JUDGMENT OF THE COURT
5 March 1986 *

In Case 242/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry], the Netherlands, for a preliminary ruling in the proceedings pending before that court between

Tezi BV, a limited liability company having its registered office at Woerden (the Netherlands),

and

Minister for Economic Affairs

on the interpretation of Articles 113 and 115 of the EEC Treaty and of Council Regulation (EEC) No 3589/82 of 23 December 1982 on common rules for imports of certain textile products originating in third countries (Official Journal 1982, L 374, p. 106),

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling and K. Bahlmann, Presidents of Chambers, G. Bosco, Y. Galmot and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

after considering the observations submitted on behalf of

Tezi BV, the plaintiff in the main proceedings, by P. M. Storm, of the Rotterdam Bar,

the Government of the Kingdom of the Netherlands, by M. Bos, acting as Agent,

the Government of the French Republic, by F. Renouard and B. Botte, acting respectively as Agent and Deputy Agent,

* Language of the Case: Dutch.

the Government of the Italian Republic, by O. Fiumara, Avvocato dello Stato, acting as Agent,

the United Kingdom, by J. R. J. Braggins, of the Treasury Solicitor's Department, acting as Agent, and, in the oral procedure, by D. Donaldson, QC,

the Commission of the European Communities, by A. Haagsma and H. P. Hartvig, members of its Legal Department, acting as Agents,

after hearing the Opinion of the Advocate General, delivered at the sitting on 2 October 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By a judgment of 2 October 1984, which was received at the Court on 4 October 1984, the College van Beroep voor het Bedrijfsleven (the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions on the interpretation of Articles 113 and 115 of the EEC Treaty.

2 Those questions were raised in proceedings between the company Tezi BV (hereinafter referred to as 'Tezi') and the Netherlands Minister for Economic Affairs concerning the Minister's refusal to grant Tezi licences to import into the Netherlands quantities of textile products falling within subheadings 61.01 B V (d) 3, 61.01 B V (e) 3 and 61.02 B II (e) 6 of the Common Customs Tariff, originating in Macao and released into free circulation in Italy.

3 At the material time, trade in textiles between Macao and the Community was governed by the second Multi-Fibre Arrangement, concluded pursuant to the General Agreement on Tariffs and Trade (GATT). Although not yet officially approved by the Community, the Arrangement became applicable provisionally, in

particular as regards relations between the Community and Macao, by virtue of Council Regulation No 3059/78 of 21 December 1978 (Official Journal 1978, L 365, p. 1), which was replaced by Council Regulation (EEC) No 3589/82 of 23 December 1982 on common rules for imports of certain textile products originating in third countries (Official Journal 1982, L 374, p. 106).

4 Regulation No 3589/82, which applies to the facts of this case, provides that imports into the Community of textile products falling within the various categories listed in Annex I are to be subject to the quantitative limits set out in Annex III. The quantitative limit for products in Category 6 originating in Macao was fixed at 10 114 000 items for 1983. That quantitative limit was divided between the Member States pursuant to Article 3 (2) and Annex IV, the Benelux countries being treated as a single unit.

5 As regards trade in those products between the Benelux countries and the rest of the Community, the Commission, acting under Article 115 of the Treaty and Commission Decision No 80/47/EEC of 20 December 1979 (Official Journal 1980, L 16, p. 14), had authorized the Benelux countries, by Decision No 82/205/EEC of 22 December 1981 (Official Journal 1982, L 97, p. 2), to exercise intra-Community surveillance of imports of the products in question by making them subject to the grant of a licence for the period ending on 30 June 1983. That system of intra-Community surveillance was in operation at the time of the facts of this case.

6 On 29 April 1983 Tezi submitted to the competent Dutch authorities several applications for licences to import the products indicated above.

7 However, those applications were refused pursuant to a decision of 12 April 1983 (Official Journal 1983, C 102, p. 3), by which the Commission, acting on a request made by the Netherlands Government with the other Benelux countries' agreement, authorized the Benelux countries to exclude from Community treatment, from 2 April to 30 November 1983, products falling within subheadings ex 61.01 B V and ex 61.02 B II of the Common Customs Tariff, which originated in Macao and had been released into free circulation in other Member States and for which applications for import licences had been lodged after 1 April 1983.

8 Tezi challenged before the College van Beroep voor het Bedrijfsleven the refusal to grant it the import licences which it had requested, on the ground that the aforementioned Commission decision of 12 April 1983 was invalid.

