JUDGMENT OF THE COURT (Sixth Chamber)
16 October 1991 *

In Case C-26/90,

REFERENCE to the Court under Article 177 of the EEC Treaty from the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Hauptzollamt Hamburg-Jonas

and

Wünsche Handelsgesellschaft mbH & Co. KG, Hamburg,

on the interpretation and validity of Commission Regulation (EEC) No 796/81 of 27 March 1981 adopting protective measures applicable to imports of preserved mushrooms (Official Journal 1981 L 82, p. 8) and Commission Regulation No 1755/81 of 30 June 1981 adopting protective measures applicable to imports of preserved cultivated mushrooms (Official Journal 1981 L 175, p. 23),

THE COURT (Sixth Chamber),

composed of P. J. G. Kapteyn, President of the Fourth Chamber, acting as President, G. F. Mancini and C. N. Kakouris, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of

* Language of the case: German.

Wünsche Handelsgesellschaft mbH & Co. KG, by Klaus Landry, Rechtsanwalt Hamburg;

the Commission of the European Communities, by its Legal Adviser, Dierk Booss, and Ulrich Wölker, a member of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of Wünsche Handelsgesellschaft mbH & Co. KG and the Commission at the hearing on 6 June 1991,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1991,

gives the following

Judgment

1 By order of 24 October 1989, which was received at the Court on 24 January 1990, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation and validity of Commission Regulation (EEC) No 796/81 of 27 March 1981 adopting protective measures applicable to imports of preserved mushrooms (Official Journal 1981 L 82, p. 8) and Commission Regulation No 1755/81 of 30 June 1981 adopting protective measures applicable to imports of preserved cultivated mushrooms (Official Journal 1981 L 175, p. 23).

2 Those questions were raised in proceedings between Hauptzollamt (Principal Customs Office) Hamburg-Jonas (hereinafter referred to as 'the Hauptzollamt') and Wünsche Handelsgesellschaft mbH & Co. KG, Hamburg (hereinafter referred to as 'Wünsche'), concerning the payment of additional amounts of DM 2 870 912.33 and DM 1 185 407.33 which the Hauptzollamt had required pursuant to Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance

recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (Official Journal 1979 L 197, p. 1) and Regulations Nos 796/81 and 1755/81.

3 The first additional amount in question was that provided for in Article 1 of Regulation No 796/81, according to which:

'Release into free circulation in the Community of preserved mushrooms within subheading 20.02 A of the Common Customs Tariff other than those referred to in Article 4 and exceeding the quantities laid down pursuant to Article 2(1) and (3) shall, during the period 1 April to 30 June 1981, be subject to the levying of an additional amount of ECU 175 per 100 kilograms net.'

4 The second additional amount was provided for in Article 1 of Regulation No 1755/81 which, under the same conditions, imposed for the period 1 July to 30 September 1981 an additional amount of ECU 160 per 100 kg net.

5 It is apparent from the order for reference that in June and July 1981 Wünsche applied for the release into free circulation of 90 000 cartons of goods declared as wild mushrooms in cans from China accompanied by import licences relating to wild mushrooms from which the Hauptzollamt initially deducted the quantities imported. After they had been released into free circulation the Hauptzollamt, following experts' reports, took the view that the imported goods were cultivated mushrooms. Subsequently, Wünsche, having been informed of the expert's conclusions, produced two import licences relating to cultivated mushrooms; the Hauptzollamt then deducted the quantities of goods imported from the latter licences. However, taking the view that it was not permissible to present import licences *ex post facto*, the Hauptzollamt decided that the imports were not covered by valid import licences and therefore charged the additional amounts mentioned above.

6 Wünsche lodged a complaint, which was dismissed by decision of the Hauptzollamt; it then brought an appeal before the Finanzgericht (Finance Court),

which annulled that decision. The Hauptzollamt then appealed on a point of law to the Bundesfinanzhof, which, taking the view that the outcome of the dispute depended on the interpretation and validity of Regulation No 3429/80, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is an additional amount under Article 1 of Regulation (EEC) No 796/81 and Article 1 of Regulation (EEC) No 1755/81 also to be levied in the case of preserved mushrooms which have been released into free circulation without a valid import licence?

2. If Question 1 is answered in the affirmative, are Regulations Nos 796/81 and 1755/81 valid, in particular as regards the level at which the additional amount is fixed?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant Community legislation, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Question 1

8 According to Wünsche, it follows from both the wording and the purpose of Article 1 of Regulations Nos 796/81 and 1755/81 that the sole criterion for the levying of the additional amount is the release into free circulation of goods in excess of the quantities laid down by those regulations. Accordingly, the regulations cannot be applied to imports already effected since Community protection can no longer be ensured once goods have been released into free circulation.

