JUDGMENT OF THE COURT (Third Chamber)

20 May 2010 *

In Case C-160/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 1 April 2009, received at the Court on 8 May 2009, in the proceedings

Ioannis Katsivardas – Nikolaos Tsitsikas OE

v

Ipourgos Ikonomikon,

* Language of the case: Greek.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 March 2010,

after considering the observations submitted on behalf of:

— Ioannis Katsivardas – Nikolaos Tsitsikas OE, by E. Stamouli and S. Gikas, dikigoroi,

— the Greek Government, by E. Leftheriotou, A. Vasilopoulou and S. Papaïoannou, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— the European Commission, by G. Valero Jordana and I. Zervas, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the most-favoured-nation clause in Article 4 of the Cooperation Agreement concluded between the European Economic Community, of the one part, and the Cartagena Agreement and the member countries thereof – Bolivia, Colombia, Ecuador, Peru and Venezuela – of the other part ('the Cooperation Agreement'), approved by Council Regulation (EEC) No 1591/84 of 4 June 1984 (OJ 1984 L 153, p. 1).

2 The reference was made in proceedings between Ioannis Katsivardas – Nikolaos Tsitsikas OE ('Katsivardas'), a partnership governed by Greek law, and the Ipourgos Ikonomikon (Minister for Finance) concerning the refund of a sum which Katsivardas paid, following the customs clearance of a consignment of bananas imported from Ecuador in 1993, in respect of the excise duty on bananas which was prescribed at the time by Greek law.

Legal context

International agreements

General Agreement on Tariffs and Trade

3 The General Agreement on Tariffs and Trade of 1994 ('the 1994 GATT'), which is included in Annex 1A to the Agreement establishing the World Trade Organisation, was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). The 1994 GATT states, in Article 1(a), that it includes the provisions in the General Agreement on Tariffs and Trade of 1947 ('the 1947 GATT'), as rectified, amended or modified by the terms of legal instruments which entered into force before the date of entry into force of the Agreement establishing the World Trade Organisation.

4 The provisions of the 1947 GATT adopted by the 1994 GATT include the most-favoured-nation clause in Article I(1), which is worded as follows:

'With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments

for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.'

5 Article III(2) of the 1947 GATT relates to internal taxes or other internal charges, whilst Article III(4) refers to the laws, regulations and requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products.

Cooperation Agreement

6 Article 1 of the Cooperation Agreement, the text of which forms an integral part of Regulation No 1591/84 by which that agreement was approved, provides that, 'in the light of their mutual interests and in accordance with their long-term economic objectives, the Contracting Parties undertake to foster, within the limits of their competence, the broadest possible economic cooperation from which no field shall be excluded in advance, taking into account their different levels of development'. Article 1 adds that the objective of such cooperation is "to contribute generally to the development of the Parties" respective economies and to raising their standards of living'.

7 Article 4 of the Cooperation Agreement provides:

"*Most-favoured-nation treatment*

1. The Contracting Parties shall, with regard to imported or exported goods, grant each other most-favoured-nation treatment in all matters relating to:

— customs duties and charges of all kinds, including the procedures for collecting such duties and charges,

— regulations concerning customs clearance, transit, warehousing or transhipment,

— direct or indirect taxes and other internal charges,

— regulations concerning payments, including the allocation of foreign currency and the transfer of such payments,

— regulations affecting the sale, purchase, transport, distribution and use of goods on the internal market.

2. Paragraph 1 shall not apply to:

(a) advantages granted to neighbouring countries to facilitate frontier-zone traffic;

(b) advantages granted with the object of establishing a customs union or a free trade area or as required by such a customs union or free trade area, including advantages accorded in the context of a regional economic integration area in Latin America;

(c) advantages granted to particular countries in conformity with the [1947 GATT];

(d) advantages which the member countries of the Cartagena Agreement grant to certain countries in accordance with the Protocol on trade negotiations among developing countries, in the context of the [1947 GATT].

3. This Article shall apply without prejudice to the rights and obligations which exist under the [1947 GATT].'

8 Article 5 of the Cooperation Agreement, relating to the Joint Cooperation Committee, provides in paragraph 2 that that committee is inter alia to recommend solutions to differences which may arise between the parties regarding the interpretation and execution of the Cooperation Agreement.

9 Annex II to the Cooperation Agreement, headed Declaration on commercial cooperation, is worded as follows:

'Under the commercial cooperation provided for in this Agreement, the Parties declare that they are prepared to examine, within the Joint Committee and in the context of their respective economic policies, any specific problems which may arise in the sphere of trade.'

