JUDGMENT OF THE COURT (Fourth Chamber)

28 February 2008 *

In Case C-398/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Düsseldorf (Germany), made by decision of 2 November 2005, received at the Court on 15 November 2005, in the proceedings

AGST Draht- und Biegetechnik GmbH

v

Hauptzollamt Aachen,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis (Rapporteur), R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2007,

after considering the observations submitted on behalf of:

— AGST Draht- und Biegetechnik GmbH, by P. Henseler and T. Lieber, Rechtsanwälte,

— the Council of the European Union, by J.-P. Hix, acting as Agent, assisted by G. Berrisch, Rechtsanwalt,

— the Commission of the European Communities, by T. Scharf and K. Gross, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the validity of Council Regulation (EC) No 1599/1999 of 12 July 1999 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on stainless steel wires with a diameter of 1 mm or more originating in India and terminating the proceeding concerning imports of stainless steel wires with a diameter of 1 mm or more originating in the Republic of Korea (OJ 1999 L 189, p. 1).

2 The reference was made in proceedings between AGST Draht- und Biegetechnik GmbH ('AGST') and Hauptzollamt Aachen ('the Hauptzollamt'), by which the latter imposed on AGST a countervailing duty on imports of stainless steel wires with a diameter of 1 mm or more under subheading 7223 00 19 in the Combined Nomenclature ('the CN') originating in India.

Legal context

3 The provisions which govern the imposition of countervailing duties by the European Community are set out in Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 ('the basic regulation').

4 Article 1(1) of the basic regulation provides as follows:

‘A countervailing duty may be imposed for the purpose of offsetting any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury.’

5 Article 8(7) of the basic regulation provides:

‘Known factors other than the subsidised imports which are injuring the Community industry at the same time shall also be examined to ensure that injury caused by these other factors is not attributed to the subsidised imports pursuant to paragraph 6. Factors which may be considered in this respect include the volume and prices of non-subsidised imports, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.’

Regulation No 1599/1999

6 On 23 March 1999, the Commission of the European Communities adopted Regulation (EC) No 618/1999 imposing a provisional countervailing duty on imports of stainless steel wire having a diameter of 1 mm or more originating in India and the Republic of Korea (OJ 1999 L 79, p. 25; ‘the provisional regulation’).

7 Subsequently, on 12 July 1999, the Council adopted Regulation No 1599/1999 imposing a definitive countervailing duty on imports originating in India and terminating the proceeding concerning imports originating in the Republic of Korea.

8 In another proceeding, concerning stainless steel bars, the Council had adopted, on 13 November 1998, Regulation (EC) No 2450/98 imposing a definitive countervailing duty on imports of stainless steel bars originating in India and collecting definitively the provisional duty imposed (OJ 1998 L 304, p. 1). That regulation was annulled by the judgment of the Court of First Instance of the European Communities in Case T-58/99 *Mukand and Others* v *Council* [2001] ECR II-2521.

The main proceedings and the question referred for a preliminary ruling

9 AGST is one of the principal German producers of flexible stainless steel wires. On 7 August and 17 November 2000, it declared to the Hauptzollamt stainless steel wires with a diameter of 1 mm or more, corresponding to subheading 7223 00 19 in the CN, for their release for free circulation.

10 AGST declared the United Arab Emirates as the goods' place of origin and, in addition, produced invoices addressed to it by Link Middle East Ltd and certificates of origin in Form A, according to which the goods had been manufactured in the United Arab Emirates.

11 An investigation by the European Anti-Fraud Office (OLAF) revealed, however, that the country of origin of the imported products was in fact India. In OLAF's view, the stainless steel wires imported into the Community by Link Middle East Ltd, between June 1999 and December 2000 had been manufactured by Venus Wire Industries Ltd, established in Mumbai (India).

12 By decision of 30 July 2003, the Hauptzollamt, on the basis of Regulation No 1599/1999, imposed post-clearance customs and countervailing duties on those customs declarations of sums, respectively, of DEM 4 034.79 and DEM 59 513.21.

13 By decision of 29 June 2004, the Hauptzollamt rejected an objection by AGST to the imposition of those duties. On 21 July 2004, AGST brought an action against that decision before the Finanzgericht Düsseldorf in which it alleges, in particular, that the post-clearance imposition of the countervailing duty is unlawful, on the ground that Regulation No 1599/1999 is invalid.

