# ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
30 January 2001 *

In Case T-49/00,

**Industria Pugliese Olive in Salamoia Erbe Aromatiche Snc (Iposea)**, whose registered office is in Cerignola (Italy), represented by A. Guarino and A. Lorang, lawyers, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by J. Shieferer, acting as Agent, assisted by M. Moretto, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Regulation (EC) No 2626/1999 of 13 December 1999 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1999 L 321, p. 3),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: H. Jung,

makes the following

## Order

### Facts of the case and legal background

1 The applicant is a company which markets preserved vegetables for human consumption within the Community. In the course of that business it imports preserved mushrooms of the Agaricus variety, principally from the People's Republic of China.

2 The imported mushrooms are subject to the Common Customs Tariff. Chapter 20 of Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EEC) No 2505/92 of 14 July 1992 (OJ 1992 L 267, p. 1) provides for the following headings and subheadings, *inter alia*:

| | |
|---|---|
| '2001 | Vegetables, fruit, nuts and other edible parts of plants, prepared or preserved by vinegar or acetic acid: |
| ... | |
| 2001 90 50 | — — Mushrooms |
| ... | |
| 2003 | Mushrooms and truffles, prepared or preserved otherwise than by vinegar or acetic acid |
| 2003 10 | — Mushrooms: |
| | — — Of the species Agaricus |
| 2003 10 20 | — — — Provisionally preserved, completely cooked |
| 2003 10 30 | — — — Other...' |

3 By Commission Regulation (EEC) No 3537/91 of 4 December 1991 amending Regulation No 2658/87 (OJ 1991 L 335, p. 9) the following additional note was added to Chapter 20 of the combined nomenclature:

'1. For the purpose of heading 2001 vegetables, fruit, nuts and other edible parts of plants prepared or preserved by vinegar or acetic acid must have a

content of free, volatile acid of 0.5% by weight or more, expressed as acetic acid.'

4 At points 3 and 4 of the Annex to Commission Regulation (EC) No 1196/97 of 27 June 1997 concerning the classification of certain goods in the combined nomenclature (OJ 1997 L 170, p. 13) it is stated that the following products are to be classified under subheading 2001 90 50:

'3. Mushrooms (genus *Agaricus*) prepared, blanched, immersed in liquid with the following specifications:

...

4. Mushrooms (genus *Agaricus*) fully cooked ..., preserved in brine (15 to 25% salt) with added vinegar or acetic acid with a content of free, volatile acid of 0.5% by weight or more expressed as acetic acid.'

5 To distinguish mushrooms under subheading 2001 90 50 from those under subheading 2003 10, Commission Regulation (EC) No 2626/99 of 13 December 1999 amending Annex I to Council Regulation No 2658/87 (OJ 1999 L 321, p. 3: hereinafter 'the contested regulation'), repealed points 3 and 4 of the Annex to Regulation No 1196/97 and replaced the first additional note to Chapter 20 of the combined nomenclature (hereinafter 'the CN') with the following text: '1. For the purposes of heading No 2001, vegetables, fruit, nuts and other edible parts of

plants... must have a content of free, volatile acid of 0.5% by weight or more, expressed as acetic acid. In addition, mushrooms falling under subheading 2001 90 50 should not have a salt content exceeding 2.5% by weight.' As stated in Article 3, the contested regulation entered into force on the 21st day following that of its publication in the *Official Journal of the European Communities* on 14 December 1999.

6 It is apparent from the application that, before the contested regulation entered into force, the preserved mushrooms imported by the applicant were classified under subheading 2001 90 50. According to the applicant, the result of the contested regulation is that those products are now classified under subheading 2003 10. Again according to the applicant, the difference in tariff between the subheadings is considerable, given that for subheading 2003 10, not only is the proportional part of the duty higher, but each kilogram of imported product falling under that subheading is also subject to an additional levy of approximately ECU 2.5. The applicant also claims that the change in customs classification means that the products in question are now subject to a quota system, which, to a large extent, makes it impossible for the applicant to import them (see below, paragraph 22).

