JUDGMENT OF THE COURT
14 DECEMBER 1962[1]

Milchwerke Heinz Wöhrmann & Sohn KG and Alfons Lütticke GmbH v Commission of the European Community[2]

Joined Cases 31 and 33/62

Summary

1. Procedure — Preliminary objection of illegality — Proceedings before a national court or tribunal — Direct application to the Court by the parties to those proceedings — Inadmissibility (EEC Treaty, Articles 173, 184)

2. Procedure — Preliminary objection of illegality — Article 184 of the EEC Treaty — Object

3. Procedure — Preliminary ruling — Proceedings before a national court or tribunal — Request addressed directly to the Court by the parties to those proceedings — Inadmissibility (EEC Treaty, Article 177)

1. It is clear from the wording and the general scheme of Article 184, and in particular from the reference to the time limit laid down in Article 173, that a declaration of the inapplicability of a regulation is only contemplated in proceedings brought before the Court of Justice itself under some other provision of the Treaty, and then only incidentally and with limited effect, and that Article 184 does not permit the said time limit to be avoided.

2. Article 184 does not provide a method of recourse running concurrently with that under Article 173. Its sole object is to protect an interested party against the application of an illegal regulation without thereby in any way calling in issue the regulation itself, which can no longer be challenged because of the expiry of the time limit laid down in Article 173.

3. The parties to an action pending before a national court or tribunal are not entitled to make a direct request to the Court of Justice for a preliminary ruling. Neither the Treaty nor the Protocol imposes such a limitation on the powers of the national court, since a question may only be referred to the Court of Justice for a preliminary ruling under the procedure laid down by Article 177.

In Joined Cases

31/62 — Milchwerke Heinz Wöhrmann & Sohn KG, Wesel/Rhein,

33/62 — Alfons Lütticke GmbH, Germinghausen/Westphalia,

1 — Language of the Case: German.
2 — CMLR.

represented by Fritz Modest, Artur Heemann, Renate Menssen, Jürgen Gündisch, Heinz Binder, advocates of the Hamburg Bar, with an address for service in Luxembourg at the office of Félicien Jansen, huissier, 21 rue Aldringer,

applicants,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Hubert Ehring, Legal Adviser to the European Executives, acting as Agent, assisted by Professor Ernst Steindorff of Tübingen, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Service of the European Executives, 2 Place de Metz,

defendant,

Applications for the annulment of:

(a) Article 3 of the Decision of the Commission of the European Economic Community of 15 March 1961 concerning the fixing of a countervailing charge on imports of whole powdered milk into the Federal Republic of Germany made pursuant to Article 46 of the EEC Treaty (Official Journal of the European Communities No 26 of 13 April 1961, p. 505); and

(b) the Decision of the Commission of 13 December 1961 extending the Decision of 15 March 1961 concerning the fixing of a countervailing charge on imports of whole powdered milk into the Federal Republic of Germany made pursuant to Article 46 of the EEC Treaty (Official Journal of the European Communities No 7 of 27 January 1962, p. 137);

or alternatively for a declaration that the said Decisions do not apply to the applicants;

THE COURT

composed of: A. M. Donner, President, L. Delvaux and R. Rossi (Presidents of Chambers), O. Riese, Ch. L. Hammes (Rapporteur), A. Trabucchi and R. Lecourt, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

1. On 14 December 1960 the Government of the Federal Republic of Germany requested the Commission of the European Economic Community to fix, pursuant to Article 46 of the Treaty, a countervailing charge on imports into its territory of whole powdered milk coming from other Member States.

2. On 15 March 1961 the Commission took a Decision 'fixing a countervailing charge on imports of whole powdered milk into the Federal Republic of Germany pursuant to Article 46'. This Decision was published in the Official Journal of the European Communities No 26 of 13 April 1961, p. 595 et seq.

3. This Decision which, according to Article 5 thereof, was only applicable until 31 December 1961, was extended with effect to 31 December 1962 by a Decision of the Commission of 13 December 1961 (Official Journal of the European Communities No 7 of 27 January 1962, pp. 137 and 138).

4. As a result of this Decision, by the Ninth Order, of 29 June 1961, amending the German Customs Tariff for 1961 (published in the 'Bundesgesetzblatt' II, No 32 of 1 July 1961, p. 788) and by the Second Order, of 28 December 1961, amending the German Customs Tariff for 1962 (published in the 'Bundesgesetzblatt' II, No 58 of 30 December 1961, p. 1684), the Government of the Federal Republic of Germany, in accordance with paragraph 21 (2) (fourth section) and 21 (5) of the Customs Law of 14 June 1961, fixed the aligned customs duty in respect of imports of whole powdered milk coming from Belgium, France and the Netherlands.