9 That court decided to stay the proceedings and to refer the following questions to the Court of Justice:

'(1) Must Articles 113 and 115 of the EEC Treaty, taken together, be interpreted as meaning that the Commission may still apply Article 115 in relation to international trade in textiles after the conclusion of the Arrangement regarding international trade in textiles ("the Multi-Fibre Arrangement") and the adoption of Council Regulation (EEC) No 3589/82?

(2) If the answer to Question 1 is in the affirmative, must the phrase "measures of commercial policy taken in accordance with this Treaty by any Member State" contained in Article 115 of the Treaty be interpreted as including a breakdown of Community quantitative limits between the Member States, such as is provided for in Annex IV to Council Regulation (EEC) No 3589/82?'

10 In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations on those questions have been submitted by Tezi, the Government of the French Republic, the Government of the Italian Republic, the United Kingdom and the Commission of the European Communities.

11 By the two questions referred to the Court of Justice, which must be considered together, the national court essentially seeks to establish whether the Commission still has the power to take decisions under Article 115 of the Treaty as regards textile products subject to the arrangements introduced by Regulation No 3589/82 which are in free circulation in other Member States.

12 In that connection, Tezi observes in the first place that in matters of commercial policy the Treaty has transferred power completely and irreversibly to the Community. However, owing to the delay in implementing that policy, the Court has recognized in its decisions that it is possible, even after the expiry of the transitional period, for the Commission to authorize the Member States under Article 115 to maintain, that is to say to continue to apply, national measures of commercial policy.

13 In Tezi's view, that possibility disappears as soon as the Community, acting under Article 113, exercises its powers with regard to the common commercial policy. In its opinion, the way in which the Community exercises those powers is irrelevant, inasmuch as it is not necessary, in order for a common commercial policy to exist, that all commercial policy measures should be uniform and take no account of differences between the Member States. Even in the case of measures which are adapted to national needs but which emanate from the Community it is still possible to speak of a common commercial policy and recourse to Article 115 is therefore ruled out.

14 That conclusion is confirmed, in Tezi's view, by the wording of Article 115, the first paragraph of which refers to 'measures of commercial policy taken in accordance with this Treaty by any Member State', which implies that only national measures of commercial policy may be protected by the grant of authorization by the Commission pursuant to Article 115. On the other hand, measures which the Member States must take in order to implement Community regulations are not covered by the first paragraph of Article 115.

15 Tezi considers that the arrangements introduced by Regulation No 3589/82 constitute a Community measure which manifests the Community's full exercise of its powers in the sphere of the common commercial policy. The fact that those arrangements provide for the division of the Community quota into national subquotas does not affect that conclusion. In particular, the arrangements cannot be regarded as the continuation of a previous national commercial policy, especially since, before the expiry of the transitional period, no import restrictions existed in the Netherlands on the textile products from Macao referred to by the national court.

16 Tezi further points out that Regulation No 3589/82 itself contains provisions designed to remedy the serious difficulties which might arise as a result of trade being deflected towards one or more Member States.

17 In that connection, Tezi refers to Article 7 (2), which provides for a procedure for adapting national subquotas 'particularly in view of trends in patterns of trade'. Tezi considers that that procedure applies not only to direct imports but also to cases in which difficulties arise because of trade flows within the Community.

18 Finally, Tezi points out that, if the procedure provided for in Article 7 (2) proved insufficient, it would still be possible to amend the Community quota under Article 5 of Regulation No 3589/82.

19 Tezi concludes by proposing that the Court should answer the two questions put by the national court in the negative.

20 However, it is contended by all the governments which have submitted written observations in this case and by the Commission that Article 115 is still applicable as regards the textile products covered by Regulation No 3589/82.

21 In support of their view, they cite the Court's judgment of 15 December 1976 in Case 41/76 (*Donckerwolcke* v *Procureur de la République* [1976] ECR 1921), in which the Court held that 'the fact that at the expiry of the transitional period the Community commercial policy was not fully achieved is one of a number of circumstances calculated to maintain in being between the Member States differences in commercial policy capable of bringing about deflections of trade or of causing economic difficulties in certain Member States'. In the same judgment, the Court stated that 'Article 115 allows difficulties of this kind to be avoided by giving to the Commission the power to authorize Member States to take protective measures particularly in the form of derogation from the principle of free circulation within the Community of products which originated in third countries and which were put into free circulation in one of the Member States'.

22 The governments which have participated in these proceedings and the Commission submit that the system introduced by Regulation No 3589/82 does not mean that imports of the products in question are now subject to uniform conditions in all the Member States since they are restricted in each Member State to the limits imposed by the respective national subquotas.

