JUDGMENT OF THE COURT
8 MARCH 1972[1]

Nordgetreide GmbH & Co. KG v Commission of the European Communities[2]

Case 42/71

Summary

Measures adopted by an institution — Act of the nature of a regulation — Applications by individuals — Category of persons viewed in the abstract and in its entirety — Inadmissibility of the application

(*EEC Treaty, Article 173*)

The conditions to which, under Article 173(2), proceedings by individuals against the acts of institutions are subject are not fulfilled if a natural or legal person is affected by such an act by reason of his belonging to a category viewed in the abstract and in its entirety and not as the person to whom an act of direct and individual concern to him is addressed.

In Case 42/71

NORDGETREIDE GMBH & CO. KG, whose registered office is at Obersickete (Federal Republic of Germany) represented by Erich Siebert and Horst G. Bens, of the Brunswick Bar, with an adress for service in Luxembourg at the chambers of Ernest Arendt, 34b rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application, at the present stage of the proceedings, for a declaration of the admissibility of the action in which the applicant company claims that goods referred to under heading 11.02 of the Common Customs Tariff, in particular

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

flaked barley (subheading 11.02 E I(b) 1) and certain categories of cereal groats and maize meal (subheading 11.02 A V(a) 1) shall be included in the list of products contained in Annex I to Regulation No 1014/71 of the Commission of 17 May 1971 fixing the compensatory amounts provided for by Regulation No 974/71 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States and to Regulation No 1272/71 of the Commission of 17 June 1971 altering the said compensatory amounts,

THE COURT,

composed of: R. Lecourt, President, J. Mertens de Wilmars and H. Kutscher, Presidents of Chambers, A. M. Donner, A. Trabucchi, R. Monaco and P. Pescatore (Rapporteur), Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

Because certain foreign exchange markets within the Community had been distributed by speculative movements involving an abnormal influx of short-term capital, the Council of the Communities by resolution of 9 May 1971 (JO C 58, 1971, p. 1) 'was prepared to envisage' that in certain circumstances Member States which had recorded an abnormal influx of short-term capital might, for a limited period, widen the margins of fluctuation for the exchange rates of their currencies in relation to their official parities.

Any appreciable deviation, in one Member State, of the current rate of exchange from the official parity was liable to create difficulties as regards the proper functioning of the common agricultural market because trade to which the current rate of exchange applied could be done at a price, in national currency, lower than the intervention or buying-in prices laid down by Community rules on the basis of the official parity. For this reason, the Council, by Regulation No 974/71 of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (OJ L 106, p. 1, English Special Edition, 1971 (I) p. 257), authorized Member States which, for the purposes of commercial transactions, allowed the exchange rate of their currencies to fluctuate by a margin wider than the one

permitted by international rules (among them the Federal Republic of Germany) in certain circumstances to charge compensatory amounts on certain imports of agricultural products and to grant them on certain exports.

Under Article 1(2) of Regulation No 974/71, these compensatory amounts were applicable, first, to products covered by intervention arrangements under the common organization of agricultural markets and, secondly, to products whose price depends on the price of the first mentioned products and which are governed by the common organization of agricultural markets or are the subject of a specific arrangement under Article 235 of the EEC Treaty.

In Annex I to Regulation No 1014/71 of 17 May 1971 fixing the compensatory amounts provided for by Regulation No 974/71 (JO L 110, 1971, p. 10) as amended in particular by Regulations Nos 1033/71 of 19 May 1971 (JO L 112, 1971, p. 26) and 1272/71 of 17 June 1971 (JO L 133, 1971, p. 1), the Commission published a list of products to which the system of compensatory amounts could be applied. With the exception of cereal groats and cereal meal (common wheat) referred to in subheading 11.02 A I(b) the list did not include any of the goods coming under heading 11.02 of the Common Customs Tariff, which applies to certain products processed from cereals.

Nordgetreide, an undertaking trading in cereals and products manufactured by the processing of cereals, procures on the world market the maize and barley which it processes in its own establishments into, respectively, meal for the brewing industry and flaked barley.

These processed products are intended for export to Denmark and Poland.

Because maize under tariff subheading 10.05 B and barley (heading 10.03) are included among the cereals in Annex I to Regulation No 1014/71, Nordgetreide had to pay a compensatory amount on their importation. On the other hand, the undertaking did not receive any compensatory amount on exports of flaked barley (subheading 11.02 E I(b) 1) or of maize groats and meal for the brewing industry (subheading 11.02 A V(a) 1), because these processed products were not included in the said annex.

By telex of 26 May 1971, confirmed by telex of 4 June 1971, Nordgetreide drew the Commission's attention to the situation and asked it to add to the list of products to which the system of compensatory amounts on exports applies.