5. Applying these rules, the Customs Office of Hamburg — Kehrwieder sent to the applicants on 3 and 12 September 1962 respectively notices of assessment to duty claiming respectively 247 700 DM and 2 451 20 DM in respect of the aligned duty for whole powdered milk imported by them.

6. Both applicants appealed against these notices, the first applicant on 5 September and the second applicant on 28 September 1962, to the competent German authority, using the procedure laid down in paragraphs 228 et seq. of the German Tax Code (Reichsabgabenordnung) of 22 May 1931.

7. In addition, both applicants lodged at the Registry of the Court, on 4 October 1962 in the case of the first applicant and on 9 October 1962 in the case of the second applicant, applications contesting the Decisions of the Commission of 15 March and 13 December 1961. These applications seek the annulment of Article 3 of the 'Regulation referred to as a Decision' of 15 March 1961 and of the whole of the 'Regulation referred to as a Decision' of 13 December 1961 or a declaration that these measures do not apply to the applicants, and also an order for costs against the Commission.

8. At this stage in the proceedings the Court decided by Orders dated 30 October 1962 made pursuant to Article 92 of the Rules of Procedure to examine of its own motion the admissibility of the applications and for this purpose to open the oral procedure.

9. That procedure, which was solely concerned with the admissibility of the two applications, took place before the Court on 14 November 1962. At the same hearing, with the consent of the parties, and after hearing the Advocate-

General, the Court decided in the interests of the efficient administration of justice to join the two applications submitted to it on the ground of the identical nature of their subject matter and to adjudicate upon their admissibility in one and the same decision.
After the parties had been heard the Advocate-General gave his reasoned oral opinion in which he expressed the view that the applications were inadmissible.

II — Submissions and arguments of the parties

The submissions and arguments of the parties on the admissibility of the applications may be summarized as follows:

A — *Admissibility under Article 184 of the Treaty*

In their application which instituted the proceedings, the *applicants* base their action solely on Article 184 of the Treaty which enables the inapplicability of regulations of the Council and of the Commission to be invoked in proceedings where such regulations are in issue. They seek to establish that in the present proceedings the conditions as regards admissibility referred to in that Article are fulfilled by maintaining that:

1. The present case is in fact concerned with regulations; and
2. Under Article 184 it is sufficient that the inapplicability of regulations should be invoked before a court or tribunal, even a national one.

1. On the jurisdiction inferred from the nature of the measures impugned

(a) In this case the *applicants* submit that the measures taken by the Commission which are referred to in the relationships between the Community applications are in fact by reason of the general nature of their applicability, regulations within the meaning of Article 184. In fact these measures are not confined to governing the internal legal and the Member States referred to therein but establish rights and obligations for all natural and legal persons engaged in importing into the Federal Republic of Germany whole powdered milk coming from France, Belgium or the Netherlands. Since they do not confer rights or impose obligations in respect of a specific individual case or a specific group of cases, the contested measures therefore constitute neither individual administrative measures nor decisions which are of direct and individual concern to a particular person. Regulations, however, are measures of a legislative nature and of general application which create rights and obligations affecting Member States and are imposed *in abstracto* upon all individuals who are affected by the system of rules which they establish. Thus they are to be distinguished from individual measures which find their concrete expression in the form of decisions which are only of direct and individual concern to those to whom they are directed.

(b) As an example the applicants point out moreover that the rules for establishing by degrees a common organization of the markets in certain sectors of agriculture, and which also include a system of levies applicable to trade between Member States, were determined by regulations. These regulations however are not directly and automatically applicable in each Member State.

(c) Lastly, the applicants maintain that the first paragraph of Article 46 of the Treaty provides that a countervailing charge must be applied by *all* Member States, even though in certain of them it were fixed at zero. Measures taken by the Commission pursuant to Article 46 are therefore general in their scope

and effect and in substance constitute regulations.
The *defendant* on the other hand maintains that the contested Decisions are indeed decisions within the meaning of Article 189 of the Treaty, and not regulations.
Regulations are binding in their entirety and directly applicable in all Member States. The contested measures are, however, binding *for* and not *in* Member States. They are not directly applicable in the Member States since they only confer rights and impose obligations upon Member States, and not upon their nationals. They only gave the applicants grounds for complaint as the result of the amendment of the German Customs Tariff.

