JUDGMENT OF THE COURT OF 3 OCTOBER 1978 [1]

Amministrazione delle Finanze dello Stato v the Rasham undertaking (preliminary ruling requested by the Corte Suprema di Cassazione)

Case 27/78

1. *Customs union — Elimination of quantitative restrictions — "Acceleration decision" — Effect on the length of the transitional period — None*
   (EEC Treaty, Art. 8; Council Decision No 66/532)

2. *Commercial policy — Transitional period — Protective measures taken by Member States — Duty to notify — Effect*
   (EEC Treaty, second para. of Art. 115)

1. Council Decision No 66/532 of 26 July 1966 concerning the abolition of customs duties, the prohibition of quantitative restrictions as between Member States and the application of the Common Customs Tariff duties for products other than those set out in Annex II to the Treaty did not bring forward the date of expiry of the transitional period within the meaning of Article 8 of the Treaty.

2. Although the notification prescribed by the second paragraph of Article 115 of the Treaty is compulsory, it is not a condition precedent of the entry into force of the protective measures adopted by the Member States.

In Case 27/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Corte Suprema di Cassazione (Supreme Court of Cassation) for a preliminary ruling in the action pending before that court between

AMMINISTRAZIONE DELLE FINANZE DELLO STATO (Italian State Finance Administration)

and

THE RASHAM UNDERTAKING

1 — Language of the Case: Italian

on the interpretation of Articles 8, 115 and 235 of the EEC Treaty and of Council Decision No 66/532/EEC of 26 July 1966 concerning the abolition of customs duties, the prohibition of quantitative restrictions as between Member States and the application of the Common Customs Tariff duties for products other than those set out in Annex II to the Treaty (Journal Officiel 1966, p. 2971),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

By a notice served on 24 February 1971, the customs office of Domodossola instructed the Rasham undertaking to pay the sum of Lit 601 215 and the costs by way of customs duties and related charges which had not been paid at the time of the clearance through customs on 9 July 1968 of 5 000 tape recorders of Japanese origin coming from Belgium. In that connexion it was stated that, by Circular No 292 of 17 June 1968, the Ministero delle Finanze (Ministry of Finance) had excluded tape recorders of non-Community origin from the treatment provided for products in free circulation in one of the Member States of the EEC, in application of the provisions regarding protective measures referred to in the second paragraph of Article 115 of the EEC Treaty.

Taking the view that the transitional period during which protective measures could be adopted under Article 115 of the EEC Treaty had expired as from 1 July 1968 by virtue of the Council's acceleration decision of 26 July 1966 (Journal Officiel 1966, p. 2971),

Rasham brought an action claiming repayment. By a judgment delivered on 24 February 1973, the Tribunale di Torino upheld the claim. On 13 February 1975 the Corte d'Appello di Torino dismissed the appeal which had been brought by the Amministrazione delle Finanze.

By a document lodged on 19 September 1975 the Amministrazione delle Finanze brought an appeal in cassation against that judgment, and by a document lodged on 23 October 1975 Rasham replied to that appeal with a counter-appeal and in addition an application for a conditional interlocutory order (ricorso incidentale condizionato).

The Amministrazione delle Finanze argued that Decision No 66/532 of 26 July 1966 did not shorten the transitional period, but merely decided that as from 1 July 1968 customs duties still existing between the Member States would be abolished. Consequently even after the above-mentioned date the Member States were entitled to adopt protective measures pursuant to the second paragraph of Article 115 of the EEC Treaty.

Rasham argued that even if it were held that Italy was entitled to adopt protective measures, the measure actually adopted must be held to be unlawful in that it was not notified to the other Member States and the Commission, since the second paragraph of Article 115 of the Treaty should be read as requiring such notification as a condition precedent for the validity and applicability of the measure concerned.