14 It is in those circumstances that the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is … Regulation … No 1599/1999 … invalid in so far as it provides that countervailing duty under subheading 7223 00 19 of the [CN] is to be imposed on wire manufactured by Venus Wire Industries Ltd [in] Mumbai, India?'

The question referred for a preliminary ruling

15 It is clear from the contents of the Court file that the referring court is asking, in essence, whether Regulation No 1599/1999 is invalid, since the determination by the Council of the European Union concerning the existence of injury to the Community industry and of the causal link between that injury and the subsidised imports of stainless steel wires is vitiated by manifest error. In that regard, that court is uncertain whether the judgment of the Court of First Instance in *Mukand and Others* v *Council*, which annulled Regulation No 2450/98 concerning stainless steel bars originating in India within subheadings 7222 20 11, 7222 20 21, 7222 20 31 and 7222 20 81 in the CN, is applicable to the main proceedings for the purpose of determining the validity of Regulation No 1599/99.

Arguments of the parties

16 AGST submits that Regulation No 1599/1999 is void, as a matter of law, on the ground that the Council's determination concerning the existence of injury to the Community industry and the causal link between that injury and the subsidised imports of stainless steel wires is vitiated by manifest error. The Community institutions did not take sufficient account of the Indian exporting producers' objection that the Community producers of flat stainless steel products had caused injury to the Community industry by forming an 'alloy surcharge cartel'.

17 At the hearing, AGST argued that, for flat products, the alloy surcharge, which is a coefficient incorporated in the calculation of the price of steel products, was artificially increased by a yield factor of 1.35. The alloy surcharge applied to steel wires was fixed by multiplying the alloy surcharge applied to flat products also by a factor of 1.35, which inevitably increased that alloy surcharge for steel wires.

18 AGST observes, in addition, that *Mukand and Others* v *Council* should be applied, by analogy, and Regulation No 1599/1999 declared invalid.

19 In that regard, AGST argues that, so far as concerns the existence of the alloy surcharge cartel for flat products, it makes no difference that the steel wire is not produced from flat products or that the respective producers are not always the same. The Commission has already established the existence of that cartel, which, as the Court of First Instance held in *Mukand and Others* v *Council*, has influenced the prices of stainless steel bars.

20 AGST submits that the cartel has also influenced the prices of stainless steel wire. There is no distinction between stainless steel bars and stainless steel wire, given that both are long products. Indeed, due to the significance of flat products, price developments in the stainless steel markets are very often driven by pricing decisions by producers of those products.

21 AGST argues that Regulation No 1599/1999 reproduces, in the recitals in its preamble, the same statement of reasons as Regulation No 2450/98, which was annulled by the judgment in *Mukand and Others* v *Council*.

22 In AGST's submission, since there is no distinction between stainless steel bars and stainless steel wire, the alloy surcharge cartel has influenced stainless steel wire prices to the same extent as those of stainless steel bars. Thus, Regulation No 1599/1999 is just as much vitiated by a manifest error of assessment as Regulation No 2450/98, which covered subsidised imports of stainless steel bars.

23 The Commission submits, on the other hand, that the Community institutions examined, both in the provisional regulation and in Regulation No 1599/1999, the Indian producers' objections concerning the existence of an alloy surcharge cartel between the Community producers of flat products.

24 In that regard, the Commission states that it found, among other matters, in the 212th to 216th recitals in the preamble to the provisional regulation, that stainless steel wires were not manufactured from flat products and that comparison of the Community industry producers' sale prices revealed that they varied for identical references.

25 Moreover, those recitals stated that the alloy surcharge cartel constituted only a small percentage of the total price of stainless steel wire products. The Council confirmed those findings, subsequently, in the 93rd recital in the preamble to the definitive Regulation No 1599/1999.

26 Furthermore, the Council and the Commission submit that the conclusions of the Court of First Instance in *Mukand and Others* v *Council* are not applicable to the main proceedings for the purpose of determining the validity of Regulation

No 1599/1999. In that regard, the Community institutions correctly concluded, in that regulation, that the application of the alloy surcharge, which constituted only a small percentage of the total price of the products in question, had cast no doubt on the reliability of the final weighted average prices for the purposes of the determination of the injury to the Community industry.

27 In any event, those institutions state that the observations based on the final weighted average prices in Regulation No 1599/1999 concerning the injury and the causal link between it and the subsidised imports of the products in question in the main proceedings are not vitiated by a manifest error of assessment.

