JUDGMENT OF THE COURT
27 September 1988 *

In Case 51/87

Commission of the European Communities, represented by Peter Gilsdorf, Legal Adviser, and Guido Berardis, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Council of the European Communities, represented by its Legal Adviser, John Carbery, acting as Agent, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer,

defendant,

APPLICATION for the annulment of Council Regulation (EEC) No 3924/86 of 16 December 1986 applying generalized tariff preferences for 1987 in respect of certain industrial products orginating in developing countries, and of Council Regulation (EEC) No 3925/86 of 16 December 1986 applying generalized tariff preferences for 1987 to textile products originating in developing countries (Official Journal 1986, L 373, pp. 1 and 68 respectively),

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Presidents of Chambers, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 19 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 June 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 February 1987, the Commission of the European Communities brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Council Regulation (EEC) No 3924/86 of 16 December 1986 applying generalized tariff preferences for 1987 in respect of certain industrial products originating in developing countries and of Council Regulation (EEC) No 3925/86 of 16 December 1986 applying generalized tariff preferences for 1987 to textile products originating in developing countries (Official Journal 1986, L 373, pp. 1 and 68 respectively).

2 The Community scheme of generalized preferences essentially consists in the suspension of the customs duties set out in the Common Customs Tariff. Under the two contested regulations, suspension of duties is granted in the framework of Community tariff quotas, which are shared out amongst the Member States according to fixed scales of apportionment based on general economic criteria. Under Regulation No 3924/86, covering certain industrial products, the initial shares represent only a first tranche, equal to 80% of the quota. The second tranche (20%) constitutes a reserve to cover the subsequent requirements of Member States which have exhausted their initial shares. Regulation No 3925/86 on textile products provides only for fixed shares, without a reserve.

3 The Commission bases its application on an infringement of the Treaty, in particular Articles 9 and 113, inasmuch as the contested regulations contain provisions which are incompatible with the principles of the customs union and in particular with the unity of the customs system *vis-à-vis* non-member countries.

4 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 It should be noted that under Article 9 (1) of the Treaty the Community is based upon a customs union which covers all trade in goods and involves the adoption of a common customs tariff in relations with non-member countries. According to Article 113 (1) of the Treaty, 'after the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates . . . '. The Court has held that regulations applying generalized tariff preferences fall within the common commercial policy (judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493).

6 Moreover, as the Court held in its judgment of 13 December 1973 in Joined Cases 37 and 38/73 (*Diamantarbeiders* v *Indiamex* [1973] ECR 1609), the Common Customs Tariff is intended to achieve an equalization of customs charges levied at the frontiers of the Community on products imported from non-member countries, in order to avoid any deflection of trade in relations with those countries and any distortion of free internal circulation or of competitive conditions, and the definition of uniform principles for the common commercial policy involves, as does the common tariff itself, the elimination of national disparities, whether in the field of taxation or of commerce, affecting trade with non-member countries.

7 It must be observed that a scheme of national shares will not reduce such disparities, but is, on the contrary, liable to lead to distortions and deflections of trade.

8 Nevertheless, it is to be admitted that, as the common commercial policy now stands, such a scheme may be compatible with Articles 9 and 113 of the Treaty provided that apportionment into national shares is justified by administrative, technical or economic constraints which preclude the administration of the quota on a Community basis. Although the Council enjoys a discretion in this regard, the exercise of that discretion remains subject to review by the Court.

9 Furthermore, to be compatible with the abovementioned provisions of the Treaty, the scheme for the apportionment of a quota into national shares must include machinery to ensure that, until the overall Community quota is exhausted, goods may be imported into a Member State which has exhausted its share without having to bear customs duties at the full rate or to be rerouted via another Member State whose share has not been exhausted. Such a result would be irreconcilable with the nature of the customs tariff and the commercial policy as a common tariff and a common policy.

10 Lastly, it should be noted that the Court has consistently held that the apportionment of a quota into national shares must not impair the free movement of products covered by the Community quota once those products have been put in free circulation in the territory of a Member State and, also, that in every Member State all the traders concerned must have access to the share allocated to that State (judgment of 23 January 1980 in Case 35/79 *Grosoli* v *Ministry of Foreign Trade* [1980] ECR 177; judgment of 13 December 1983 in Case 218/82 *Commission* v *Council* [1983] ECR 4063; and judgment of 7 October 1985 in Case 199/84 *Procuratore della Repubblica* v *Migliorini* [1985] ECR 3325).