By an order of 2 December 1977, the Corte Suprema di Cassazione stayed the proceedings and referred the following questions for a preliminary ruling:

"1. Must Decision No 66/532 of the Council of the EEC, under which the Member States provided that customs duties then existing between them on products other than those listed in Annex II to the Treaty were to be abolished (Article 1) and that at the same time the Common Customs Tariff was to be fully applicable to such products imported from third countries (Article 2) on a date (1 July 1968) prior to that laid down in the Treaty pursuant to Article 235 of the Treaty, be interpreted as meaning that it brought forward the date of expiry of the transitional period referred to in Article 8 of the said Treaty?

2. If Question 1 is answered in the affirmative, does the bringing forward of the date of expiry of the transitional period for the aforesaid purposes also entail the corresponding bringing forward of the date before which the Member States may, in the circumstances described in the first paragraph of Article 115 of the Treaty and in case of urgency, themselves take the necessary protective measures pursuant to the second paragraph of Article 115?

3. If the answer to Questions 1 and 2 is to the effect that the Member States' power to take protective measures pursuant to the second paragraph of Article 115 of the Treaty continued to exist, must the said provision, in providing that the Member States are to notify the necessary measures which they themselves take to the other Member States and to the Commission, which may decide that the States concerned are to amend or abolish such measures, be interpreted as meaning that it makes such notification a condition for the validity of the applicability of the provision imposing the said measures?"

The order making the reference to the Court was received at the Court Registry on 3 March 1978.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Italian Government and by the Commission of the European Communities, represented by Alberto Prozzillo, a member of the Legal Service of the Commission, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

The *Italian Government* argues that the acceleration decision of 26 July 1966 refers only to the achievement of the customs union and to the simultaneous full application of the Common Customs Tariff, as is clearly shown by the recitals in the preamble to it. It had to effect on the length of the transitional period as laid down in Article 8 of the Treaty. Hence there was no change in the Member States' entitlement until the actual date expiry of the transitional period to use the powers granted to them by other provisions of the Treaty in order to attain objectives other those contained in the acceleration decision.

The second paragraph of Article 115 of the Treaty concerns the common commercial policy, hence an aim which had not been achieved in fact even by 31 December 1969. Consequently, there is no reason to doubt that the second paragraph of Article 115 of the EEC Treaty was applicable during the period between 1 July 1968 and 31 December 1969.

Moreover, this view is confirmed by the case-law of the Court of Justice, according to which it is certain that the transitional period ended on 31 December 1969 and not on 30 June 1968 (judgment of 18 February 1970 in Case 38/69 *Commission* v *Italian Republic* [1970] 1 ECR 47; judgment of 11 February 1971 in Case 37/70 *Rewe* v *Hauptzollamt Emmerich* [1971] 1 ECR 23; judgment of 15 December 1976 41/76 *Donckerwolcke* [1976] ECR 1921).

The scope and purpose of Decision No 66/532 of 26 July 1966 together with the principles which emerge from the case-law of the Court do not admit of the view that the acceleration decision brought forward to 30 June 1968 the date of expiry for the transitional period laid down in Article 8 of the EEC Treaty, and consequently require that the first question in the order for reference should be answered in the negative.

This conclusion makes purposeless the second question, which was asked by the national court in the event of the first question being answered in the affirmative.

The Italian Government argues that the third question is in reality purposeless, since the protective measure concerned was in point of fact adopted in agreement with the competent departments of the Commission and was duly notified. The Italian Government does not see any purpose in the Court of Justice giving a ruling on this point.

Purely for the sake of completeness, the Italian Government puts forward the view that notification of a protective measure to the Member States and to the Commission is not and cannot be a condition for the validity or the applicability of the national measure. In fact, it is no more than a means of informing the other Member States and a formality enabling the Commission to exercice the supervisory powers conferred on it. Moreover, the Commission could have issued instructions to amend or abolish the protective measure, even in the absence of the prescribed notification.

In conclusion, the Italian Government proposes that the Court should rule that:

"... Decision No 532 of the Council of the EEC of 26 July 1966 did not have the effect of bringing forward the date of expiry of the transitional period laid down in Article 8 of the EEC Treaty; and, if it is found necessary also to answer the third question referred to the Court by the national court, that the notification prescribed in the second paragraph of Article 115 of the EEC Treaty was not a condition for the validity or the applicability of protective measures adopted by national authorities during the transitional period."