Framework Agreement on Cooperation

10 The framework agreement on cooperation between the European Economic Community and the Cartagena Agreement and its member countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela ('the Framework Agreement on Cooperation'), was approved on behalf of the Community by Council Decision 98/278/EC of 7 April 1998 (OJ 1998 L 127, p. 10).

11 Under Article 2 of the Framework Agreement on Cooperation, the contracting parties undertake to impart renewed vigour to relations between them, reinforcing the development of their cooperation by its extension to new fields.

12 Article 4 of the Framework Agreement on Cooperation provides:

'The Contracting Parties hereby grant each other most-favoured-nation treatment in trade, in accordance with the [1994 GATT].

Both Parties reaffirm their will to conduct trade with each other in accordance with that Agreement.'

13 Article 33(2) of the Framework Agreement on Cooperation provides that the agreement's provisions are to replace the provisions of the previous agreements between the Community and the member countries of the Cartagena Agreement where such provisions are either incompatible with or identical to the provisions of the Framework Agreement.

Fourth ACP-EEC Convention

14 The Fourth ACP-EEC Convention, signed at Lomé on 15 December 1989, was approved by Decision 91/400/ECSC, EEC of the Council and the Commission of 25 February 1991 (OJ 1991 L 229, p. 1). Article 1 of Protocol No 5 on bananas which is annexed to that Convention is worded as follows:

'In respect of its banana exports to the Community markets, [none of the African, Caribbean and Pacific States having concluded the Convention ("the ACP States")]

shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present.'

National law

15 Article 7 of Law No 1798/1988, as amended by Law No 1914/1990, provided from 1 July 1988 that an excise duty of GRD 150 per kilogram was to be charged on bananas imported from abroad and, in certain cases, on bananas produced in Greece. This duty was subsequently increased and then reduced, before being abolished in 1998.

The dispute in the main proceedings and the question referred for a preliminary ruling

16 In July 1993, following customs clearance of a consignment of bananas imported directly from Ecuador, Katsivardas was charged customs duty and other taxes totalling GRD 6 785 565 (EUR 19 913,61), an amount which it paid whilst recording, however, a reservation concerning the sum of GRD 4 986 100 paid by way of excise duty. Katsivardas subsequently requested the refund of that sum and the corresponding value added tax, which in its view had been wrongly paid.

17 Following refusal of a refund by the competent customs authority, Katsivardas brought proceedings before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens), which upheld its action so far as concerns annulment of the notices of assessment at issue and the request for a refund. Since that decision was,

however, set aside by the appellate court, Katsivardas brought an appeal on a point of law before the Simvoulio tis Epikratias (Council of State).

18 The Simvoulio tis Epikratias, unlike the applicant in the main proceedings, takes the view that the excise duty in dispute must be classified as internal taxation within the meaning of Article 95 of the EEC Treaty (which became Article 95 of the EC Treaty, which itself became, after amendment, Article 90 EC), and not as a charge having equivalent effect to customs duty for the purposes of Articles 9 and 12 of the EEC Treaty (which respectively became Articles 9 and 12 of the EC Treaty, which themselves became, after amendment, Articles 23 EC and 25 EC). According to the referring court, such internal taxation could lawfully be charged on bananas imported directly from non-member countries if less favourable tax treatment were not precluded by specific clauses resulting from trade agreements between the Community and those non-member countries, such as Article 4 of the Cooperation Agreement.

19 The referring court also made reference to the judgment in Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, according to which Protocol No 5 on bananas annexed to the Fourth ACP-EEC Convention contains a provision aiming to ensure access of bananas from ACP States to their traditional markets upon conditions no less favourable than those which existed upon the entry into force, on 1 April 1976, of the similar clause in paragraph 1 of Protocol No 6 on bananas annexed to the ACP-EEC Lomé Convention signed on 28 February 1975 ('the standstill clause').

20 Consequently, according to the referring court, the grant of most-favoured-nation treatment to the member countries of the Cartagena Agreement means that bananas originating in those countries are to be equated with bananas coming from the ACP States. Its ability to determine the legality of an excise duty such as that at issue in the

main proceedings thus depends on whether the Cooperation Agreement, in particular Article 4, confers rights which can be directly relied upon by individuals before the national courts of the Member States, so that Katsivardas can rely on that article, read in conjunction with the standstill clause, to contest the excise duty on bananas at issue in the main proceedings.