11 It is in the light of the foregoing considerations that the compatibility of the contested regulations with Articles 9 and 113 of the Treaty should be examined.

12 First, as regards the regulation on certain industrial products, it should be observed that according to the Commission there are now no further impediments to the centralized administration of the quotas at Community level. In that connection the Commission had stated in its proposal for a regulation, with regard to Community quotas and with a view to the completion of the internal market, that the apportionment of quotas among the Member States was inappropriate, whereas

the proposed new method of administration could improve the use made of them by enabling needs to be met wherever they occurred.

13 However, the Council did not follow that proposal but decided intead that an apportionment of the Community tariff quotas into national shares was necessary. In the preamble to Regulation No 3924/86, the Council explained that 'an arrangement whereby the quotas are apportioned among the Member States would best respect their Community nature . . . the application of the generally accepted principles in respect of the apportionment of the Community tariff quotas which have been opened hitherto cannot be reconciled with the continuity necessary for the application of the tariff preferences concerned; . . . it would accordingly be advisable to adopt a fixed scale for apportioning the Community tariff quotas among the Member States'.

14 That statement of reasons, which is essentially the same as the seventh and eighth recitals in the preamble to the first regulation on the subject (Regulation No 1308/71 of 21 June 1971, *Journal Officiel* 1971, L 142, p. 1), does not set out the reasons justifying, 15 years later, the continuation of the system without alteration.

15 The Council also pleaded the 'sensitive' nature of the products in question, a factor whose importance may vary from one Member State to another, and the resultant economic constraints. It contends that national shares are necessary to enable every Member State to know in advance the volume of goods which will be brought onto its market.

16 That argument must be rejected. An arrangement based on national shares necessarily embodies some uncertainty because, as the Council itself observed, it is always subject to the possibility of goods being re-exported from the other Member States.

17 Lastly, it should be noted that the Council has not seriously challenged the Commission's assertion that it would be in a position to ensure the effective

administration of the quotas now that the introduction of new means of telecommunication has overcome the former obstacles to administration on a Community basis.

18 It follows from the foregoing that the Council has been unable to justify the apportionment of the quotas into national shares. Accordingly, the regulation concerning certain industrial products must be annulled.

19 As regards the regulation on textile products, the Commission admits that there are certain economic and administrative constraints such as to justify apportionment into national shares but takes the view that the regulation is not in conformity with Articles 9 and 113 of the Treaty inasmuch as it makes no provision for the possibility of transferring part of the quota of one Member State to another.

20 In this regard it should be emphasized that, as was noted above, one of the indispensable conditions for ensuring that the apportionment of a quota into national shares is compatible with the Treaty is that the scheme for such apportionment include machinery to ensure that, until the overall Community quota is exhausted, goods may be imported into a Member State which has exhausted its share without having to bear customs duties at the full rate or to be rerouted via another Member State whose share has not been exhausted.

21 It has to be observed that the regulation governing textile products contains no such machinery but envisages only fixed national shares. That regulation, too, must therefore be annulled.

22 In view of the circumstances of this case and the requirements of legal certainty, the effects of both the annulled regulations must be declared to be definitive, pursuant to the second paragraph of Article 174 of the Treaty.

Costs

23 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. As the Council has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Annuls Council Regulation No 3924/86 of 16 December 1986 applying generalized tariff preferences for 1987 in respect of certain industrial products originating in developing countries and Council Regulation No 3925/86 of 16 December 1986 applying generalized tariff preferences for 1987 to textile products originating in developing countries (Official Journal 1986, L 373, pp. 1 and 68 respectively);

(2) Declares that the effects of the annulled regulations are to be considered definitive;

(3) Orders the Council to bear the costs.

Mackenzie Stuart Bosco Due Moitinho de Almeida

Rodríguez Iglesias Koopmans Everling

Bahlmann Galmot Joliet O'Higgins

Delivered in open court in Luxembourg on 27 September 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President