JUDGMENT OF THE COURT (Fourth Chamber)

13 January 2005 *

In Case C-126/04,

REFERENCE for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 18 February 2004, received at the Court on 8 March 2004, in the proceedings

Heineken Brouwerijen BV

v

Hoofdproductschap Akkerbouw,

THE COURT (Fourth Chamber),

composed of: K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász and M. Ilešič, Judges,

* Language of the case: Dutch.

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Heineken Brouwerijen BV, by H. Bronkhorst, advocaat,

— the Greek Government, by V. Kontolaimos and E. Svolopoulou, acting as Agents,

— the Council of the European Union, by M. Balta and K. Michoel, acting as Agents,

— the Commission of the European Communities, by F. Clotuche-Duvieusart and D.W.V. Zijlstra, acting as Agents,

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

gives the following

Judgment

1 The reference for a preliminary ruling concerns the validity of Council Regulation (EC) No 1269/1999 of 14 June 1999 and Council Regulation (EC) No 822/2001 of 24 April 2001 opening a Community tariff quota for barley for malting falling within CN code 1003 00 (OJ 1999 L 151, p. 1, and OJ 2001 L 120, p. 1, respectively), the interpretation of Article 10 of Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals (OJ 1992 L 181, p. 21), as amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105) ('Regulation No 1766/92'), and the interpretation of the provisions of Commission Regulation (EC) No 2023/2001 of 15 October 2001 fixing the import duties in the cereals sector (OJ 2001 L 273, p. 18).

2 That reference was made in connection with proceedings between Heineken Brouwerijen BV ('Heineken') and Hoofdproductschap Akkerbouw (Central Marketing Office for Agricultural Products, 'the HPA') concerning the import duties due on barley for malting imported by Heineken into the Community.

Relevant provisions

3 Article 1 of Regulation No 1766/92 lists barley among the products under CN code 1003 00 covered by the common organisation of the market in cereals.

4 Article 10 of Regulation No 1766/92 provides:

'1. Unless this regulation provides otherwise, the rates of duty in the Common Customs Tariff shall apply to the products listed in Article 1.

2. Notwithstanding paragraph 1, the import duty on products covered by CN codes ... 1003 ... shall be equal to the intervention price valid for such products on importation and increased by 55%, minus the cif import price applicable to the consignment in question. However, that duty may not exceed the rate of duty in the Common Customs Tariff.

...'

5 Regulation No 2023/2001 fixes the import duties in the cereals sector.

6 Article 2(5) of Commission Regulation (EC) No 1249/96 of 28 June 1996 on rules of application (cereal sector import duties) for Regulation No 1766/92 (OJ 1996 L 161, p. 125), in the version applicable until 1 July 2003, provides:

'Import duties shall be reduced at a flat rate of ... [EUR] 8 per tonne on malting barley ... provided the importer shows that a quality premium on the normal product price was paid.

...'

7 Article 1 of Regulation No 1269/1999 provides:

'1. An annual Community tariff quota of 50 000 tonnes is hereby opened for 1999 and 2000 for high-graded barley falling within CN code 1003 00 and intended for the production of malt to be used for the manufacture of certain beer aged in tanks containing beechwood.

2. The common customs tariff duty applicable to the quota shall be 50% of the full rate of duty in force, without the abatement applied on imports of barley for malting, on the day of import.'

8 Article 1 of Regulation No 822/2001 also opens the same annual Community tariff quota for 2001 and 2002 of '50 000 tonnes ... for high-graded barley falling within CN code 1003 00 and intended for the production of malt used for the manufacture of certain beer aged in tanks containing beechwood.'

9 The first and second recitals in the preamble to Regulation No 1269/1999 and Regulation No 822/2001 read as follows:

'(1) The Community has undertaken, in the conclusion of the GATT [General Agreement on Tariffs and Trade] Article XXIV:6 negotiations, to examine problems identified if the functioning of the "representative price" system for cereals appears to be impeding trade. Certain consignments of barley for malting have been subject to impediment;

(2) In order to remedy such impediment, a Community tariff quota for barley for malting falling within CN code 1003 00 should be opened ...'.

The main proceedings and the questions referred for a preliminary ruling

10 Heineken is a company of international standing engaged in the production and sale of beer sector.

11 By decision of 25 October 2001, the HPA demanded payment of the sum of EUR 254.82 for import duties due for the importation by that company of 15 177 kg of barley for malting. The objection brought by Heineken against that decision was rejected by the HPA by decision of 28 October 2002.

12 Heineken brought an appeal against the latter decision before the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry). Since producers such as Heineken which do not manufacture beers aged in tanks containing beechwood were not able to obtain the tariff quotas opened by Regulation No 1269/1999 and Regulation No 822/2001 for 1999 to 2002, that court raises the question of whether the Community legislation at issue is discriminatory.