7 The applicant states that, on the date on which the contested regulation was adopted, it had already entered into contracts with its suppliers, as had other economic operators, for the supply of *Agaricus* mushrooms preserved in brine with a salt content exceeding the limits allowed by the contested regulation, and that these supplies were due to be delivered after the regulation entered into force. The imported products are transported by sea, which takes an average of 30 to 40 days, depending on the season. The applicant adds, without being contradicted by the Commission, that it usually enters into annual contracts with its suppliers, which stipulate the frequency of shipments and determine from the outset the amounts to be sent in each consignment.

## Procedure

8 It was in those circumstances that, by application lodged at the Court Registry on 8 March 2000, the applicant brought the present action.

9 In the application, the applicant claims that the Court should:

— annul the contested regulation;

— order the Commission to pay the costs.

10 In a separate application, lodged at the Court Registry on 22 June 2000, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance. It claims that the Court should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

11 On 12 September 2000, the applicant lodged its observations on that objection, under Article 114(2) of the Rules of Procedure. It contends that the Court should:

— dismiss the objection as inadmissible;

— in the alternative, reserve its decision on the objection for the final judgment;

— order the Commission to pay the costs.

## Admissibility

12 Under Article 114(1) of the Rules of Procedure, if a party so requests, the Court will rule on inadmissibility without examining the substance of the case. Under paragraph 3 of the same article, the remainder of the proceedings is to be oral, unless the Court otherwise decides. In this case, the Court considers that it is sufficiently informed by an examination of the documents before it to give a decision on the objection without opening the oral procedure.

### *Arguments of the parties*

13 The Commission submits that the applicant cannot claim that the contested regulation is of individual concern to it within the meaning of the fourth

paragraph of Article 230 EC. That regulation is a legislative measure, and concerns the applicant only in its objective capacity as an importer of the products concerned. According to the Commission, the applicant cannot rely on a particular situation of fact which distinguishes it from all other persons.

14 In addition, the Commission states that no Community provision requires it to take account of the position of the applicant and to provide for a transitional scheme for goods in transit. Moreover, the applicant could have protected its own interests by obtaining, on request, a binding tariff information allowing it, under Article 12 of Council Regulation (EEC) No 2913/92 of 12 October 1992, establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter the 'Customs Code'), to rely on the previous tariff classification for a certain period and under certain conditions even if the information ceases to be valid, provided that the operator who made the request concluded binding and definitive contracts on the basis of the binding tariff information. The Commission points out that, in this case, the applicant did not request any binding tariff information concerning products in transit.

15 The applicant replies that, as a matter of principle, a measure is of individual concern to a person when that person could have been identified, at least on a logical level, before the adoption of the measure as the person to whom that measure is in reality addressed. The fact that such a measure is of general application does not prevent it from being of individual concern to certain persons (Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraphs 19 and 20). Once it is possible to identify a category of persons which differs from all the others and no other person could come into that category subsequently, after the adoption of the measure in question that measure will be of individual concern to all those to whom it applies in that category.

16 In the field of customs, where a Community measure amending the customs regime applicable to certain products also concerns products which were dispatched before the date of adoption of the measure, but for which the customs formalities are completed after its entry into force, the category of

operators concerned by those products constitutes a closed class, since no new operator can enter that category after the date on which the measure was adopted. Consequently, according to the applicant, the contested regulation is of individual concern to each of those operators.

17 In that regard, the applicant argues that the effects of the contested regulation on those operators could not be foreseen at the time when the products began their journey from the country of origin to the Community. In contrast, all the other operators importing the same category of products at a later stage were at the outset in a position to establish whether the products were to be classified under subheading 2001 90 50 or subheading 2003 10 of the CN. As a result, they were able to make an accurate assessment of the amount of customs duties payable and establish whether they were able to proceed with the import under the quota system (see below, paragraph 22).

18 The applicant contends that the effects of the contested regulation are equivalent to those of a measure with retroactive effect. In both cases, the factual conditions which determine the applicability of the measure were already satisfied when it was adopted, given that the situation could no longer be changed after the adoption of the contested regulation. It is clear, in the applicant's submission, that a retroactive measure is of individual concern to all those to whom it applies.

19 The applicant submits that the Commission's contention that it was under no obligation to take account of the position of importers who had already dispatched their products before the contested regulation was adopted has no relevance as regards admissibility. It can only concern the substance of the case.