2. On the jurisdiction of the Court

(a) The *applicants* claim that the second condition as regards admissibility under Article 184 is satisfied, since in fact contested proceedings in which regulations of the Commission are in issue are pending before the German authorities. Article 184 does not say before which court or tribunal the proceedings to which it refers must be pending. The mere existence of genuine proceedings is enough to enable a party to those proceedings to invoke the inapplicability of a regulation before the Court.
The *defendant* on the other hand takes the view that by the very terms of Article 184 a party is only permitted to invoke the inapplicability of a regulation by way of an incidental step in a main action brought before the Court of Justice of the Communities. It does not open the way to a direct application to the Court upon the ground that these are proceedings before a national court or tribunal.
The interpretation of Article 184 adopted by the applicants would oblige the Court of Justice to consider whether the proceedings pending before the national court or tribunal in fact call in issue the validity of a regulation. This, however, is prohibited by Article 164 from which it is apparent that the Court is only competent to interpret and apply Community law.

(b) The *defendant* lastly maintains that a case such as the present may only be brought before the Court by means of a reference to it for a preliminary ruling under Article 177.
The *applicants'* reply to this argument is that Article 177 does not guarantee them the judicial protection which they are entitled to claim. Only Article 184, by enabling the parties themselves to bring the matter before the Court, gives them that guarantee, since it does not contain the restrictions on direct applications for annulment imposed by Article 173

The *defendant* replies that the applicants, by pursuing under Article 184 an objective which the Treaty only permits them to attain under Article 173, are seeking to avoid a fundamental provision of the Treaty.

B — *Admissibility under Article 173 of the Treaty*

The *applicants* declared in the course of the oral procedure that they wished to found their application alternatively on the second paragraph of Article 173 of the Treaty.
They maintain that, should the contested measures not be regarded as regulations, then they must be decisions which are of direct and individual concern to the applicants.
In their opinion the period of two months specified in the third paragraph of Article 173 for the institution of proceedings against decisions only runs from the day on which it became obvious that the contested decisions were of direct and individual concern to them. The date of publication in the 'Official Journal of the Communities' or in the 'Bundesgesetzblatt' of the Federal Republic of Germany is irrelevant.

The only day which is to be taken into consideration is the one on which the countervailing charge became effective so far as the applicants were concerned in the specific form of the notice of assessment to duty.

The *defendant* leaves to the Court's discretion the question whether the change in the legal basis of the application is admissible.

It considers that in any event the applications are inadmissible if only because they were not brought within the strict time limit specified in the third paragraph of Article 173. They are out of time, whether the commencement of the period is taken to be the publication of the contested Decisions in the 'Official Journal' or the date on which they came to the knowledge of the applicants, that is to say, at the latest, when the Orders amending the German Customs Tariff were published.

Grounds of judgment

The applications are made in the prescribed form; they are not contested on this ground and there are no reasons for the Court to raise the matter of its own motion. The applicants base their proceedings on Article 184 of the EEC Treaty from which they infer the existence of a right, so far as jurisdiction is concerned, to refer to the Court, for the purpose of having them declared void or inapplicable, Article 3 of the Decision of the Commission of 15 March 1961 and the whole of the Decision of the Commission of 13 December 1961.

Before examining the question whether the contested measures are of their nature decisions or regulations, it is necessary to examine whether Article 184 empowers the Court to adjudicate upon the inapplicability of a regulation when this is invoked in proceedings—as in the present case—before a national court or tribunal.

Article 184 enables any party, notwithstanding the expiry of the period laid down in the third paragraph of Article 173, to invoke before the Court of Justice, for the purpose of making an application for annulment, the inapplicability of a regulation in proceedings in which it is at issue and to plead the grounds specified in the first paragraph of Article 173.

Because Article 184 does not specify before which court or tribunal the proceedings in which the regulation is at issue must be brought, the applicants conclude that the inapplicability of that regulation may in any event be invoked before the Court of Justice. This would mean that there would exist a method of recourse running concurrently with that available under Article 173.

This is however not the meaning of Article 184. It is clear from the wording and the general scheme of this Article that a declaration of the inapplicability of a regulation is only contemplated in proceedings brought before the Court of Justice itself under some other provision of the Treaty, and then only incidentally and with limited effect.

