JUDGMENT OF THE COURT
20 October 1987 *

In Case 128/86

Kingdom of Spain, represented by Luís Javier Casanova Fernández, Secretary-General for the European Communities, acting as Agent, assisted by Fernando Mansito Caballero, Director-General for the Coordination of Legal and Institutional Relations with the Communities, Jaime Folguera Crespo, Deputy Director-General for the Coordination of Legal Affairs concerning the Communities, and Mrs Rosario Silva Lapuerta, a member of the Legal Department of the Ministry of Foreign Affairs, Mr Fuertes Suárez, Technical Adviser at the office of the Secretary of State for the European Communities, and Michael Waelbroeck, Advocate, with an address for service in Luxembourg at the Spanish Embassy, 4-6 boulevard Emmanuel-Servais,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Jean-Claude Séché, acting as Agent, assisted by Carlos Palacio, a member of its Legal Department, with an address for service in Luxembourg at the office of G. Kremlis, also a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Regulation (EEC) No 648/86 of 28 February 1986 fixing the regulatory amounts for 1985/86 for imports of certain viticultural products from Spain into the Community as constituted on 31 December 1985 (Official Journal 1986, L 60, p. 54), as amended by Commission Regulation (EEC) No 969/86 of 3 April 1986 (Official Journal 1986, L 89, p. 22), is void,

* Language of the Case: Spanish.

THE COURT,

composed of: G. Bosco, President of Chamber, acting as President, O. Due and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 9 April 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 June 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 26 May 1986, the Kingdom of Spain brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Regulation No 648/86 of 28 February 1986 fixing the regulatory amounts for 1985/86 for imports of certain viticultural products from Spain into the Community as constituted on 31 December 1985 and Commission Regulation No 969/86 of 3 April 1986 amending Regulation No 648/86 (Official Journal L 89, p. 22) are void.

2 The mechanism for applying regulatory amounts to imports of viticultural products from Spain into the Community as constituted on 31 December 1985 (hereinafter referred to as 'the Community of Ten') was established by Article 123 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (Official Journal 1985, L 302, p. 23, hereinafter referred to as 'the Act of Accession'). That provision forms part of Subsection 18, entitled 'Wine', of Section II, entitled 'Provisions relating to certain common organizations of markets', in the chapter on agriculture in the Act of Accession. Article 123 (2) provides that a regulatory amount 'shall be

levied' for table wines, whilst a regulatory amount 'may be fixed' for certain wines with an appellation as to origin and for the other products likely to create disturbances on the market.

3 As regards the level of regulatory amounts, Article 123 provides that, in the case of table wines, the amount is to be equal to the difference between the guide prices in Spain and in the Community of Ten, whilst the level of that amount may be adapted in order to take account of the situation of market prices as assessed 'according to the different categories of wines and on the basis of their quality'. The regulatory amount applicable to wines with an appellation as to origin and to the other products of the sector in question is derived from that applicable to table wines 'according to procedures to be determined'. However, according to Article 123 (3), the regulatory amount is to be fixed at a level which ensures conditions under which treatment is no less favourable than those in force under the arrangements prior to accession.

4 The criteria applicable to the calculation of regulatory amounts were established by Council Regulation (EEC) No 480/86 of 25 February 1986 laying down general rules of application of the regulatory amounts applicable to trade in certain wine sector products between the Community as constituted on 31 December 1985 and Spain (Official Journal 1986, L 54, p. 2). That regulation is not contested in this application. On the basis of that regulation, the Commission determined, by means of the contested regulations, the regulatory amounts applicable to table wines and to wines with an appellation as to origin, liqueur wines, new wines, grape juice, grape must and wine fortified for distillation.

5 The applicant relies on two submissions, the first alleging an infringement of essential procedural requirements and a failure to state reasons, and the second alleging an infringement of Article 123 of the Act of Accession. It is appropriate to consider the second submission first.

6 With regard to the alleged infringement of Article 123 of the Act of Accession, the applicant relies on three different complaints. In fixing the regulatory amounts the Commission:

(i) committed a breach of the rule setting a ceiling;

(ii) disregarded the rule regarding the adjustment of the regulatory amount for certain table wines;

(iii) fixed the regulatory amounts for wines with an appellation as to origin and for the other products of the sector in question without establishing that there was a risk of disturbances on the market.

7 The applicant maintains that the regulatory amounts were fixed for certain wines, in particular for white table wines, at such a level that the condition requiring treatment to be no less favourable than it was prior to accession was not observed. That condition, which is laid down by the first sentence of Article 123 (3), means that the level of the regulatory amounts cannot exceed the reduction of the level of customs duties as provided for in the Act of Accession.

