JUDGMENT OF THE COURT (Third Chamber)
24 October 1985 *

In Case 239/84

REFERENCE to the Court under Article 41 of the ECSC Treaty by the College van Beroep voor het Bedrijfsleven, The Hague, for a preliminary ruling in the proceedings pending before that court between

Gerlach & Co. BV, Internationale Expeditie, Bergh,

and

Minister for Economic Affairs, The Hague,

on the validity of the Commission's communication of 29 December 1981 (Official Journal L 372, p. 1),

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Y. Galmot and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of:

the Commission of the European Communities, represented by J. Temple Lang, Legal Adviser, and Frederik Grondman, a member of the Commission's Legal Department, acting as Agents,

after hearing the Opinion of the Advocate General delivered at the sitting on 26 September 1985,

gives the following

* Language of the Case: Dutch.

JUDGMENT

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

Decision

1 By judgment of 18 September 1984, which was received at the Court on 26 September 1984, the College van Beroep voor het Bedrijfsleven [Administrative Court of Last Instance in Matters of Trade and Industry, hereinafter abbreviated to 'the College van Beroep'], referred to the Court for a preliminary ruling under Article 41 of the ECSC Treaty a number of questions concerning the communications whereby the Commission publishes the basic prices in European currency units (ECU) of certain steel products and the rates for converting them into the currencies of the Member States.

2 The main proceedings arise out of a dispute between Gerlach & Co. and the Netherlands Minister for Economic Affairs. On 16 and 17 June 1982 Gerlach made four customs declarations in respect of the importation into the Netherlands of four consignments of galvanized steel sheet originating in the German Democratic Republic to the collector of import duties at the frontier post at Bergh; the latter, acting on behalf of the Netherlands Minister for Economic Affairs, levied anti-dumping duties determined on the basis of the Commission's communication of 29 December 1981 amending the basic prices for certain iron and steel products (Official Journal L 372, p. 1).

3 Gerlach lodged objections with the Inspector of Customs and Excise at Lobith on the ground that the basic prices fixed by the Commission should have been converted into Dutch guilders, not at the ECU rate applicable on 1 January 1982 as required by the aforesaid communication of 29 December 1981, but at the daily rate published by the Commission which was applicable at the date when the importation took place. The objections were rejected and Gerlach appealed to the Tariefcommissie [Administrative Court of Last Instance in Revenue Matters], which forwarded the relevant applications to the College van Beroep.

4 It appears from the documents before the Court that the Netherlands Ministry relies, in the first place, on the telex of 24 November 1982 by which the Commission notified it that the communication of 29 December 1981 should be applied, and, secondly, on Article 2 (2) of Council Regulation (EEC) No 2779/78 of 23 November 1978 on the procedure for applying the European unit of account

(EUA) to legal acts adopted in the customs sphere (Official Journal L 333, p. 5), which provides that:

'The value of the EUA in national currencies for the purposes of determining the classification of goods or the customs duty applicable under the Common Customs Tariff, including . . . anti-dumping duties . . . shall be fixed once a year. The rates to be applied shall be those obtaining on the first working day of October, with effect from 1 January of the following year.'

5 In order to settle the dispute the College van Beroep referred the following questions to the Court for a preliminary ruling:

'(a) Is Council Regulation (EEC) No 2779/78 of 23 November 1978 applicable to products falling within the ambit of the ECSC Treaty, such as those described in this judgment?

(b) If question (a) is answered in the negative, does the Commission of the European Communities derive from another provision of Community law the power to fix the conversion rates of the currencies of the Member States in relation to the ECU so as to be legally binding by means of a communication published in the *Official Journal of the European Communities*?

(c) If question (b) is answered in the affirmative, is a system in which the said conversion rates are fixed only once or a few times a year compatible with Community law as it stands at present?'

6 It should first be pointed out, having regard to the Court's judgment of 21 March 1985 in Case 172/84 (*Celestri* v *Ministry of Finance* [1985] ECR 966), that, as the Commission recognized in its written observations, the anti-dumping duty applicable to the products in question should have been calculated at the date of importation, not on the basis of the Commission's communication of 29 December 1981, but on the basis of the Commission's communication of 30 December 1978 (Official Journal L 372, p. 2), which was applicable by virtue of Article 1 (1) of Commission Recommendation No 3140/78/ECSC of 29 December 1978 (Official Journal L 372, p. 1) and which remained in force until the amending recommendation, No 874/83/ECSC (Official Journal L 96, p. 10), was adopted by the Commission on 12 April 1983. The national court is referred to the text of the judgment in *Celestri* as regards this point.

7 During the proceedings the Commission concluded from that judgment that the application of Recommendation No 3140/78/ECSC to the facts of this case might result in a decision that no anti-dumping duty was owed by Gerlach. It considered that in that event the questions raised by the national court would have no purpose.

8 It should be pointed out in that connection that Article 41 of the ECSC Treaty is based on a clearly defined separation of tasks between the national courts and the Court of Justice and does not allow the latter to appraise the facts which are the subject of the main proceedings or to consider whether the request for a preliminary ruling was appropriate in the circumstances. The Court's sole task is to consider the relevant elements of Community law and to provide the national court with a useful answer.

The first question

9 Article 232 (1) of the EEC Treaty provides as follows:

'The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel.'

It follows that the rules of the ECSC Treaty and all the provisions adopted to implement that Treaty remain in force as regards the functioning of the common market in coal and steel, despite the adoption of the EEC Treaty.