The *Commission* observes first of all that the Council and the Commission did not make use of the power provided in Article 8 (5) of the EEC Treaty to curtail the second and third stages of the transitional period. The Council Decision of 26 July 1966 had no effect beyond its purpose, and did not shorten the transitional period generally (last sentence of paragraph 22/25 of the decision of 18 June 1975 in Case 94/74 *IGAV* v *ENCC* [1975] 1 ECR 699, at p. 711).

The Commission proposes that the answer to the first two questions should be that the transitional period was not curtailed by Decision No 66/532/EEC and that in June 1968 the Member States were still entitled to adopt the measures which under the Treaty they were allowed to take during the said period.

However the Commission points out that under the second paragraph of Article 115 a Member State may take only such measures as are not incompatible with the Community measures in force at the time of the adoption of the national measures. Thus the application of the Common Customs Tariff referred to in the aforesaid Council decision restricted the Member States' powers in the field of commercial policy, in that it excluded their power to alter customs duties and to impose such duties upon a product in free circulation within the Community.

This view is confirmed by an argument based on a literal construction of the third paragraph of Article 115. If measures adopted unilaterally by the Member States must take into account the need to expedite the introduction of the Common Customs Tariff, then *a fortiori* they must respect the said tariff once it has been established.

As to the third question, the Commission points out that in general the notification of a measure has no influence upon its validity.

In conclusion the Commission proposes the following answer to Questions 1 and 2, Question 3 then becoming purposeless;

"Decision No 66/532/EEC did not curtail for all purposes the transitional period laid down in Article 8 of the EEC Treaty, but it did restrict the power granted to Member States during the said period by the second paragraph of Article 115 of the EEC Treaty to the power of adopting such measures as are not incompatible with the aforesaid decision."

III — Oral procedure

The Commission of the European Communities, represented by Alberto Prozzillo, a member of the Legal Service of the Commission, submitted oral observations at the hearing on 13 July 1978.

At that hearing the Commission pointed out, in connexion with the notification of the protective measure, that it appeared from its archives that the measure had not been notified.

The Advocate General delivered his opinion at the same hearing.

Decision

1 By an order of 2 December 1977, received at the Court on 3 March 1978, the Corte Suprema di Cassazione referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions relating to the interpretation of Article 115 of the Treaty and of Council Decision No 66/532 of 26 July 1966 concerning the abolition of customs duties, the prohibition of quantitative restrictions as between Member States and the application of the Common Customs Tariff duties for products other than those set out in Annex II to the Treaty (Journal Officiel 1966, p. 2971).

2 The questions were raised in the course of a dispute between the Amministrazione delle Finanze dello Stato (Italian State Finance Administration) and an undertaking which on 9 July 1968 had imported into Italy 5 000 tape recorders of Japanese origin coming from Belgium.

3 The customs authorities called on the importing undertaking to pay the sum of Lit 601 215 together with the additional costs by way of customs duties and related charges which had not been paid at the time of clearance through customs, stating that by that Circular No 292 of 17 June 1968 the Ministero delle Finanze (Ministry of Finance) had excluded goods of the type in question from free circulation treatment, in application of the provisions regarding protective measures referred to in the second paragraph of Article 115 of the Treaty.

4 Taking the view that the transitional period during which protective measures were allowed under Article 115 of the Treaty had expired as from 1 July 1968 by virtue of the Council Decision of 26 July 1966, the importing undertaking claimed repayment of the amount charged.

5 The first question asks whether the Council Decision of 26 July 1966 must be interpreted as meaning that it brought forward the date of expiry of the transitional period referred to in Article 8 of the Treaty.

6 If that question is answered in the affirmative, the second question asks whether the bringing forward of the date of expiry of the transitional period entails a corresponding curtailment of the period referred to in the second paragraph of Article 115 of the Treaty.

