JUDGMENT OF THE COURT (First Chamber)
28 April 1999 *

In Case C-31/98,

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

Peter Luksch

and

Hauptzollamt Weiden

on the interpretation of Article 1 of Commission Regulation (EC) No 1395/94 of 17 June 1994 establishing a minimum import price for sour cherries (OJ 1994 L 152, p. 31) and 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 2551/93 of 10 August 1993 (OJ 1993 L 241, p. 1), and in particular Note 1 to Chapter 8 of the Combined Nomenclature,

* Language of the case: German.

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, D. A. O. Edward and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr Luksch, by Clemens Theil, of the Munich Bar,

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1998,

gives the following

Judgment

1 By order of 22 January 1998, received at the Court on 9 February 1998, the Finanzgericht München (Finance Court, Munich) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 1 of Commission Regulation (EC) No 1395/94 of 17 June 1994 establishing a minimum import price for sour cherries (OJ 1994 L 152, p. 31) and 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 2551/93 of 10 August 1993 (OJ 1993 L 241, p. 1), and in particular Note 1 to Chapter 8 of the Combined Nomenclature (hereinafter 'the CN').

2 Those questions were raised in proceedings between Mr Luksch and the Hauptzollamt Weiden (Principal Customs Office, Weiden) concerning the payment of a countervailing charge imposed on Mr Luksch on the ground that he had not adhered to the minimum price for the importation of several consignments of sour cherries.

Applicable legislation

3 Article 1 of Regulation No 1395/94 provides:

'1. The minimum price to be observed for imports into the Community of sour cherries shall be ECU 40 per 100 kilograms net for the product falling within CN code 0809 20 20 and ECU 36 per 100 kilograms net for the product falling within CN code 0809 20 60.

2. If the import price is lower than the minimum price referred to in paragraph 1, a countervailing charge equal to the difference between the two prices shall be levied.'

The first and second recitals in the preamble to that regulation state in this connection that:

'whereas, in the absence of a system of protection at the border, the marketing of Community production could be influenced by competition from third countries offering prices substantially lower that the prices at which Community products can be marketed;

...

[W]hereas, given the short marketing period for the products concerned, measures should be adopted forthwith in order to prevent low-price imports; whereas a system of minimum import prices and countervailing charges for products which do not comply with that price is the most appropriate system for that purpose'.

4 Article 3(2) of Council Regulation (EEC) No 2707/72 of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables (OJ, English Special Edition 1972 (28-30.12), p. 3) provides moreover that those measures may only be taken in so far, and for as long, as they are strictly necessary. The fifth recital in the preamble to that regulation states in this connection that 'the measures referred to above should be in keeping with circumstances so that they have none but the desired effect'.

5 The CN states that sour cherries are to be classified under subheading 0809 20 20 where they are imported into the Community between 1 May and 15 July and under subheading 0809 20 60 where they are imported into the Community between 16 July and 30 April.

6 Note 1 to Chapter 8 of the CN, entitled 'Edible fruit and nuts; peel of citrus fruits or melons', states that that chapter 'does not cover inedible nuts or fruits'.

The main proceedings and the questions referred for a preliminary ruling

7 It appears from the order for reference that on 4 July 1994 Mr Luksch requested the Hauptzollamt Weiden (the competent customs authority) to release for free circulation three consignments of sour cherries, weighing 42 286 kg in total, from Romania, under CN code 0809 20 20. The import price given was DM 65 per 100 kg. Since that price was slightly below the minimum price of ECU 40 per 100 kg laid down in Article 1(1) of Regulation No 1395/94, the Hauptzollamt levied a countervailing charge of DM 2 414.80.

8 When the fruit was delivered on 5 July 1994, it was apparent that it was already in an advanced state of decay. The consignee therefore refused to accept delivery and Mr Luksch instructed an expert to inspect the fruit. The latter confirmed that the fruit was spoiled to a great extent by the formation of mould and decay, which were clearly attributable to storage at too high a temperature. He advised selling the goods to a distillery, estimating the reduction in profits at 75%. Mr Luksch followed this recommendation and sold the cherries to a distillery at a price of DM 10 per 100 kg.

9 Because of the reduction in the import price, by notice of amendment of 8 February 1995, the Hauptzollamt increased the countervailing charge to DM 34 726.86. Mr Luksch lodged an objection against that notice, following which, by decision of 22 May 1995, the Hauptzollamt increased the countervailing charge a second time, raising it to DM 40 124.02, to take into account a reduction in the cost of transporting the goods within the Community.

10 Mr Luksch brought an action against that decision in the court making the reference, claiming essentially that the rules in issue in the main proceedings were not applicable to spoiled goods.

11 The national court was in some doubt as to whether the minimum price rules applied to the goods imported by Mr Luksch, since the objective of those rules, which is to prevent disturbances in the common market caused by abnormally low price offers emanating from third countries, would not be jeopardised by the presence of spoiled goods. It therefore stayed proceedings and referred to the Court the following questions for a preliminary ruling:

'(1) Is Article 1 of Commission Regulation No 1395/94 of 17 June 1994 to be interpreted as meaning that a countervailing charge is to be levied on sour cherries which have deteriorated through the formation of mould and incipient fermentation to such an extent that the only economic use to which they can be put is distillation?