20 Furthermore, the applicant argues that the Commission's contention is incorrect. Precisely because of its particular situation, the applicant was in a specific legal situation which the Commission should have taken into account. The applicant was entitled to rely on a legitimate expectation that the Commission would

include in the contested regulation provisions excluding its application to imports which had already begun before its adoption. The fact that the Commission did not take account of such a legitimate expectation leads to only one conclusion: the Commission intended the contested regulation to have effect also *vis-à-vis* operators who had already dispatched their products before its adoption. However, that finding does not have any negative consequences as regards the admissibility of the action.

21 In that respect, the applicant invokes the general principle, expressly stated in Article 12 of the Customs Code, according to which not only the customs authorities, but also the Commission, cannot amend a provision relating to the classification of products without allowing those affected at least six months to adapt to the amendment, where, on the basis of that provision, they were bound by a contract for the sale or purchase of the products in question. According to the applicant, that constitutes an expression of the principle of the protection of legitimate expectations.

22 Finally, the applicant submits that the contested regulation makes it impossible to carry out the operations it was contractually bound to undertake. The quantities to which its contracts relate amount to more than 4 000 tonnes. The importation of mushrooms classified under subheading 2003 10 of the CN is subject to a quota system in accordance with Commission Regulation (EC) No 2125/95 of 6 September 1995 opening and providing for the administration of tariff quotas for preserved mushrooms of the genus Agaricus (OJ 1995 L 212, p. 16), as amended by Commission Regulation (EC) No 2493/98 of 18 November 1998 (OJ 1998 L 309, p. 38). Those regulations authorise the importation of 22 750 tonnes per annum of products originating in China. Under the distribution mechanism laid down by the same regulations, 85% of that amount is reserved for importers who have already imported the same products subject to quota restrictions during previous years. The applicant is not one of those traditional importers, as the products it imported were classified under subheading 2001 90 50 of the CN before the contested regulation entered into force, and were not therefore subject to quota restrictions. Consequently, the applicant argues, it could only participate in the distribution of the remaining 15%, that is 3 412 tonnes, amongst all of the new importers in the Community. Therefore, the amount to be distributed is much lower than the amount the applicant is contractually committed to importing for the current year.

*Findings of the Court*

23 In order to establish whether the contested regulation is of individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC it must be observed at the outset that the regulation is designed to clarify the tariff classification of a certain type of products, by defining the scope of the two subheadings of the CN which, before the date of entry into force of the regulation, could be taken into consideration for the purposes of the classification of that type of product. As the applicant has rightly pointed out, the contested regulation classifies under subheading 2003 10 of the CN those products which could previously be classified under subheading 2001 90 50.

24 The contested regulation is therefore to be seen as a measure of general application within the meaning of the second paragraph of Article 249 EC. It concerns, in the interests of a uniform application of the Common Customs Tariff, an objectively determined situation and produces legal effects with respect to categories of persons envisaged generally and in the abstract, namely, importers of the products it describes (see, to that effect, Case 40/84 *Casteels* v *Commission* [1985] ECR 667, paragraph 11, and order of the Court of First Instance in Case T-120/98 *Alce* v *Commission* [1999] ECR II-1395, paragraph 18).

25 Referring to the case-law to the effect that even a measure of general application may be of individual concern to some economic operators, the applicant submits, in essence, that it belongs to a closed class of economic operators affected by the contested regulation in a particular way, namely the class of importers who had concluded before the adoption of that regulation contracts of purchase to be performed during the period of its application, the products which were the subject of the contracts and which were covered by the said regulation being already in transit to the Community on the date of its adoption. In the applicant's submission, as the contested regulation and the quota system laid down in Regulations No 2125/95 and No 2493/98 had made performance of the contracts in question impossible, the Commission should have taken account of the special situation of those importers.

26 The Court finds, however, that the matters thus raised by the applicant are not sufficient to distinguish it individually for the purposes of the fourth paragraph of Article 230 EC.