8 On that point, it must be borne in mind first of all that Article 123 (3) of the Act of Accession does not simply lay down a ceiling in the first sentence but also specifies, in the second sentence, the consequences which must be drawn from that rule for the calculation of the level of the regulatory amounts. Having provided that the regulatory amount is to be fixed at a level which ensures conditions under which treatment is no less favourable than those in force prior to accession, paragraph (3) goes on to state that 'to this end' that amount is to be calculated in such a way that the amount obtained by increasing the Spanish guide price by the regulatory amount and by the customs duties does not exceed the Community reference price for the product in question.

9 It follows that, in order to ascertain whether the ceiling rule in Article 123 (3) has been complied with, it is necessary to compare the level of the Community reference price for the product in question with the sum of the Spanish guide price for that product, the regulatory amount and the customs duty.

10 At the Court's request, the Commission submitted a table of figures showing, for the most common table wines, the calculation of the regulatory amounts in relation to the levels of the Community reference prices, the Spanish guide prices and the customs duties. Those figures, which are not contested by the applicant, show that the level of the reference price representing the ceiling to be observed was not reached but that, on the other hand, the sum of the Spanish guide price, the regulatory amount and the customs duty was considerably below that ceiling.

11 As the applicant has not put forward any firm evidence in support of its complaint, in so far as it concerns the other products of the sector in question, this complaint cannot be upheld.

12 The applicant also maintains that the Commission fixed regulatory amounts only for the traditional categories of table wines without taking account of superior quality table wines and without providing for a specific amount for that category. In so doing, the Commission infringed not only the adjustment rule laid down in Article 123 (2) of the Act of Accession but also Article 2 (3) of Council Regulation No 480/86, according to which the regulatory amount for certain table wines is to be set at a level below the highest regulatory amount for the type of table wine in question.

13 In response to a question from the Court, the Commission stated, in the first place, that certain table wines bottled and marketed in the production area are of a high quality owing to the particular care taken over them and to the specific conditions in which they are produced, and secondly that the cost of bottling and of transporting bottled wines represents a large part of the final value of the product. For those reasons, the Commission associated bottling in the production area with the concept of quality in the case of those table wines, to which it therefore applied a different regulatory amount, namely an amount reduced by 50% compared with the amount applicable to equivalent unbottled wines.

14 It is in fact clear from the Annex to Regulation No 648/86 that specific regulatory amounts were laid down for white table wine and red or rosé table wine 'in containers holding 0.75 litres or less'. The level of those amounts is 50% lower than the level of the lowest regulatory amount laid down for the same wines in other containers, and in particular for those supplied in bulk. The applicant has failed to demonstrate in what way the Commission acted unlawfully by relying on that distinction in adjusting the regulatory amounts 'according to the different categories of wines and on the basis of their quality' as provided for in Article 123 (2) of the Act of Accession.

15 Accordingly, the complaint that the adjustment rule was not observed cannot be upheld.

16 The applicant also contends that the regulatory amounts for wines with an appellation as to origin and for the other viticultural products, other than table wines, were fixed without the necessary conditions being fulfilled. In the case of the viticultural products in question, Article 123 (2) of the Act of Accession expressly provides that the application of the mechanism for regulatory amounts is subject to the existence of a risk of disturbances on the market, a condition which is also contained in Article 3 of Council Regulation No 480/86. The existence of such a risk cannot be established until changes in trade have been analysed and prices charged on the market have been calculated; the Commission has not done either.

17 In its defence, the Commission merely points out that the level of the regulatory amounts 'was fixed on the basis of the risk of disturbances presented by the wines in question' and that, accordingly, if an amount higher than zero was fixed, 'the reason was the existence of a risk of disturbance'. In response to a request from the Court to specify what factors likely to create disturbances on the market had been taken into consideration in fixing and calculating the regulatory amount applicable to wines with an appellation as to origin, the Commission simply replied that, in its view, the factors which may create disturbances on the wine market are the price and the possibility of commercial substitution, both of which reflect the degree of competition and, consequently, the degree of disturbance. The Commission added that it fixed the regulatory amount at zero for certain kinds of dry liqueur wines with an appellation as to origin, including in particular sherry wines, since those wines were unlikely to create disturbances on the market of the Community of Ten, which produces exclusively sweet liqueur wines.

18 It follows from those explanations that, in fixing the regulatory amounts for wines with an appellation as to origin and for the other viticultural products other than table wines, the Commission relied on the argument that a risk of disturbance arises once it can be established that it is possible for Spanish wines to be substituted for wines produced in the Community of Ten.

