JUDGMENT OF THE COURT (Fifth Chamber)
22 October 1991 *

In Case C-16/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Bremen (Second Chamber) for a preliminary ruling in the proceedings pending before that court between

Detlef Nölle, trading as 'Eugen Nölle'

and

Hauptzollamt Bremen-Freihafen

on the validity of Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports (Official Journal 1989 L 79, p. 24),

THE COURT (Fifth Chamber),

composed of: Sir Gordon Slynn, President of Chamber, acting as President of the Fifth Chamber, F. Grévisse, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: D. Louterman, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— Detlef Nölle, trading as 'Eugen Nölle', the plaintiff in the main proceedings, by Frank Montag, Rechtsanwalt, Cologne,

— the Council of the European Communities by Erik Stein, Legal Adviser, acting as Agent,

— the Commission of the European Communities by Eric White, a member of the Legal Service, acting as Agent, assisted by Reinhard Wagner, a German Judge seconded to the Commission within the framework of the exchange scheme for national officials,

having regard to the Report for the Hearing,

after hearing the oral observations of Detlef Nölle, the Council and the Commission, represented by Eric White, Legal Adviser, and Claus-Michael Happe, a German official seconded to the Commission in the framework of the exchange scheme for national officials, at the hearing on 16 January 1991,

after hearing the Opinion of the Advocate General at the sitting on 4 June 1991,

gives the following

Judgment

1 By order of 12 December 1989, which was received at the Court on 22 January 1990, the Finanzgericht Bremen (Second Chamber), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the validity of Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports (Official Journal 1989 L 79, p. 24).

2 The question was raised in proceedings between Detlef Nölle, trading as 'Eugen Nölle' (hereinafter referred to as 'Nölle') and the Hauptzollamt Bremen-Freihafen (hereinafter referred to as 'the Hauptzollamt') concerning the definitive anti-dumping duties imposed by the latter on Nölle's imports of paint brushes from China.

3 On 21 November 1988 and 8 and 14 February 1989, Nölle applied to the Hauptzollamt for entry for free circulation of three consignments of cleaning and paint brushes falling under Combined Nomenclature code 9603 40 10 originating in the People's Republic of China. The Hauptzollamt first demanded, pursuant to Article 1 of Commission Regulation (EEC) No 3052/88 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China (Official Journal 1988 L 272, p. 16), payment of a provisional anti-dumping duty in respect of which Nölle, in pursuance of Article 1(4) of the said regulation, lodged a security in the form of a directly enforceable bank guarantee in the amounts of DM 31 000, DM 17 000 and DM 4 400, a total of DM 52 400 for the three consignments.

4 In three notices dated 14 April 1989, the Hauptzollamt requested Nölle to pay DM 29 937.04, DM 16 972.57 and DM 4 307.79, a total of DM 51 217.40, in definitive anti-dumping duty, corresponding, in accordance with Article 1 of the said Regulation No 725/89 (hereinafter referred to as 'the contested regulation'), to 69% of the net price per brush, free-at-Community-frontier, not cleared through customs.

5 On 3 May 1989, Nölle lodged an objection with the Hauptzollamt, claiming that the notices of 14 April were illegal on the ground that the contested regulation, on which they were based, was in several respects in breach of higher-ranking Community rules. The objection was dismissed and Nölle then brought an action before the Finanzgericht Bremen for the cancellation of the three notices.

6 In those circumstances the national court referred the following question to the Court for a preliminary ruling:

'Is Council Regulation (EEC) No 725/89 of 20 March 1989 invalid?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, 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.

8 The national court bases its doubts as to the validity of the contested regulation on the grounds pleaded by the plaintiff in the main proceedings, namely infringement of Article 2(5)(a) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1988 L 209, p. 1) (hereinafter referred to as 'the basic regulation').

9 That article provides that:

'In the case of imports from non-market economy countries . . . normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country is actually sold:

(i) for consumption on the domestic market of that country; or

(ii) to other countries, including the Community;

. . . '

10 First of all it should be stressed that the aim of Article 2(5) of the basic regulation is to prevent account being taken of prices and costs in non-market-economy countries, that is to say, which are not the normal result of market forces (see the judgment in Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945).

11 It should also be remembered that the choice of reference country is a matter falling within the discretion enjoyed by the institutions in analysing complex economic situations.

12 However, the exercise of that discretion is not excluded from review by the Court. The Court has consistently held that in the context of such a review it will verify whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers (judgments in Case 240/84 *NTN Toyo Bearing Company Limited and Others* v *Council* [1987] ECR 1809 and Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923).