23 They also contest the view that the total Community quota was divided into national subquotas for purely administrative reasons.

24 The Italian Government maintains that, as is clear from the 10th recital in the preamble to Regulation No 3589/82, the division into national subquotas was

adopted in view of the economic requirements of the various Member States and the particular sensitivity of the Community's textile industry.

25 The United Kingdom considers that the national subquotas were not allocated on the basis of the needs of the Community market as a whole but having regard to the various national markets, which continue to exist in the textile products sector and which it must be possible to protect, in appropriate cases, through the application by the Commission of Article 115.

26 As for Article 7 (2), the United Kingdom considers that the mechanism provided therein is slow in operation and unsuitable to deal with deflections of trade.

27 The Commission also considers that Article 7 (2) would have been of no avail in this case, since the aim of that provision is to influence direct imports by adaptating national subquotas; it cannot be applied when, as in this case, all the national quotas are fully utilized.

28 The United Kingdom submits that the possibility provided for in Article 5 of amending the Community quantitative limit cannot be used either in cases such as this, since the non-member countries which would be affected by a reduction in the quantitative limit are not responsible for any deflections of trade occurring after the goods have come into free circulation in Community territory and have no means of preventing them.

29 As regards, more specifically, the second question put by the national court, the Commission and the United Kingdom submit that the phrase 'measures of commercial policy taken in accordance with the Treaty by any Member State' in Article 115 covers both measures taken by Member States for purely national reasons and measures adopted by Member States in order to comply with Community obligations; in both cases substantively identical measures are involved.

30 In conclusion, all the governments which have submitted observations and the Commission submit that the two questions put by the national court should be answered in the affirmative.

31 The Court must observe in the first place that, as it pointed out in its judgment in *Donckerwolcke* (cited above), according to Article 9 (2) of the Treaty, the provisions for the liberalization of intra-Community trade apply in identical fashion to products originating in Member States and to products from non-member countries which are in free circulation in the Community in accordance with the requirements laid down by Article 10. The Court also made it clear that, as regards free circulation of goods within the Community, products in free circulation are definitively and wholly assimilated to products originating in Member States.

32 The existence of a system such as that laid down in Regulation No 3589/82 for textile products originating in non-member countries which are signatories of the Multi-Fibre Arrangement is not of such a nature as to reduce the scope of the principle described above, by reason of the fact that that regulation provides for the division of the Community quantitative limit into national subquotas.

33 Indeed, as the Court stated in its judgment of 13 December 1983 in Case 218/82 (*Commission* v *Council* [1983] ECR 4063), whilst a total Community quota may be divided into national subquotas, such a division cannot hinder the free movement of the goods subject to the quota once they have been released into free circulation in the territory of one of the Member States.

34 It follows that, once goods originating in countries which are parties to the Multi-Fibre Arrangement are imported and released into free circulation in one Member State, they must be able to circulate freely in any other Member State.

35 However, the Court held in its judgment in *Donckerwolcke* that under the system of the Treaty the full application of the principle of free movement to goods imported from non-member countries is conditional upon the establishment of a common commercial policy.

36 The Court observed in that connection that the assimilation to goods originating within the Member States of goods originating in a non-member country but in free circulation in one of the Member States may only take full effect if those

goods are subject to the same conditions of importation, with regard to customs and commercial considerations, irrespective of the State in which they were released into free circulation.

37 In the same judgment, after observing that, despite the expiry of the transitional period, a common commercial policy based, in accordance with Article 113 (1) of the Treaty, on uniform principles had not yet been fully achieved, the Court recognized that the incompleteness of the common commercial policy, together with other circumstances, was likely to maintain differences in commercial policy between the Member States capable of causing deflections of trade or economic dificulties in some Member States.

38 The Court stated that Article 115 enabled difficulties of this kind to be overcome by giving to the Commission the power to authorize Member States to take protective measures, particularly in the form of derogations from the principle that goods originating in non-member countries and released into free circulation in one of the Member States should circulate freely in the Community.

39 The question to be considered is therefore whether Regulation No 3589/82 introduced a genuine common commercial policy, within the meaning of Article 113, for products originating in non-member countries participating in the Multi-Fibre Arrangement, with the result that, in the sphere of application of that regulation, the Commission no longer has the power to grant Member States authorizations under Article 115.