27 According to settled case-law on the situation of an applicant belonging to a closed class of economic operators holding contracts whose performance is allegedly prevented by the legislative measure complained of, an application for annulment of that measure can be declared admissible only if the institution from which it emanates was under an obligation, by virtue of specific provisions, to take into account the effects of the measure in question on the situation of those operators (judgments of the Court of Justice in Case C-209/94 P *Buralux and Others* v *Council* [1996] ECR I-615, paragraphs 33 and 34, and of the Court of First Instance in Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 67; see also, to that effect, order of the President of the Court of Justice of 12 October 2000 in Case C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council and Commission* [2000] ECR I-8797, paragraph 46).

28 That case-law also covers the situation of economic operators who, faced with a scheme which introduces quotas for certain imports, are prohibited under that scheme from being issued with import licences (order of the Court of First Instance in Case T-100/94 *Michailidis and Others* v *Commission* [1998] ECR II-3115, paragraph 64, which refers to the judgment in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477).

29 In the present case, the applicant does not invoke any specific provision which would have obliged the Commission to take into consideration, in the contested regulation, the situation of operators such as the applicant with respect to the application of the Common Customs Tariff and to the quota system introduced by Regulations No 2125/95 and No 2493/98. In that respect, the applicant merely pleads the general principle of the protection of legitimate expectations, claiming that Article 12 of the Customs Code is an expression of that principle.

30 In any event, for the purposes of the admissibility of the present application, it is of no avail to the applicant to plead that general principle. First, it is common ground that the applicant has not made use of the possibilities afforded by Article 12 of the Customs Code, as amended by Article 1(3) of European Parliament and Council Regulation (EC) No 82/97 of 19 December 1996 (OJ 1997 L 17, p. 1), in order to obtain at least some protection of its own individual interests by means of a binding tariff information. Second, by postponing the entry into force of the contested regulation to the 21st day following that of its publication, the Commission complied both with the provisions of Article 254(2) EC, and at the same time, took into account the case-law according to which the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new legislation from applying to the future consequences of situations which arose under the earlier legislation (Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 25, and the case-law there cited).

31 Even though the applicant goes on to stress that the class of importers to which it belongs is closed, in that, after the adoption of the contested regulation, no new operator could enter the category of the operators concerned, with the result that the latter could have been easily identified by the Commission, it should be recalled that, according to settled case-law, the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question (Case T-138/98 *ACAV and Others* v *Council* [2000] ECR II-341, paragraph 64, and case-law there cited).

32 As has already been pointed out, the contested regulation provides that the salt content of mushrooms under subheading 2001 90 50 of the CN must not exceed a certain limit. It therefore applies to a situation defined objectively and concerns the applicant only in its objective capacity as an importer of the products thus referred to.

33 For the same reason, the arguments to the effect that the contested regulation has a serious economic impact on the applicant's business, in that it prevented performance of its long-term purchase contracts, cannot be accepted. According to settled case-law, the fact that a legislative measure may have specific effects which differ according to the various persons to whom it applies is not such as to differentiate those persons in relation to all the other operators concerned, where that measure is applied on the basis of an objectively determined situation (*ACAV and Others* v *Council*, cited above, paragraph 66, and the case-law there cited).

34 On the latter point, it should be added that the fact that the applicant had entered into annual supply contracts was a choice it made on the basis of its own commercial interests. Such a contractual position, which is a necessary part of the normal business activity of any importing company, cannot be characterised as a specific right in the sense contemplated in *Codorniu* v *Council*, cited above (see, to that effect, the order in *Michaelidis and Others* v *Commission*, cited above, paragraphs 66 and 67). Nor, therefore, can it distinguish the applicant individually in relation to the contested regulation.

35 It follows from the foregoing that the contested regulation cannot be held to be a measure of individual concern to the applicant. As the applicant does not satisfy one of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, the present application must be declared inadmissible.

36 However, while it is not open to the applicant to apply for the annulment of the contested regulation, it retains the right to plead the illegality of that measure before the national courts, adjudicating in accordance with Article 234 EC (Case C-70/97 P *Kruidvat* v *Commission* [1998] ECR I-7183, paragraphs 48 and 49).

Costs

37 In accordance with Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. As the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicant shall pay the costs.**

Luxembourg, 30 January 2001.

H. Jung
Registrar

A.W.H. Meij
President