19 That argument of the Commission is based on a misconception of disturbances on the market. It is tantamount to denying the difference between the system applicable to table wines and that laid down for the other viticultural products. Whilst requiring the mechanism for regulatory amounts to be applied to imports of

Spanish table wines into the Community of Ten, the Act of Accession provides that, in the case of the other products of the sector concerned by that mechanism, its application depends on the existence of a risk of disturbances on the market resulting from the importation of those products. In making any extension of the application of the mechanism for regulatory amounts to viticultural products other than table wines subject to the specific condition that there must be a risk of disturbances, Article 123 (2) of the Act of Accession covers a situation in which the importation of those products into the Community of Ten would, or might, lead to developments actually threatening to upset the balance on the market. Whatever discretion the Commission enjoys in assessing that risk, it cannot simply rely, abstractly, on the possibility of substitution without having any firm evidence of the existence of a real risk of imbalance or disruption.

20 Accordingly, it must be held that the condition laid down by Article 123 (2) (b) was not fulfilled. Hence there was no legal basis for the fixing of regulatory amounts in so far as such amounts were fixed for products other than table wines. The Annex to Regulation No 648/86 as well as Regulation No 969/86, which amends certain amounts fixed in that annex, must therefore be declared void in part.

21 Since the applicant's second submission has been upheld only in so far as it concerns products other than table wines, it is still necessary to consider the first submission alleging an infringement of essential procedural requirements and a failure to state reasons. However, the complaint alleging a failure to state reasons concerns exclusively the reasons for the fixing of the regulatory amounts applicable to wines with an appellation as to origin and therefore no longer needs to be examined.

22 With regard to the alleged infringement of essential procedural requirements, the applicant maintains that the final recital of the preambles to the two contested regulations states that the measures provided for are in accordance with the opinion of the Management Committee for Wine, yet the Management Committee did not deliver an opinion on the matter. The Committee refrained from expressing an opinion because a sufficient majority could not be obtained. In the applicant's view, that procedural irregularity is particularly serious since Article 11 of Council Regulation No 480/86 makes the Management Committee procedure compulsory in this case.

23 The Commission acknowledges that the Management Committee did not give an opinion and that the statement set out in the preambles to the two regulations to the effect that the Committee gave a favourable opinion is incorrect. It maintains, however, that this fact is incapable of vitiating the legality of the regulations in question since the Commission was in any event authorized to adopt the proposal submitted to the Management Committee even without a favourable opinion of the Committee, as is clear from Article 67 of Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine (Official Journal 1979, L 226, p. 11), to which Article 11 of Council Regulation No 480/86 refers.

24 It must be pointed out in the first place that in its complaint the applicant alleges the existence of a procedural irregularity inasmuch as the recitals in question contain an untrue statement. It is indeed clear from the Commission's defence that the applicant's complaint is well founded.

25 The procedural irregularity which has been established cannot, however, entail the annulment of the two contested regulations. According to the first paragraph of Article 173 of the Treaty, only the infringement of 'essential' procedural requirements permits the measure in question to be declared unlawful. In this case, the incorrect reference to the opinion of the Management Committee cannot be regarded as an infringement of an essential procedural requirement. It is clear from the documents before the Court that the matter had been properly referred to the Management Committee but that the Committee was unable to give an opinion, whilst according to Article 67 of the basic regulation only an opinion of the Management Committee which is not in accordance with the draft measures proposed by the Commission may entail legal consequences, in particular in the sense that the measures in question are to be referred to the Council. Where, as in this case, the Management Committee does not give an opinion, the Commission is entirely at liberty to adopt those measures on its own responsibility. The absence of an opinion of the Management Committee is not therefore capable of affecting the legality of the measures adopted in that way.

26 Consequently, the complaint alleging an infringement of essential procedural requirements cannot be upheld.

27 It follows from all the foregoing considerations that Commission Regulations Nos 648 and 969/86 must be declared void in so far as they fix the regulatory amounts for viticultural products other than table wines, and that the remainder of the application must be dismissed.

Costs

28 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under the first subparagraph of Article 69 (3), where each party succeeds on some and fails on other heads, the Court may order the parties to bear their own costs in whole or in part.

On those grounds,

THE COURT

hereby:

(1) Declares Commission Regulation (EEC) No 648/86 of 28 February 1986 fixing the regulatory amounts for 1985/86 for imports of certain viticultural products from Spain into the Community as constituted on 31 December 1985 (Official Journal 1986, L 60, p. 54) and Commission Regulation (EEC) No 969/86 of 3 April 1986 amending Regulation No 648/86 (Official Journal 1986, L 89, p. 82) void in so far as they fix regulatory amounts for viticultural products other than table wines;

(2) Dismisses the remainder of the application;

(3) Orders the parties to bear their own costs.

Bosco Due Rodríguez Iglesias Koopmans Everling

Bahlmann Galmot Kakouris Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 20 October 1987.

P. Heim
Registrar

G. Bosco
President of Chamber,
acting as President