9 That argument must be dismissed. Article 1 of Regulation No 796/81 and Article 1 of Regulation No 1755/81 both provide that the additional amount is to be levied whenever preserved mushrooms in excess of the quantities laid down pursuant to Article 2(1) and (3) of those regulations are released into free circulation, and no distinction whatsoever is drawn by those provisions regarding the arrangements under which the goods are released into free circulation. According to the system

provided for in those regulations, observance of the quantities laid down is ensured by the granting to economic agents of import licences which do not in the aggregate exceed those quantities. The effectiveness of the system would thus be undermined if goods could be released into free circulation in the Community without its being possible to verify, by requiring production of an import licence, that the quantities of goods in question do not exceed the quantities laid down by the abovementioned regulations.

10 The effectiveness of the system laid down by Regulations Nos 796/81 and 1755/81 is ensured by the levying of the additional amount. It follows that all imports without a valid import licence must, even where the importer acts in good faith, be regarded as being in excess of the quantities laid down by those regulations, thereby giving rise to the levy of the prescribed additional amount. By virtue of that function of the additional amount, it must also be levied where it becomes apparent, after the goods in question have been released into free circulation, that they were imported without a valid import licence.

11 Accordingly, the reply to the national court's first question should be that the additional amount provided for in Article 1 of Regulations Nos 796/81 and 1755/81 must also be levied where preserved mushrooms have been released into free circulation within the Community and it has been discovered, after their release into free circulation, that they were not accompanied by a valid import licence.

Question 2

12 By its second question, the national court essentially asks whether the additional amount laid down by the regulations in question and in particular the level at which that amount was fixed are lawful in the light of the principle of proportionality.

13 As the Court has consistently held, it follows from that principle that measures imposing financial charges on economic agents are lawful provided that the measures are appropriate and necessary for the attainment of the objectives legit-

imately pursued by the legislation in question. Of course, where there is a choice between several appropriate measures, the least onerous measures must be used and the charges imposed must not be disproportionate to the aims pursued (see, for example, the judgment in Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21). Thus, in order to answer the second question, it is first necessary to recall the objective of Regulations Nos 796/81 and 1755/81.

14 The legal basis for those regulations is Council Regulation (EEC) No 516/77 of 14 March 1977 on the common organization of the market in products processed from fruit and vegetables (Official Journal 1977 L 73, p. 1), in particular Article 14(2), pursuant to which the Commission, acting either at the request of a Member State or on its own initiative, is to decide what measures are necessary and communicate them to the Member States; such measures are to be immediately applicable.

15 Pursuant to that provision, Article 2(1) of Council Regulation (EEC) No 521/77 of 14 March 1977 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables (Official Journal 1977 L 73, p. 28) provided for a number of measures.

16 As far as the scope of those measures is concerned, Article 2(2) of the latter regulation provides, *inter alia*, that they may be taken only to such extent and for such length of time as is strictly necessary and that they may be restricted to products imported from or originating in certain countries, to exports to particular countries or to particular qualities or types of presentation.

17 On the basis of those various provisions, the levy of the additional amount was introduced by Regulations Nos 796/81 and 1755/81 as a protective measure. Whilst that measure was not among those expressly envisaged by Regulation No 521/77, it has nevertheless been recognized as lawful by the Court (see the judgment in Case 345/82 *Wünsche Handelsgesellschaft* v *Federal Republic of Germany* [1984] ECR 1995, paragraph 24) in relation to a measure of exactly the same kind, Commission Regulation No 3429/80 adopting protective measures applicable to imports of preserved mushrooms (Official Journal 1980 L 358, p. 66).

18 In that respect, it should be observed that, according to the first three recitals in the preambles thereto, read in conjunction with the first two recitals in the preamble to Regulation No 3429/80, Regulations Nos 796/81 and 1755/81 are intended to maintain, for a further period, pending the adoption of a Council regulation, the protective measures introduced by Regulation No 3429/80 in order to protect the Community market in mushrooms which, on account of imports from non-member countries, was threatened with serious disturbances which were liable to endanger the objectives of Article 39 of the Treaty.

19 As stated in the third recital in the preamble to Regulation No 3429/80, and to the extent to which, as indicated by the third recital in each of Regulations Nos 796/81 and 1755/81, circumstances had not changed, the Commission considered it appropriate, in view of traditional trade flows with non-member supplier countries, not to apply measures to suspend imports but to make imports exceeding the traditional volume subject to a less restrictive measure consisting in levying an additional amount in order to protect the Community market.

20 Having regard to the contested regulations, it should be pointed out that the levy of an additional amount was appropriate and necessary for the attainment of their objectives, as described above. Taking account, however, of the fact that that amount was fixed at a flat rate of ECU 175 per 100 kg net by Regulation No 796/81 and ECU 160 by Regulation No 1755/81, with no provision for it to be set at different levels according to the quality of the goods and the circumstances in which they were imported, it is necessary to determine whether those amounts exceed the limit inherent in observance of the principle of proportionality as expressed in Article 2(2) of Regulation No 521/77.