28 In the context of the determination of that injury, the two essential factors were, first, a considerable undercutting of the imports from India and, second, a significant depression in the Community industry's sale prices. Consequently, even assuming that the application of the alloy surcharge raised all the net prices in the Community and that, in addition, that increase was entirely attributable to anti-competitive conduct, the undercutting would be of around 17% of those imports.

The Court's reply

29 It must be examined whether the Community institutions fell into manifest error in the determination of the existence of injury to the Community industry and of the causal link between that injury and the subsidised imports of stainless steel wires.

30 The referring court points out that Regulation No 1599/1999 repeats the same reasons as those set forth in Regulation No 2450/98 for rejecting the Indian exporting producers' objection relating to the Community producers' restrictive practices, namely the uniform application of the alloy surcharge.

31 It must be noted, on the one hand, that, under Article 8(7) of the basic regulation, known factors, other than the subsidised imports, which are injuring the Community industry at the same time are also to be examined to ensure that injury caused by those other factors is not attributed to the subsidised imports pursuant to Article 8(6).

32 As an indication, that article provides, among other things, that the factors which may be considered relevant in this respect include restrictive trade practices of, and competition between, third country and Community producers.

33 It must, on the other hand, be observed that in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the Community institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (see Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40, and the case-law cited).

34 Furthermore, it is settled case-law that the determination of the existence of harm to the Community industry requires an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether relevant procedural rules have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see *Ikea Wholesale*, paragraph 41, and the case-law cited). That is, particularly, the case as regards the determination of the factors injuring the Community industry in an anti-subsidy proceeding.

35 In determining injury, the Council and the Commission are under an obligation to consider whether the injury on which they intend to base their conclusions actually derives from the subsidised imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves (see Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, paragraph 16).

36 In that regard, it should be noted that, in order to refute AGST's argument that the Indian producers' objections concerning the alloy surcharge cartel for flat products was not examined by the Community institutions, those institutions referred, in the proceedings before the Court, to the 93rd recital in the preamble to Regulation No 1599/1999, which confirmed the conclusions set forth in the 209th to 216th recitals in the preamble to the provisional regulation, since none of the parties concerned put forward additional arguments concerning the Indian exporting producers' objections that all data submitted by the Community industry within the framework of the anti-subsidy proceeding would be artificially inflated as a result of the uniform application of the 'alloy surcharge' system.

37 In the 210th and 211th recitals in the preamble to the provisional regulation, it was noted that the decision which held that the alloy surcharge was an anti-competitive practice covered flat products as opposed to long products, which include the stainless steel wires in question in the main proceedings. However, the exporting producers argued that the existing illegal practice for flat products would have a synergy or downstream effect on long products.

38 In that regard, in the 212th recital in the preamble to the provisional regulation, the Commission, in order to refute that argument of the exporting producers, maintained that stainless steel wires were not produced, for technical reasons, from flat products and that therefore any downstream effect of the concerted practice found for flat products on stainless steel wires was doubtful. The Commission added that the producers of flat products and the producers of long products were not the same and that the number of the latter was significantly higher than that of the former.

39 It follows from those recitals that, contrary to AGST's submission, the Community institutions, in accordance with the requirement of the basic regulation to disregard any injury arising from factors other than the subsidised imports, examined whether the data submitted by the Community industry within the framework of the anti-subsidy proceeding could have been influenced by the concerted application of the 'alloy surcharge' system by the flat product producers.

40 In support of its arguments, AGST declares that the 209th to 216th recitals in the preamble to the provisional regulation, in which the Commission had rejected the Indian producers' objection relating to the existence of an alloy surcharge cartel, correspond, on the whole, to the 43rd, 46th and 47th recitals in the preamble to Regulation No 2450/98, on the basis of which the Court of First Instance, in *Mukand and Others* v *Council*, declared that they contained manifest errors of assessment.

41 In that regard, it is clear from the contents of the Court file that Regulations No 1599/1999 and No 2450/98 cover stainless steel products which belong in the category of long products. In addition, it is not disputed that the alloy surcharge applied to stainless steel wires had been fixed in the same way by the steel bar producers, by multiplying the alloy surcharge applied to flat steel products by a factor of 1.35.

42 Thus, the question which arises is whether the anti-competitive conduct of the flat steel producers, linked to the uniform application of the alloy surcharge cartel, constituted, for the stainless steel wires sector, a known factor within the meaning of Article 8(7) of the basic regulation.