10 As regards more specifically the anti-dumping rules, in accordance with Article 232 (1) of the EEC Treaty the Community legislature confirmed, in the seventh recital in the preamble to Recommendation No 77/329/ECSC of 15 April 1977 (Official Journal L 114, p. 6) and in the 27th recital in the preamble to Recommendation No 3018/79/ECSC of 21 December 1979 (Official Journal L 339, p. 15), that the EEC anti-dumping rules do not apply to products falling within the ambit of the ECSC Treaty, which continue to be governed by separate rules.

11 It follows from the foregoing that the first question should be answered as follows: the provisions of Council Regulation (EEC) No 2779/78 of 23 November 1978 are not applicable to products which fall within the ambit of the ECSC Treaty.

The second question

12 Article 74 of the ECSC Treaty authorizes the Commission to make recommendations to the governments if 'it is found that countries not members of the Community or undertakings situated in such countries are engaging in dumping'. Under Article 86 of the ECSC Treaty the Member States are under a duty to take all appropriate measures to ensure fulfilment of the obligations resulting from recommendations of the Commission. It follows that the Commission is empowered to make binding recommendations designed to combat dumping by non-member countries.

13 Furthermore, under Articles 19 and 21 of the abovementioned basic recommendation, No 77/329/ECSC, anti-dumping duties are to be imposed on the basis of recommendations and are to be collected by the Member States in the form, at the rate and according to the other criteria laid down when the duties were imposed.

14 It should be observed that Article 1 of Recommendation No 3140/78/ECSC expressly provides that the amount of the anti-dumping duties applicable to products of the type involved in the main proceedings is to be calculated on the basis of their effective prices as published in the Commission's communication of 30 December 1978. That communication sets out the amount of those effective prices in ECU and the rates for converting the ECU into the currencies of the various Member States. Those matters must be deemed to be an integral part of Recommendation No 3140/78/ECSC as a result of the express reference embodied in Article 1 (1) of that recommendation.

15 The second question should therefore be answered as follows: the Commission derived from Article 74 of the ECSC Treaty and from Recommendation No 77/329/ECSC the power to issue Recommendation No 3140/78/ECSC, of which the Commission's communication of 30 December 1978 must be regarded as an integral part.

The third question

16 In Decision No 3289/75/ECSC of 18 December 1975 on the definition and conversion of the unit of account to be used in decisions, recommendations, opinions and communications for the purposes of the Treaty establishing the

ECSC (Official Journal L 327, p. 4), as amended by Decision No 3334/80/ECSC of 19 December 1980 (Official Journal L 349, p. 27), the Commission stipulated that the value of the ECU is to be determined on the basis of the daily market exchange rates and that the rates of conversion into the various national currencies are to be published daily in the *Official Journal of the European Communities.*

17 It is true that, by adopting Recommendation No 3140/78/ECSC and thereby basing the calculation of anti-dumping duties on the basic prices expressed in ECU and the conversion rates published on a specific date — an approach already adopted in the case of Recommendation No 1535/78/ECSC of 21 June 1978 (Official Journal L 183, p. 1) —, the Commission departed from the abovementioned system in the specific areas covered by those recommendations.

18 The Court observes that no provision of the basic recommendation, No 77/329/ECSC (as amended), which was the basis for the specific recommendations mentioned above, directly precludes the use of such a calculation method. Article 21 of Recommendation No 77/329/ECSC merely provides that the criteria to be taken into account when calculating the anti-dumping duty are laid down when the duty is imposed.

19 However, it should be observed that, whilst, as the Commission maintains, legal certainty and the danger of deflections of trade may justify the ECU rate's being adapted only periodically, Article 19 (3) of Recommendation No 77/329/ECSC provides that the amount of an anti-dumping duty must not exceed the margin of dumping established and should be less than the margin if such lesser duty would be adequate to remove the injury.

20 The third question should therefore be answered as follows: the prolonged maintenance of obligatory conversion rates for calculating the anti-dumping duty applicable to products falling within the ambit of the ECSC cannot be considered as such to be incompatible with Community law, unless it is established that the resulting calculation conflicts with the requirements of Commission Recommendation No 77/329/ECSC of 15 April 1977 and, in particular, with Article 19 (3) thereof.

Costs

21 The costs incurred by the Commission of the European Communities, which has 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 proceedings pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the College van Beroep, by order of 18 November 1984, hereby rules:

(1) The provisions of Council Regulation (EEC) No 2779/78 of 23 November 1978 (Official Journal L 333, p. 5) are not applicable to products which fall within the ambit of the ECSC Treaty.

(2) The Commission derived from Article 74 of the ECSC Treaty and from Recommendation No 77/329/ECSC of 15 April 1977 (Official Journal L 114, p. 6) the power to issue Recommendation No 3140/78/ECSC of 29 December 1978 (Official Journal L 372, p. 1), of which the Commission's communication of 30 December 1978 must be regarded as an integral part.

(3) The prolonged maintenance of obligatory conversion rates for calculating the anti-dumping duty applicable to products falling within the ambit of the ECSC cannot be considered as such to be incompatible with Community law, unless it is established that the resulting calculation conflicts with the requirements of Commission Recommendation No 77/329/ECSC of 15 April 1977 and, in particular, with Article 19 (3) thereof.

Everling Galmot Kakouris

Delivered in open court in Luxembourg on 24 October 1985.

P. Heim
Registrar

U. Everling
President of the Third Chamber