If Question 1 is answered in the affirmative:

(2) Is Annex I to Regulation No 2658/87, in the version in Regulation No 2551/93 of 10 August 1993, and in particular note 1 to Chapter 8 of the Combined Nomenclature, to be interpreted as meaning that the goods described in Question 1 are to be classified under subheading 0809 20 20 or 0809 20 60?'

First question

12 Mr Luksch and the Commission argue that the countervailing charge does not apply to the goods in issue. The preambles to Regulation (EEC) No 1035/72 of 18 May 1972 of the Council on the common organisation of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437) and Regulation No 1395/94 justify the imposition of the countervailing charge only where it is necessary to prevent disturbance in the Community market due to abnormally low price offers emanating from third countries. Mr Luksch and the Commission maintain that the goods in issue in the main action were not in competition with Community produce since the low price at which they were eventually sold was solely attributable to the fact that they were not fit for consumption.

13 In its judgment in Case C-81/92 *Hans Dinter* v *Hauptzollamt Bad Reichenhall* [1993] ECR I-4601, the Court held (at paragraph 19) that protective measures may only be taken to such extent and for such length of time as is strictly necessary and that, consequently, once the objective pursued by the protective measures is attained, the levying of a countervailing charge is unlawful. Those findings should be transposed to the present case, in which the sale to a distillery of spoiled cherries did not affect the Community market in fresh fruit. To levy a countervailing charge in such circumstances would be to offend against the principle of proportionality.

14 The Commission also points out that the deterioration of the goods, and thus also the considerable depreciation in their commercial value, had already occurred when they were released for free circulation, which is the relevant date for the purposes of levying the countervailing charge. An essential condition for applying Article 1 of Regulation No 1395/94 is therefore missing, since the low price paid by the importer is not attributable to the pricing policy of a third country but results from circumstances which are totally unconnected with the provenance of the goods.

15 It should be observed at the outset that it is clear from the first recital in the preamble to Regulation No 1395/94 that the purpose of that regulation is to introduce safeguard measures designed to protect the Community market in sour cherries which, because of imports from third countries offering prices substantially lower than the prices at which Community products can be marketed, is at risk of serious disturbance likely to jeopardise the objectives of Article 39 of the EC Treaty.

16 As the second recital in the preamble to that regulation states, safeguard measures must aim to prevent the influx of goods imported at low prices. That objective can be attained by the introduction of a system of minimum import prices in the Community and the imposition of countervailing charges for goods which do not comply with those prices. It is clear from the regulation that the countervailing charge is in principle determined on the basis of the price originally agreed between the contracting parties.

17 It must therefore be considered whether, despite the apparent absence of any disturbance of the Community market, the levying of the countervailing charge was justified in this case, since the low price at which the goods were sold was essentially attributable to circumstances wholly unconnected with their origin, namely their deterioration to such an extent that the only economic use to which they could be put was distillation.

18 In this connection, it should be borne in mind that Article 3(2) of Regulation No 2707/72 states that protective measures in the fruit and vegetables sector may only be taken 'in so far, and for as long, as they are strictly necessary.' It follows that, as the Court already held in *Dinter*, cited above, at paragraph 19, a case concerning the payment of a countervailing charge for failure to comply with the minimum import price for Morello cherries, when the objective of protecting the Community market pursued by the protective measures is attained, the levying of a countervailing charge is unlawful. The levying of such a charge must be held to be even more unjustified when the functioning of the Community market cannot be affected by a low price which results from circumstances unconnected with the origin of the goods in question.

19 In light of the foregoing, it must be concluded that, in circumstances such as those in point in the main proceedings, payment of a countervailing charge may only be demanded if, and only in so far as, it is strictly necessary to attain the objectives pursued by Regulation No 1395/94.

20 It is for the referring court to ascertain, in the light of all the guidance on interpretation set out above, the reasons for which, on the day the importer requested the release for free circulation of the sour cherries, their price was below the minimum price and, in particular, whether that low price arose from circumstances wholly beyond the importer's control and totally unconnected with the origin of the goods.

21 The answer to the first question must therefore be that Article 1 of Regulation No 1395/94 must be interpreted as meaning that a countervailing charge may not be levied in respect of sour cherries released for free circulation within the Community at a low price, where their low price is attributable to circumstances beyond the control of the importer and unconnected with the origin of the goods, such as a significant and unexpected deterioration of the fruit.

The second question

22 Since the second question was put only in the event of the first question being answered in the affirmative, there is no need to reply to it.

Costs

23 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Finanzgericht München by order of 22 January 1998, hereby rules:

Article 1 of Commission Regulation (EC) No 1395/94 of 17 June 1994 establishing a minimum import price for sour cherries must be interpreted as meaning that a countervailing charge may not be levied in respect of sour cherries released for free circulation within the Community at a low price, where their low price is attributable to circumstances beyond the control of the importer and unconnected with the origin of the goods, such as a significant and unexpected deterioration of the fruit.

Jann Edward Sevón

Delivered in open court in Luxembourg on 28 April 1999.

R. Grass P. Jann

Registrar President of the First Chamber