43 In that context, *Mukand and Others* v *Council*, upon which AGST relies, concerns the anti-competitive fixing of the amount of the alloy surcharge, applied by the Community producers to flat stainless steel products, which had significantly affected the prices of stainless steel bars and artificially caused their increase, and which would render those prices unreliable for the purposes of the determination of the injury suffered by the Community industry.

44 In that judgment, the Court of First Instance held that, although it was not proved that the final sale prices of stainless steel bars had been fixed by Community producers acting in concert, the Community institutions, by failing to take account of the uniform, consistent industrial practice of Community stainless steel bar producers, the objective effect of which was automatically to mirror, in the markets for those products, the artificial price increases achieved through concerted action between the flat product producers, disregarded a known factor, other than the subsidised imports, which could have caused injury to the Community industry at the same time.

45 It is therefore necessary to examine whether the concerted application of the alloy surcharge by the flat product producers which, as was held in *Mukand and Others* v *Council*, could have had a significant influence on the prices of stainless steel bars, could also have had such an influence on the prices of stainless steel wire for the purposes of Article 8(7) of the basic regulation.

46 In that regard, it is necessary to note that the Community institutions stated that the alloy surcharge for stainless steel wires had already been imposed as an element in the final price.

47 Those institutions submit that the alloy surcharge for stainless steel wires was, during the period under investigation, a percentage lower on average than 5% of the net average weighted price of those products. Even assuming that the amount of the alloy surcharge was influenced by the flat product producers' anti-competitive conduct, the effect of the artificial increase of the alloy surcharge on the net average weighted prices of stainless steel wires was so small that it could not cast doubt on the reliability of those prices.

48 AGST claims that if the alloy surcharge for stainless steel bars artificially increased their prices, since it was multiplied by a yield factor of 1.35, it also inevitably artificially increased the price of stainless steel wires. In that regard, AGST maintained, at the hearing, that the alloy surcharge for stainless steel wires, during the period under investigation, was, in any event, higher than the 4 or 5% suggested by the Commission.

49 The exporting producers stated, during the administrative procedure, that the Community producers which had applied an alloy surcharge to steel wires had fixed its amount in the same way as the steel bar producers, by multiplying the alloy surcharge applied to flat steel products by a factor of 1.35, the objective effect

of which was automatically to mirror, in the markets for those products, the artificial price increases achieved through the concerted action between the flat product producers.

50 However, AGST provided no evidence concerning the parallelism between the evolution of the prices of flat products and that of the prices of stainless steel wires because of the uniform application of the yield coefficient of 1.35 by the wire producers to the alloy surcharge applied to flat products which could show that the flat product producers' anti-competitive conduct could have significant repercussions on the level of stainless steel wire prices which would render them artificially higher.

51 In the main proceedings, the Community institutions did not fail to take account of a known factor like the system of applying the alloy surcharge. They examined the factor of the application of the alloy surcharge and concluded that it constituted a small percentage of the final price. In those circumstances, it is for the parties pleading the invalidity of the regulation to adduce evidence to show that the concerted application of the alloy surcharge by the flat product producers could have had an effect of such magnitude that the final prices of stainless steel wires could no longer be used to establish the existence of injury to the Community industry and of the causal link between that injury and the subsidised imports.

52 However, the Court file contains no material which could lead to the conclusion that the Community institutions made a manifest error of assessment by relying, in the determination of the injury and of the causal link between that injury and the subsidised imports, on the absence of factors, other than those imports, which, according to AGST, caused injury to the Community industry at the same time.

53 AGST relied solely on *Mukand and Others* v *Council* to claim that the conclusions therein apply to Regulation No 1599/1999, since stainless steel wires belong, just like stainless steel bars, in the category of so-called 'long' products, and on the similarity between the two products in respect of the calculation of the alloy surcharge.

54 No indication has been given that the concerted application of the alloy surcharge to flat products led to an increase in the overall level of stainless steel wire prices such that the final prices of those products could not be regarded as a reliable indicator for the purpose of establishing what injury was suffered by the Community industry because of the subsidised imports.

55 It follows from all the foregoing that consideration of the question referred has disclosed nothing capable of affecting the validity of Regulation No 1599/1999.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Consideration of the question referred has disclosed nothing capable of affecting the validity of Council Regulation (EC) No 1599/1999 of 12 July 1999 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on stainless steel wires with a diameter of 1 mm or more originating in India and terminating the proceeding concerning imports of stainless steel wires with a diameter of 1 mm or more originating in the Republic of Korea.

[Signatures]