More particularly, it is clear from the reference to the time limit laid down in Article 173 that Article 184 is applicable only in the context of proceedings brought before the Court of Justice and that it does not permit the said time limit to be avoided.

The sole object of Article 184 is thus to protect an interested party against the application of an illegal regulation, without thereby in any way calling in issue the regulation itself, which can no longer be challenged because of the expiry of the time limit laid down in Article 173.

It must be stressed that the Treaty clearly defines the respective jurisdictions of the Court of Justice and of national courts or tribunals. In fact, by virtue of both Article 177 and Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, the decision to suspend proceedings and to refer a case to this Court is one for the national court or tribunal.

If the parties to an action pending before a national court or tribunal were entitled to make a direct request to this Court for a preliminary ruling, they could compel the national court to suspend proceedings pending a decision of the Court of Justice. Neither the Treaty nor the Protocol, however, imposes such a limitation on the powers of the national court.

Although, therefore, Article 184 does not provide sufficient grounds to enable the Court of Justice to give a decision at the present stage, Article 177 does empower the Court to give a ruling if a national court or tribunal were to refer proceedings instituted before it to the Court.

In the light of all these considerations, the Court must declare that it has no jurisdiction to consider the present applications, both insofar as they seek the annulment of the contested measures and insofar as they seek to have them declared inapplicable. It is unnecessary therefore to decide upon the question of the Court's jurisdiction with regard to the exact nature of the measures of the Commission which are challenged by the applicants.

During the oral procedure the applicants alternatively pleaded Article 173 as ground for their applications. With regard to this it does not appear

necessary to examine the admissibility of this change in the legal basis of the requests or the question whether the contested measures are decisions under the second paragraph of Article 173 of the Treaty, since the applicants did not in fact commence their action within the period laid down by the third paragraph of Article 173.

This period must be regarded as having commenced, at the latest, with the publication in the Bundesgesetzblatt of the Federal Republic of Germany on 1 July 1961, of the Ninth Order amending the German Customs Tariff of 1961, or if not then with the publication on 30 December 1961 of the Second Order amending the German Customs Tariff of 1962. It was then at the very latest that the contested measures must have come to the knowledge of the applicants. Their applications, which were made respectively on 4 and 9 October 1962, are therefore inadmissible insofar as they are based on Article 173 since they were made out of time.

The applications are therefore inadmissible in their entirety.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

Since the applications are inadmissible, the applicants must bear the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General:
Having regard to Articles 46, 164, 173, 177, 184 and 189 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby

1. Dismisses the applications as being inadmissible;

2. Orders the applicants to pay the costs.

Donner Delvaux Rossi
Riese Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 14 December 1962.

on behalf of the President
A. Van Houtte L. Delvaux
Registrar President of Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 14 NOVEMBER 1962[1]

Mr President,
Members of the Court,

In the two applications brought against the Commission of the EEC by two German undertakings, the debate in today's oral procedure was confined to the question of the admissibility of the applications and this accordingly prescribes the limits of my remarks.

The applications are directed against a number of Decisions of the Commission, relating to the fixing of a countervailing charge imposed on imports of whole powdered milk into the Federal Republic of Germany. They are the Decision of 15 March 1961, published in the Official Journal of 13 April 1961 at page 595, the amendment of that Decision, published in the Official Journal of 2 May 1961 at page 688, and the Decision of 13 December 1961 extending the first mentioned Decision, published in the Official Journal of 27 January 1962 at page 137. The Commission took all these Decisions under the fourth indent to Article 155 of the Treaty. They are measures which can in principle be the subject matter of applications for annulment.

These applications were originally founded on Article 184 of the EEC Treaty. During the oral procedure the applicants pleaded as a subsidiary point the second paragraph of Article 173.

It is in the light of these two provisions that the admissibility of the applications should be examined, and there is certainly no need to consider all those specific problems which the parties have dealt with, at times in great detail, namely the admissibility of changes in the conclusions, or whether the contested measures should be described as decisions or regulations.

1. *Article 184*

According to the applicants, the intention of Article 184 is to extend judicial protection for persons who, by virtue of the legislative nature of a contested measure, are not entitled to institute proceedings under the second paragraph of Article 173. It is also claimed that Article 184 is meant to make the parties independent of the decision of a national court or tribunal whether or not to refer a question to the European Court of Justice under Article 177. The conditions for Article 184 to apply are said to be met in the present case, because the applicants are involved in proceedings before national courts.

It seems to me that this interpretation is clearly wrong.

1 — Translated from the German.