13 In those circumstances, the College van Beroep voor het bedrijfsleven decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Are ... Regulation No 1269/1999 and Regulation No 822/2001... , which fix Community tariff quotas only in respect of the importation of barley intended

for the production of beer aged in tanks containing beechwood, valid in the light of the prohibition on discrimination between producers laid down in the second subparagraph of Article 34(2) EC?

2. If the abovementioned regulations are invalid, does Article 10(2) of ... Regulation ... No 1766/92 of 30 June 1992 ... in conjunction with ... Regulation ... No 2023/2001... nevertheless require that import duty be charged on high-graded barley falling within CN code 1003 00 which is intended for the manufacture of beer made from malt?'

The questions referred for a preliminary ruling

The first question

14 Heineken observes that Regulation No 1269/1999 and Regulation No 822/2001 opened Community tariff quotas for 1999 to 2002 only for high-graded barley falling within CN code 1003 00 intended for the production of certain types of beers. The regulations concerned infringe the second subparagraph of Article 34(2) EC, since they result in an unjustified difference in treatment between barley intended for the production of beers aged in tanks containing beechwood and barley intended for the production of beers in accordance with other methods.

15 By contrast, the Greek Government, the Council of the European Union and the Commission of the European Communities submit that Regulation No 1269/1999 and Regulation No 822/2001 do not infringe the principle of non-discrimination. On

the one hand, the opening of tariff quotas for barley intended for the production of malt to be used in the manufacture of beers aged in tanks containing beechwood takes account of the needs of supplying the Community market and safeguarding the balance of that market. On the other hand, it is objectively justified to treat differently barley intended for the production of different types of beers.

16 It should be noted that the Court has consistently held that the second subparagraph of Article 34(2) EC, which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment, which requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified (see, inter alia, Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25, Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35, Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39, and Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49).

17 In this case, in accordance with Article 10(2) of Regulation No 1766/92, the import duties on cereals are to be calculated by reference to the intervention price on the one hand, and the representative import price determined on the basis of listings on the world market on the other.

18 However, as the first and second recitals of Regulation No 1269/1999 and Regulation No 822/2001 show, the 'representative price' system has given rise to impediments to trade.

19 The Council and the Commission explain that the import duties affecting both feed barley and barley for malting — in the absence of separate listings available for the

latter — are calculated by means of the listings for feed barley on the Minneapolis Grain Exchange (United States of America). Since the price of barley for malting is considerably higher than the price of feed barley, the calculation provided for in Article 10(2) of Regulation No 1766/92 has the effect of making the importation of barley for malting practically impossible. The reduction of the duties laid down in Article 2(5) of Regulation No 1249/96 has not proven sufficient to remove the impediments to trade affecting the importation of barley.

20 It is apparent from the first and second recitals of Regulation No 1269/1999 and Regulation No 822/2001 that the opening of tariff quotas is intended in particular to remedy those impediments, which had been called into question by the United States of America in the light of the Community's obligations flowing from the GATT.

21 As for the restriction of the scope of the Community tariff quotas opened by Regulation No 1269/1999 and Regulation No 822/2001, the Council and the Commission point out that barley for malting is available in sufficient quantities within the Community, with the exception of barley used for the production of beers in beechwood tanks which has to be imported from the United States. Producers of beers aged in beechwood tanks are therefore dependent on the importation of barley for malting coming from a third country, while the other Community producers easily find within the Community the barley for malting which they need for their beer production. Since the import duties are too high to be able to continue production of beers aged in beechwood tanks in the Community, and the reduction of the duties laid down in Article 2(5) of Regulation No 1249/96 is not sufficient to remove the impediments to trade affecting the importation of barley which can be used for the production of beer in beechwood tanks, it was objectively justified to open the tariff quotas only for barley intended for the production of those beers. Regulation No 1269/1999 and Regulation No 822/2001 thus balance the

Community's obligations flowing from the GATT and the common organisation of the market in cereals, while ensuring supply to the Community of a type of barley which is not produced on the Community market and the price of which, without the quotas concerned, would have been prohibitive.

22 It therefore follows that the restriction of the scope of the Community tariff quotas opened by Regulation No 1269/1999 and Regulation No 822/2001 is objectively justified by the differences between barley intended for the production of malt to be used in the manufacture of beers aged in tanks containing beechwood on the one hand, and barley intended for the production of other beers on the other.

23 It follows from the foregoing that consideration of the first question has disclosed no facts or circumstances to affect the validity of Regulation No 1269/1999 and Regulation No 822/2001.

The second question

24 The second question concerns the interpretation of the provisions of Article 10(2) of Regulation No 1766/92 in conjunction with those of Regulation No 2023/2001 if Regulation No 1269/1999 and Regulation No 822/2001 are invalid.

25 In the light of the answer to the first question, there is no longer any need to answer the second question.

Costs

26 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. The 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) rules as follows:

Consideration of the questions raised has disclosed nothing capable of affecting the validity of Council Regulation (EC) No 1269/1999 of 14 June 1999 and Council Regulation No 822/2001 of 24 April 2001 opening a Community tariff quota for barley for malting falling within CN code 1003 00.

Signatures.