40 An affirmative answer to that question, as suggested by Tezi, would be appropriate only if it could be shown that the system established by Regulation No 3589/82 led to the creation of uniform conditions of importation for textile products, irrespective of the State in which they were released into free circulation.

41 It must be observed first of all in this regard that, within its sphere of application, Regulation No 3589/82 is undoubtedly a step towards the establishment of a common commercial policy based, in accordance with Article 113 (1) of the Treaty, on uniform principles.

42 However, it does not appear that the system established by that regulation has brought about complete uniformity as regards conditions of importation. The second clause of the 10th recital in the preamble to the regulation states in fact

that 'the extent of the disparities existing in the conditions for importation of these products into the Member States and the particularly sensitive position of the Community textiles industry mean that the said conditions can be standardized only gradually'.

43 Contrary to Tezi's contention, the disparities in question cannot therefore be attributed solely to Regulation No 3589/82; they are the result of measures taken by the Member States, on their own initiative, but in accordance with the relevant requirements laid down by Community law. As can be seen from the passage in the 10th recital quoted above, Regulation No 3589/82 merely maintains, to a certain extent, existing disparities, while proclaiming as its goal their gradual reduction and eventual elimination.

44 *A fortiori*, it cannot be maintained, as Tezi does, that the Community quantitative limits have been divided into national subquotas for purely administrative reasons.

45 It is true that the ninth recital in the preamble to Regulation No 3589/82 justifies the division into national quotas by the need to establish a decentralized 'special management procedure' for the Community quantitative limits. However, the ninth recital must be read together with the first sentence of the 10th recital, which states that 'in order to ensure the best possible utilization of the Community quantitative limits, they should be allocated in accordance with the requirements of the Member States and with the quantitative objectives established by the Council'.

46 Nor can Article 7 (2) of Regulation No 3589/82 serve as a basis for arguing that the Community legislature has provided therein for an instrument which makes the application of Article 115 of the Treaty unnecessary.

47 The fact that the allocation of the Community quantitative limits may be adapted 'where this proves necessary, particularly in view of trends in patterns of trade, in order to ensure their improved utilization' could in fact lead, in the event of a reduction of a Member State's national subquota, to a restriction of direct imports of textile products into that Member State — that is to say, imports from non-

member producer countries — but can have no effect on the possibility of importing into that Member State products in free circulation in another Member State.

48 As regards Article 5, which was also relied on by Tezi in order to show that the system provided for in Regulation No 3589/82 leaves no further scope for the application of Article 115 of the Treaty, it is sufficient to point out that a reduction of the total Community quantitative quota would have much more serious consequences for the non-member producer countries than a Commission decision taken under Article 115.

49 Whereas such a decision merely authorizes a Member State not to apply Community treatment to certain products originating in a non-member country and already in free circulation in another Member State, recourse to the possibilities afforded by Article 5 of Regulation No 3589/82 would have the effect of reducing the quantities which may be imported into the Community as a whole and would take no account of the fact that the producer countries have no control over the destination of products once they are in free circulation.

50 It must therefore be concluded that the Commission has retained the power under Article 115 to grant a Member State authorization to adopt protective measures with regard to textile products covered by Regulation No 3589/82 and in free circulation in other Member States where the circumstances justify such action.

51 Moreover, since, as stated above, the system introduced by Regulation No 3589/82 constitutes, in its sphere of application, a step towards the establishment of a common commercial policy based, as Article 113 (1) provides, on uniform principles, the Commission must show great prudence and moderation in exercising the powers which it still has under Article 115 with regard to the products covered by Regulation No 3589/82.

52 Consequently, the answer to the questions put by the national court must be that Articles 113 and 115 of the EEC Treaty, taken together, must be interpreted as

meaning that the Commission may still apply Article 115 in relation to trade in the textile products that are subject to that regulation after the conclusion of the Arrangement regarding international trade in textiles and the adoption of Council Regulation (EEC) No 3589/82 of 23 December 1982.

Costs

53 The costs incurred by the French Government, the Italian Government, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by judgment of 2 October 1984, hereby rules:

Articles 113 and 115 of the EEC Treaty, taken together, must be interpreted as meaning that the Commission may still apply Article 115 in relation to trade in the textile products that are subject to that regulation after the conclusion of the Arrangement regarding international trade in textiles and the adoption of Council Regulation (EEC) No 3589/82 of 23 December 1982.

Mackenzie Stuart Koopmans Everling

Bahlmann Bosco Galmot Kakouris

Delivered in open court in Luxembourg on 5 March 1986.

P. Heim
Register

A. J. Mackenzie Stuart
President