7 Adopted under Articles 14 and 235 of the Treaty, the Council Decision of 26 July 1966 is intended to "accelerate the pace of the achievement of the objectives of the Treaty, in particular in the field of the customs union and the abolition of quantitative restrictions" (first recital).

8 For that purpose, Article 1 of the decision provides that:

"Member States shall abolish customs duties still existing as between them on products other than those listed in Annex II to the Treaty, by applying on 1 July 1967 a reduction to lower the duty on each product to 15% of the basic duty and by abolishing these duties on 1 July 1968;"

and Article 2 provides that:

"As from 1 July 1968, Member States shall apply the Common Customs Tariff to products, other than those listed in Annex II to the Treaty, imported from third countries."

9 Thus the decision is based on the concept of a selective acceleration of actions which as a whole were to be completed by the end of the transitional period at the latest, and it applies only to measures to which it specifically refers.

10 Therefore the answer to the first question must be that the Council Decision of 26 July 1966 did not bring forward the date of expiry of the transitional period within the meaning of Article 8 of the Treaty.

11 Consequently it is not necessary to answer the second question.

12 The third question asks whether the stipulation in the second paragraph in Article 115 of the Treaty, to the effect that Member States are to notify protective measures which they have taken unilaterally to the other Member States and to the Commission, must be interpreted as meaning that it makes such notification a condition for the validity or the applicability of the provision imposing the said measures.

13 The provision at issue implies that the unilateral adoption of protective measures and the notification of the Commission and the other Member States should take place at the same time or immediately after one another.

14 However, it cannot be inferred from the wording of the provision that notification is a condition precedent of the entry into force of the measures adopted.

15 It follows that although the duty to notify protective measures which is laid down in the second paragraph of Article 115 of the Treaty is absolute, compliance therewith cannot be a condition precedent of the entry into force of the protective measures adopted.

16 The answer should be in these terms.

Costs

17 The costs incurred by the Commission and by the Italian Government which have submitted observations to the Court are not recoverable.

18 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

THE COURT,

in answer to the questions referred to it by the Corte Suprema di Cassazione by an order of 2 December 1977, hereby rules:

1. Council Decision No 66/532 of 26 July 1966 concerning the abolition of customs duties, the prohibition of quantitative restrictions as between Member States and the application of the Common Customs Tariff duties for products other than those set out in Annex II to the Treaty (Journal Officiel 1966, p. 2971) did not bring forward the date of expiry of the transitional period within the meaning of Article 8 of the Treaty.

2. Although the duty to notify protective measures which is laid down in the second paragraph of Article 115 of the Treaty is absolute,

compliance therewith cannot be a condition precedent of the entry into force of the protective measures adopted.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 3 October 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 13 JULY 1978

My Lords,

I do not think it necessary in this case to ask Your Lordships to adjourn while I consider my opinion.

Your Lordships know the facts of the case.

The first question referred to the Court by the Corte Suprema di Cassazione is, shortly stated, whether Council Decision No 66/532 of 26 July 1966 — often referred to as "the Acceleration Decision" — had the effect of curtailing the transitional period defined by Article 8 of the EEC Treaty.

The answer to that question is, in my opinion, clearly "No".

The Acceleration Decision did three things:

(1) It accelerated the suppression of customs duties as between Member States;

(2) It advanced the date of the entry into force of the Common Customs Tariff; and

(3) It eliminated quantitative restrictions on imports from one Member State into another.

The Decision itself did not however, either expressly or by necessary implication, do more than that. So much was indeed made clear by the Court in its Judgment in Case 94/74 *IGAV* v *ENCC* [1975] 1 ECR where, at p. 711, the Court said this:

"In fact the Council's decision of 26 July 1966 on the abolition of customs duties in line with the implementation of the Common Customs Tariff on 1 July 1968 (OJ p. 2971) is based on the concept of a selective acceleration of actions which as a whole were to be completed by the end of the transitional period at the latest. In these circum-