21 The referring court stated that the Court of Justice declared in Case C-377/02 *Van Parys* [2005] ECR I-1465 that such rights do not accrue from the most-favoured-nation clause in the Framework Agreement on Cooperation, concluded subsequently with the member countries of the Cartagena Agreement, and the advantages resulting from the ACP-EEC Conventions concern only 'traditional' ACP bananas, that is to say bananas originating in the ACP States up to the limit of the annual quantity imported as at 1 April 1976, so that those advantages do not appear to be capable of being extended to bananas originating in other countries.

22 Since the Simvoulio tis Epikratias took the view, on the other hand, that the Court had never ruled on the Cooperation Agreement, it decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Can an individual (a trader importing bananas [originating in] Ecuador) who claims the refund of domestic excise duty as having been wrongly paid plead before the national court that the national tax rule (Article 7 of Law No 1798/1988, as amended by Article 10 of Law No 1914/1990) is incompatible with Article 4 of the [Cooperation Agreement]?'

Consideration of the question referred

Admissibility

23 The Greek Government contests the admissibility of the question referred for a preliminary ruling on the ground that it, first, concerns not the interpretation of a provision of Community law but the extent to which an individual can plead a contradiction between national provisions and a Community measure and, second, does not specify which provision requires interpretation.

24 It is to be recalled that, although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule, it may none the less, within the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of that provision (Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 37 and the case-law cited).

25 The question referred for a preliminary ruling in the present proceedings, which relates to whether an individual can plead before a national court the most-favoured-nation clause in Article 4 of the Cooperation Agreement in order to oppose the application of a national fiscal provision, concerns the ability of that clause to give rise to direct effect for an individual and, therefore, its interpretation.

26 That clause is set out in the Cooperation Agreement, which was approved on behalf of the Community by Regulation No 1591/84 and thus constitutes, in light of settled case-law, an act of the Community institutions which the Court has jurisdiction to interpret in preliminary ruling proceedings (see, to this effect, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6; Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 41; and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 23).

27 It is also settled case-law that questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to verify, enjoy a presumption of relevance. The Court can decline to rule on a reference for a preliminary ruling from a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 67 and the case-law cited).

28 Here, the answer to the question, asked by the referring court, whether a person such as Katsivardas may plead Article 4 of the Cooperation Agreement before the national courts will determine whether the applicant in the main proceedings can effectively invoke the standstill clause which forms the basis of the line of argument set out by it in those proceedings that the excise duty on bananas established by the national legislation is unlawful.

29 Thus, it is not obvious that the interpretation of Community law that is sought would be of no use to the referring court.

30 It follows that the question referred for a preliminary ruling is admissible.

Substance

31 By its question, the referring court essentially asks whether Article 4 of the Cooperation Agreement can be relied upon directly by an individual in a case before the national courts of a Member State.

32 It should first be noted, as a preliminary point, that in conformity with the principles of public international law the institutions of the European Union, which have power to negotiate and conclude an agreement with non-member countries, are free to agree with those countries what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the FEU Treaty, in the same manner as any other question of interpretation relating to the application of the agreement in the European Union (see Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17; Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 34; and Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission* [2008] ECR I-6513, paragraph 108).

33 It should also be noted that, in accordance with the Court's settled case-law, examination of the direct effect of provisions contained in an agreement concluded by the European Union with non-member countries invariably involves an analysis of the spirit, general scheme and terms of that agreement (see *Chiquita Italia*, paragraph 25 and the case-law cited).

34 On the other hand, as the European Commission observed at the hearing, the nature of the legal measure approving the international agreement concerned is not relevant in such an examination. As follows from Case 12/86 *Demirel* [1987] ECR 3719, paragraph 25, the fact that an international agreement has been approved by means of a decision or by means of a regulation cannot affect whether it is recognised as having direct effect. It is therefore necessary to reject the argument in favour of

the most-favoured-nation clause in the Cooperation Agreement having direct effect that Katsivardas derives from the fact that the Cooperation Agreement was approved by a regulation, in contrast to the Framework Agreement on Cooperation which was approved by a decision.