By telex of 16 June the Deputy Director-General of the Directorate-General for Agriculture of the Commission informed Nordgetreide that the fixing or the non-fixing of the compensatory amounts was without doubt liable to create difficulties in trade in certain products but that, in certain cases in which the market situation justified the belief that the application of the monetary measures concerned would not lead to disturbances in trade, the necessarily general character of the measures adopted had persuaded the Commission not to fix compensatory amounts.

Having failed to obtain the Commission's agreement that it should, in accordance with the request which had been made to it, add to the list of products to which the system of compensatory amounts applies, Nordgetreide brought proceedings before the Court by application lodged on 21 July 1971.

By Regulation No 1687/71 of 30 July 1971 amending the annexes to Regulation No 1014/71 with respect to the compensatory amounts applicable in agriculture following the temporatory widening of the margins of fluctuation for the currencies of certain Member States (JO L 173, 1971, p. 1), the Commission added to the list of products for which compensatory amounts are fixed and included in particular flaked barley (tariff subheading 11.02 E I(b) 1) and maize groats and meal of a fat content not exceeding 1.5% by weight for the brewing industry (subheading 11.02 A V(a) 1).

II — Procedure

In its application of 21 July 1971 originating the proceedings, Nordgetreide claimed, under Article 173 and, alternatively, Article 175 of the EEC Treaty,

that goods coming under heading 11.02 of the Common Customs Tariff, in particular flaked barley and maize groats and flour for the brewing industry, should be included in the lists of products to which the system of compensatory amounts applies.

In its statement of defence lodged on 9 October 1971, the Commission asked that the Court should, first, rule that, by reason of entry into force on 2 August 1971 of Regulation No 1687/71, there was no longer any cause of action and, secondly, in the alternative, that it should rule on the question of the admissibility of the application without going into the substance and dismiss it as inadmissible.

The Commission contends that the Court should consider of its own motion whether there is any cause of action on which it can rule.

In the present case, the aim pursued by the applicant, namely the inclusion of certain products processed from cereals in the list of goods appearing in Annex I to Regulation No 1014/71 (and to Regulation No 1272/71) and, thereby, the application to these products of the system of compensatory amounts, was achieved by entry into force on 2 August 1971, which is after the proceedings were commenced, of Regulation No 1687/71 of the Commission.

In observations lodged on 16 November 1971, Nordgetreide, in the first place, declared that it maintained the conclusions in its application in their entirety and, in the second place, concluded that the Court should dismiss the objection of inadmissibility raised by the Commission. It claimed that the conditions for ruling that there was no cause of action did not apply since the object of the application was to secure inclusion of the products concerned in the list of goods to which, since the date when Regulation No 1014/71 came into effect, 12 May 1971, that regulation applies.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court, having also established that it was not possible for it, without going into the substance of the dispute, to rule on the objection raised by the Commission that there was no cause of action decided to open, without any preparatory inquiry, the oral procedure on the admissibility of the action under Article 91 of the Rules of Procedure. By order of 13 January 1972 the President of the Court designated Mr Karl Roemer as Advocate-General in the place of Mr A. Dutheillet de Lamothe, deceased. The parties submitted their oral observations on the admissibility of the application at the hearing on 26 January 1972. The Advocate-General delivered his opinion on the admissibility of the application at the hearing on 3 February 1972.

III — Submissions and arguments of the parties on the admissibility of the application

The submissions and arguments of the parties on the admissibility of the application may be summarized as follows.

The *Commission*, defendant in the main action and applicant in the preliminary action, contends that the application is inadmissible as regards both its main and its alternative conclusions.

(a) The main conclusion, based on Article 173 of the EEC Treaty, is inadmissible on the following grounds:

The question whether the negative attitude adopted by an institution constitutes an actionable decision must be considered in the light of the object of the conclusion itself; as it has no legal effect of itself, an attitude is something of merely secondary importance. The aim pursued by the applicant is the amendment of an act of the nature of a regulation, Regulation No 1014/71, by a fresh act of the nature of a regulation. A natural or legal person may, however, institute proceedings against a regulation only if it is of direct and individual concern to that person; for the present application to be admissible the applicant must, accordingly, be directly and individually concerned by the act of the nature of a regulation which the Commission should, according to the applicant, have adopted in order to supplement Regulation No 1014/71. This is manifestly not the case.

Such an act is not of direct and individual concern to the applicant; the fixing of compensatory amounts for the products involved affects an indefinite number not only of exporters but also of importers in several Member States. Consequently, the applicant cannot be affected thereby on account of certain attributes which are peculiar to it or of factual circumstances which distinguish it from every other person and, for this reason, identify it in the same way as a person to whom an act is addressed is identified.

Regulation No 1014/71 in no way constitutes a collection of individual decisions; this could be the case only in circumstances where the act affects a predetermined number of persons.

Another reason which makes it doubtful whether the applicant can be directly concerned is that Regulation No 1014/71 amounts to no more than a measure enabling certain Member States to charge or grant compensatory amounts.

