheads and has recalled its interpretation of Article 226 and the need to determine the cause of the difficulties which constitute the condition *sine qua non* of application of the Article as well as the obligation on the Commission to relate the level of the protective measures to that cause.

It has already been shown that the protective measure was only intended to compensate the higher cost arising from the use of a more expensive raw material. There is thus no need to define the 'components' of a customs duty authorized under Article 226. If the interpretation given to this Article by the Italian Government were valid, the necessary conclusion would be that any measure authorized was intended not only to ensure a balance between the situations but also to offer a 'premium', consisting of additional protection to the sector benefiting from it; this contravenes the provisions of the said Article.

IV — Procedure

The procedure in the main action followed the normal course.

No separate proceedings took place on the request for suspension of the operation of the measure which was included in the application.

After hearing the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry but after requesting information from the parties on the yearly trend from 1960 to 1964 of:

1. Italian imports, country by country,
   (a) of raw materials,
   (b) of manufactured products,

2. Italian exports, country by country,
3. Prices of raw material in Japan and in the Member States.

The parties provided the required information.

The parties presented their submissions at the hearing on 1 April 1965.

The Advocate-General delivered his reasoned oral opinion at the hearing on 6 May 1965.

Grounds of judgment

The application brought by the Government of the Italian Republic against the Decision of the EEC Commission of 22 May 1964 authorizing various protective measures seeks, first, suspension of the operation of Article 3 of the said Decision and, secondly, its annulment.

The application to suspend the operation of the contested Decision

Article 3 of the above Decision authorizes the Italian Republic for a period of ten months to levy certain customs duties, the amount of which it fixes for itself, on the import of various woven silk fabrics.

The application to suspend the operation of this provision is based upon the irreparable nature of the damage caused by this provision to Italian sericulture and the Italian silk industry.

According to Article 83 (3) of the Rules of Procedure an application to suspend the operation of any measure adopted by an institution 'shall be made by a separate document'.

This has not been done in the present case.

By the terms of a single document the Court is requested 'after making an order to suspend the operation of the decision in question' to 'annul Article 3 thereof'.

Since this request was not submitted in a separate document but in the application for annulment itself, into which it was incorporated and from which it cannot be separated, it must be dismissed as inadmissible for failure to observe the essential requirements of Article 83 (3) of the Rules of Procedure.

Moreover, the application to suspend the operation of the decision has become pointless by virtue of the present judgment on the main issue.

The application for annulment

(a) Infringement of an essential procedural requirement.

It is complained that the reasons stated for the Decision fixing the protective measures only take account of the cost of the raw material and not the other factors involved in the cost price of the fabric, in particular the overheads.

It can be seen from the Decision, however, that the reasons given include ample explanations for the limitation on the customs duties authorized in particular as regards the rationalization of the production of raw silk and the prices both of the latter and of woven silk fabrics.

These reasons appear sufficient to justify the operative part of the Decision.

Although the Commission is criticized for not having considered other factors which might have led it to take a different decision, this complaint is not one which could apply to the reasons for the Decision but rather concerns a consideration of the substance of the Decision.

This submission must therefore be dismissed.

(b) Infringement of the Treaty

The Italian Republic having, by virtue of Protocol No VIII annexed to the Agreement of 2 March 1960, requested authorization to take protective measures within the meaning of Article 226, the Commission, by the terms of the contested Decision, fixed various customs duties on woven silk fabrics to be imposed by the applicant, but considered by that party to be, first, an infringement of Article 2 of the said Protocol and, secondly, contrary to Articles 14 (2) and (3) and 15 (1) and (2) of the Treaty and, finally, vitiated by misuse of powers.

In particular, in support of these various arguments, it complains that the Commission wrongly restricted the protection requested to the difference between the Italian and Japanese prices for raw materials alone by calculating the average of these prices over only one year and by failing to take into account the effect of the overheads on the Italian finished product and of the protection due to the processing industry itself.

The infringement of Article 2 of Protocol No VIII

According to the terms of Article 2 of Protocol No VIII annexed to the

Agreement of 2 March 1960 'The Member States support the application of Article 226 of the Treaty entailing the isolation, for a period of six years from the signing of the present Protocol, of the Italian market in those products appearing in Chapter 50 of the Common Customs Tariff for which such isolation appears necessary, both as regards other Member States and third countries'.

Far from laying down a mandatory rule this provision is a mere expression of 'support'.