35 With regard to Article 4 of the Cooperation Agreement, contrary to the Italian Government's assertions, the fact that this article appears in a cooperation agreement does not mean that, as a matter of principle, individuals cannot rely upon it. It is settled case-law that the fact that such an agreement is intended essentially to promote the economic development of the non-member countries party to it, confining itself to instituting cooperation between the parties without being directed towards future accession of those countries to the European Union, is not such as to prevent certain of its provisions from being directly applicable (see, by analogy, Case 87/75 *Conceria Bresciani* [1976] ECR 129, paragraph 23; *Kupferberg*, paragraph 22; and Case C-18/90 *Kziber* [1991] ECR I-199, paragraph 21).

36 However, in paragraph 58 of the judgment in *Van Parys*, the Court, answering a question relating to the interpretation of the most-favoured-nation clause in the Framework Agreement on Cooperation which succeeded the Cooperation Agreement, held that that clause may not be relied upon by an individual before a court of a Member State. That interpretation is not called into question by any of the interested parties which have submitted observations to the Court in the present proceedings.

37 It should therefore be examined whether there are factors that permit that assessment of the most-favoured-nation clause in the Framework Agreement on Cooperation to be departed from so far as concerns the interpretation of the most-favoured-nation clause in the Cooperation Agreement.

38 It is true that the most-favoured-nation clause as set out in the Framework Agreement on Cooperation is couched in terms that diverge from those of the most-favoured-nation clause in the Cooperation Agreement. However, the fact that the latter

is drafted differently can be considered a factor requiring a divergent interpretation as regards its possible direct effect only in so far as the general scheme of the agreements and their aims show that the contracting parties intended, by the difference in drafting, to deny Article 4 of the Framework Agreement on Cooperation direct effect previously accorded to Article 4 of the Cooperation Agreement.

39 However, the Framework Agreement on Cooperation, in particular Article 4 thereof, does not display characteristics showing the contracting parties to be placed in a less favourable position compared with the position that they had under the Cooperation Agreement, in particular in relation to the clause providing for most-favoured-nation treatment.

40 On the contrary, as regards first of all the nature and the object of the Framework Agreement on Cooperation, it must be stated that it has the aim of renewing and deepening the mutual commitments entered into by the contracting parties under the Cooperation Agreement. Whilst those two agreements were concluded between the same parties and their implementation falls within the same institutional framework, through the retention, by virtue of Article 32(1) of the Framework Agreement on Cooperation, of the Joint Committee and the sub-committees established by the Cooperation Agreement, the Framework Agreement on Cooperation provides for cooperation that is wider, as regards the number of fields concerned, and deeper so far as concerns the specific actions envisaged.

41 Furthermore, the change in name from a cooperation agreement to a framework agreement on cooperation stems, as Article 39(1) of the Framework Agreement on Cooperation shows, from the intention of the contracting parties to give themselves the ability to supplement that framework agreement by means of sectoral agreements or agreements on specific activities, and not from an intention to enter into commitments having a narrower scope.

42 Comparison of the two agreements thus reveals a gradual strengthening in the intensity of the cooperation to which the parties committed themselves.

43 Moreover, as the Commission points out, when Article 4 of the Cooperation Agreement was adopted, the member countries of the Cartagena Agreement were not yet all parties to the 1947 GATT. As the Court observed in paragraph 57 of the judgment in *Van Parys*, in relation to the Framework Agreement on Cooperation, the intention of the parties to that framework agreement was to extend the application of the system drawn up within the framework of the 1994 GATT to the member countries of the Cartagena Agreement, in order to grant them the benefit of the most-favoured-nation clause in Article I(1) of the GATT, without altering its scope. The same reasoning holds true for the Cooperation Agreement, since the drafting of Article 4 thereof clearly does not reveal an intention of the contracting parties to grant the three member countries of the Cartagena Agreement which were not yet parties to the 1947 GATT trade concessions going beyond those which they had granted to their GATT partners.

44 It follows that the Court's decision in *Van Parys* as to the lack of direct effect of the most-favoured-nation clause in the Framework Agreement on Cooperation is also valid in relation to Article 4 of the Cooperation Agreement.

45 In light of the foregoing, the answer to the question referred is that Article 4 of the Cooperation Agreement approved by Regulation No 1591/84 is not such as to confer on individuals rights upon which they might rely before the courts of a Member State.

Costs

46 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 4 of the Cooperation Agreement concluded between the European Economic Community, of the one part, and the Cartagena Agreement and the member countries thereof – Bolivia, Colombia, Ecuador, Peru and Venezuela – of the other part, approved by Council Regulation (EEC) No 1591/84 of 4 June 1984, is not such as to confer on individuals rights upon which they might rely before the courts of a Member State.

[Signatures]