(b) The alternative conclusion, based on Article 175 of the EEC Treaty, is also inadmissible.

There cannot be an action for failure to act when, as in the present case, the institution, after being asked to act, took a decision even though a negative one. It is clear from the case-law of the Court that, under Article 175, failure to act means refraining from ruling or defining a position and not the adoption of an act which differs from what those concerned would have liked or believed necessary. In the present case the telex of 16 June 1971 by which, in the name of the Commission, the Deputy Director-General of the Directorate-General for Agriculture informed the applicant of the reasons why it did not appear necessary to fix compensatory amounts for the products concerned, certainly constituted a definition by the institution of its position. Again the Commission is under no obligation to the applicant to promulgate any particular legislative act.

Nordgetreide, the applicant in the main action, and defendant in the preliminary action, submits the following main arguments against the objection of inadmissibility raised by the Commission.

Since the Commission itself admits that it defined its position on the applications which the applicant addressed to it on 26 May and 4 June 1971, the admissibility or otherwise of the application must be appraised exclusively in the light of Article 173 of the EEC Treaty.

Regulation No 1014/71 can be broken down into a collection of individual decisions; the annexes thereto affect the legal position of only a small number of specific producers or undertakings whose identity and character were readily ascertainable. In any case the Commission intended to exclude a particular category of milled products from the application of the regulation; the undertakings which work in this branch of industry constitute a closed and clearly defined group.

The applicant is one of the few German undertakings affected by the fact that Regulation No 1014/71 did not provide for the products concerned to be included amongst those to which the system of compensatory amounts applies. The exceptionally heavy loss suffered by the applicant also demonstrates that Regulation No 1014/71 of the Commission and the subsequent conduct of the latter are of individual concern to it.

With regard to the second condition of admissibility it must be borne in mind that the Federal Republic of Germany has made full use of the authorization which it has received from the Community institutions on the subject of compensatory amounts. The list, as it was adopted by the Commission, of products to which this system can be applied determines when compensatory amounts should or should not be applied. Regulation No 1014/71 is the decisive factor in placing the applicant in the position in which it finds itself; it is accordingly of individual concern to it within the meaning of Article 173 of the EEC Treaty.

Grounds of judgment

1 By application of 21 July 1971, the applicant has, under Article 173 of the EEC Treaty, claimed annulment of the communication of 16 June 1971 in which the Commission refused to accede to its request, submitted on 26 May 1971 and confirmed on 4 June following, that goods referred to under heading 11.02 of the Common Customs Tariff, in particular flaked barley (subheading 11.02 E I(b) 1) and certain categories of maize groats and meal (subheading 11.02 A V(a) 1), should be included in the list of products contained in Annex I to Regulation No 1014/71 of the Commission of 17 May 1971 fixing the compensatory amounts provided for by Regulation No 974/71 of the Council on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (JO L 110, 1971, p. 10) and in Annex I to Regulation No 1272/71 of the Commission of 17 June 1971 altering the said compensatory amounts (JO L 133, 1971, p. 1).

2 In the alternative, the applicant claims under Article 175 of the EEC Treaty that the Court should find that the Commission has, in breach of the Treaty, failed to give a ruling on its request.

3 Since the Commission requested that Article 91 of the Rules of Procedure should be applied, the Court decided to rule on the admissibility of the action without going into the substance.

4 Since the Commission, within the time-limit fixed by Article 175, defined its position in its communication of 16 June 1971, the conditions for application of that article are not satisfied; the admissibility of the action must, in consequence, be considered in the light of Article 173 alone.

5 Since the definition by the Commission of its position amounts to a rejection it must be appraised in the light of the object of the request to which it constituted a reply. The object of the request was the inclusion in the annex to Regulations Nos 1014/71 and 1272/71 of the products of concern to the applicant; it accordingly sought amendment of a regulation by an act which would itself have taken the form of a regulation. In fact, inclusion in the annex to the regulations concerned of the products referred to by the applicant would have had the effect of applying the system of compensatory amounts to all exports and, furthermore, to all imports of the products involved to the advantage or the disadvantage, as the case may be, of any and every exporter or importer. Such a provision would have affected the applicant only in so far as it belongs to a category viewed in the abstract and in its entirety and not as the person to who an act of direct and individual concern to him was addressed. In consequence there is a want of the

conditions to which under Article 173(2) proceedings by individuals against the acts of the institutions are subject.

6 The application must therefore be dismissed as inadmissible.

Costs

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

The application has been declared inadmissible.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties on the admissibility of the action;
Upon hearing the opinion of the Advocate-General on the admissibility of the action;
Having regard to the Treaty establishing the European Economic Community, especially Articles 173 and 175;
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, especially Articles 91 and 69,

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**
2. **Orders the applicant to bear the costs of the action.**

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 8 March 1972.

A. Van Houtte
Registrar

R. Lecourt
President