The duty of the Commission was thus to attempt to take account of this policy without being bound by any specific legal obligation.

Consequently, the Decision could not be annulled for infringement of the rules of law allegedly laid down by the Protocol in question.

The infringement of Articles 14 (2) and (3) and 15 (1) and (2) of the Treaty

Articles 14 and 15 of the Treaty, which lay down the time-table for the reduction of the customs duties and the possibility of Member States' anticipating the realization of these measures, are not relevant to this case.

It does not appear from the written procedure or the hearings that these Articles were infringed by the contested Decision.

As Article 2 of Protocol No VIII did not enact any positive measure of law it could neither have resulted in a departure from the abovementioned Articles of the Treaty, nor substituted for them a special rule concerning Italian silk products.

Moreover, the derogations sought by the applicant prevent it from claiming an infringement of the very Articles which it is specifically trying to avoid.

This submission is therefore unfounded.

The claim that the Commission acted ultra vires

It appears that the Commission is being accused by a submission relating to *ultra vires* acts of having misused its powers.

According to the applicant the Commission should have taken into account the policies outlined in Protocol No VIII when exercising its powers under Article 226.

However, Article 2 of Protocol No VIII involves no departure from Article 226.

On the contrary, by declaring therein that they 'support the application of Article 226 of the Treaty' the Member States intended to remain within the actual framework of that Article.

Moreover, it cannot be maintained that the Commission misused its powers by failing to take the support in question sufficiently into account in its assessment in application of Article 226.

In fact, the support expressed for the isolation of the Italian market leaves intact the discretionary power vested in the Commission under Article 226.

This discretionary power is especially emphasized in so far as the Protocol requires the isolation to appear necessary both as regards other Member States and third countries.

Consequently, the Commission, being required to observe the legal obligations of Article 226 and to attempt to take into account the support expressed in Protocol No VIII can only be criticized in its assessment of the economic situation of the Italian products in question in the case of a serious failure to carry out these duties.

The fact that it calculated the average reference prices of the raw product upon the basis of 1963 alone does not constitute such a failure, since this method of calculation involves a consideration of the considerable increase in the Japanese price in 1963.

Nor does the decision to disregard in its calculation of the customs duties authorized as protective measures the overheads incurred by the undertakings and the special protection required by the processing industry constitute such a failure.

Protocol No VIII in fact records the anxiety of Member States to protect production of the raw material.

In Article 4 the Member States agreed to reconsider the situation at the end end of the period of six years laid down in Article 2 and decided that the duty should then be reimposed within the framework of Article 28 if at that date the Council finds 'that production of raw silk in Italy has at least maintained its present level (840 metric tons) and that for comparable qualities the price of this product is no higher than the world c.i.f. price at Community port plus 10%'.

The aim of Protocol No VIII was thus closely linked to the production of raw silk and in directing the protective measure towards this objective the Commission did not fail to carry out the abovementioned duties.

Thus, it cannot be claimed that the Commission refused to establish either a special protection taking account of the overheads incurred by the undertakings or additional protection for the processing industry.

Moreover, it is clear from the documents produced at the hearing that during 1964, the year affected by the contested Decision, aggregate imports into Italy of woven silk fabrics decreased perceptibly in quantity and value.

Italian exports in 1964 appear to have remained at a level comparable to, if not higher than, that of the preceding year.

Thus, the state of the market after the contested Decision was taken does not reveal that in authorizing these measures the Commission committed any major error of judgment likely to have serious consequences.

This submission must therefore be dismissed.

Costs

Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

The applicant has failed in its submissions.

It must therefore be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 14, 15, 173 and 226 and to Protocol No VIII of 2 March 1960;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 83;

THE COURT

hereby:

1. **Dismisses as inadmissible the application to suspend the operation of the Decision, contained in Application 32/64;**
2. **Dismisses Application 32/64 as unfounded;**
3. **Order the applicant to pay the costs.**

Hammes Donner Lecourt

Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 17 June 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 6 MAY 1965[1]

Summary

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Mr President,
Members of the Court,

At the time of the establishment of the Common Customs Tariff for the products in list G in Annex I of the EEC Treaty (Agreement of 2 March 1960, Official Journal 1960, p. 1825), the Member States of the Community agreed in Protocol No VIII concerning silk (raw, tariff heading 50.02) annexed to the Agreement to express their support

1 — Translated from the German.