21 In that respect, the Commission claims that it observed the principle of proportionality because the contested measure is less restrictive of trade than the complete prohibition of imports which it could have applied and because it is more flexible, in that the measure can be adjusted according to the requirements of the market simply by changing the additional amount.

22 That argument cannot be accepted since Regulations Nos 796/81 and 1755/81 were intended not to prohibit imports in excess of certain quantities but to leave open the possibility of issuing import licences against payment of an additional amount even where those quantities were exceeded (see the judgment in *Wünsche*, cited above, paragraph 25). The Commission could thus not have had recourse to prohibition.

23 As for the level of the additional amount, the Commission claims that it had to be high in order to constitute a deterrent.

24 That argument likewise cannot be accepted, because, as already mentioned, the objective pursued by the regulations was not to exclude completely imports in excess of the quantities fixed. Furthermore, the objective of the regulations was not to penalize imports without a licence but to protect the Community market in mushrooms from serious disturbances on account of imports from non-member countries.

25 In that respect, the Commission contends that the level of the additional amount was justified because it corresponded to the cost price of grade 1 preserved mushrooms which, originating in France, had been sold on the German market. That choice was made because France is the leading producer in the Community and Germany the main purchaser. In the Commission's opinion, an additional amount which was merely equal to the difference between the price charged in the exporting country and that charged within the Community would not have enabled the objectives of Regulations Nos 796/81 and 1755/81 to be achieved.

26 That argument must be dismissed. As the Advocate General showed in his Opinion (paragraphs 41 and 44), the effect of the level of the additional amounts laid down by Regulations Nos 796/81 and 1755/81, corresponding to the production costs of mushrooms within the Community, was that the cost of preserved mushrooms produced, like those in the main proceedings, in China was significantly increased in relation to the cost of preserved mushrooms produced in the common market.

27 It should also be pointed out that, as the Commission states, the additional amount was laid down by Regulations Nos 796/81 and 1755/81 solely on the basis of the cost of grade 1 preserved mushrooms produced in the Community. It follows that the level of the additional amount for lower-grade mushrooms imported from non-member countries had much more serious effects and, consequently, considerably exceeded the cost of lower-grade preserved mushrooms produced in the Community. An additional amount set at such a level, which constituted a considerable financial charge for importers, is therefore disproportionate in relation to the objective pursued by the Commission in adopting Regulations Nos 796/81 and 1755/81.

28 In that respect, it must be added that, as the Court held in its judgment in Case 77/86 *The Queen* v *Customs and Excise, ex parte National Dried Fruit Trade Association* [1988] ECR 757, paragraph 29, concerning a countervailing charge imposed as a protective measure in respect of dried grapes, such a charge is not unlawful merely because it is set at a fixed rate. Its legality depends on a whole range of factors, such as the prices charged for imports and the requirements of effectively achieving the desired aim.

29 In the same judgment, the Court stated that the aim of that protective measure was not to inflict an economic penalty on a trader who has imported the goods in question below the minimum price (paragraph 32). However, the introduction of a single, fixed-rate countervailing charge, imposed even where the difference between the import price and the minimum price is very small, amounts to an economic penalty.

30 The same applies to the additional amounts fixed by Regulations Nos 796/81 and 1755/81 at ECU 175 and ECU 160 per 100 kg net respectively which, being applied to all preserved mushrooms irrespective of their origin or grade, lead to a greater penalty being imposed on importers of mushrooms of a grade lower than grade 1, even though Article 2(2) of Regulation No 521/77 authorized the

Commission to take account, *inter alia*, of the origin and quality of the mushrooms and, in the light of those factors, to fix different additional amounts if necessary.

31 It follows from all of the foregoing considerations that the answer to the second question referred by the national court must be that Article 1 of each of Commission Regulations Nos 796/81 and 1755/81 is invalid as regards the level of the additional amount fixed.

Costs

32 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 24 October 1990, hereby rules:

1. **The additional amount laid down by Article 1 of Commission Regulation (EEC) No 796/81 of 27 March 1981 adopting protective measures applicable to imports of preserved mushrooms and the additional amount laid down by Article 1 of Commission Regulation No 1755/81 of 30 June 1981 adopting protective measures applicable to imports of preserved cultivated mushrooms must also be levied in cases where preserved mushrooms have been released into free circulation in the Community and it has been discovered, after their release into free circulation, that they were not accompanied by a valid import licence;**

2. Article 1 of each of those regulations is invalid as regards the level of the additional amount fixed.

Kapteyn Mancini Kakouris

Delivered in open court in Luxembourg on 16 October 1991.

J.-G. Giraud
Registrar

P. J. G. Kapteyn
President of Chamber
acting as President