13 As regards in particular the choice of reference country it is desirable to verify whether the institutions neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and whether the information contained in the documents in the case were considered with all the care required for the view to be taken that the normal value was determined in an appropriate and not unreasonable manner.

14 Nölle claims that the normal value was not determined in such a manner since Sri Lanka, the country chosen as the reference country, satisfied none of the conditions of which the Commission, according to its usual practice, has hitherto taken account, namely the existence in the country concerned of a like product of like volume and production methods, of conditions of access to raw materials comparable to those of the exporting country concerned and of prices resulting from the operation of the rules of the market economy.

15 In this respect Nölle claims first that China produces round, flat and radiator paint brushes, whereas Sri Lanka produces only flat brushes as well as other brushes not affected by the anti-dumping duty at issue.

16 The Commission thinks, however, that the Sri Lankan brushes are similar to the Chinese brushes because they are essentially manufactured from animal hair and have wooden handles of similar thickness, a ferrule and a quantity and weight of hair and bristle similar to those of the Chinese brushes. It is therefore in the Commission's view irrelevant that Sri Lanka produces only flat brushes.

17 It should be noted that neither the documents sent by the national court nor the documents and explanations produced during the hearing before the Court show conclusively whether or not the products in question are similar. It is therefore not established that in this respect the institutions made a manifestly incorrect appraisal.

18 Nölle claims in the second place that production volumes are not comparable, because in Sri Lanka there are only two major producers, one of whom manufactures practically none of the products in question, whereas in China there are at least 150 small and medium-sized businesses and the production volume there is accordingly at least 200 times as great as that in Sri Lanka.

19 According to the Commission the fact that production volume in the People's Republic of China is higher than in Sri Lanka is not relevant since the decisive criterion for calculating the normal value is the production costs of individual firms. In both these countries the firms are small or medium-sized with labour-intensive production in small-scale units with low wage rates.

20 It should be recalled that according in particular to paragraph 31 of the judgment in Joined Cases C-305/86 and C-160/87 *Neotype*, cited above, the size of the domestic market is not in principle a factor capable of being taken into consideration in the choice of a reference country under Article 2(5) of the basic regulation in so far as, during the period of the investigation, there is a sufficient number of transactions to ensure the representative nature of the market in relation to the exports in question. In this respect it should be borne in mind that in paragraphs 12 and 13 of the judgment in Case 250/85 *Brother Industries* v *Council* [1988] ECR 5683, the Court rejected a challenge to the institutions' practice of fixing the minimum level of representativity of the domestic market, for the purpose of calculating the normal value, at 5% of the exports in question.

21 At the hearing Nölle and the Commission agreed that the volume of exports of Chinese paint brushes to the Community was some 60 million brushes, whereas Sri Lanka's total production was of the order of 750 000 brushes a year, representing 1.25% of the volume of the exports in question.

22 It should be emphasized that although the sole fact that the production volume of the reference country is below the minimum level of 5% does not necessarily signify that the choice of that country cannot be regarded as appropriate and not unreasonable, a figure of 1.25% nevertheless amounts to an indication that the market considered is not very representative.

23 It must also be noted that the Commission and the Council did not produce during either the written or the oral procedure any figures or details capable of showing that, as they stated, production methods in Sri Lanka consisted in labour-intensive production in small-scale units with low wage rates, so that they were comparable to production methods in China.

24 Nölle states in the third place that the Sri Lankan industry is obliged to import pig bristle, wood for the handles, and the ferrules, whilst China has practically 85% of the world market in pig bristle.

25 The Commission contends that the alleged advantage resulting from access to raw materials cannot be satisfactorily quantified in a non-market-economy country and that in any event such an advantage may be offset by other competitive advantages existing in a market-economy country. Moreover it claims that, as regards the raw materials imported for paint-brush manufacture, adjustments were made (see recital 20 in the preamble to the contested regulation) and that the Commission deducted 25% of the already adjusted price to take account of quality differences.

26 This argument put forward by the Commission cannot be accepted. In the first place it follows from the Community institutions' established practice that the comparability of access to raw materials must be taken into consideration for the choice of reference country (see, for example Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, Official Journal 1980 L 48, p. 1). Secondly the advantages resulting from access to raw materials cannot be excluded simply because there is no market economy in the exporting country. Since Article 2(5) of the basic regulation is actually applied only in the case of imports from non-market-economy countries, that argument would be tantamount to making impossible any comparison between the production costs of countries with different market conditions.

27 Nölle claims finally that the prices charged in Sri Lanka are not the result of the rules of a market economy since there is no natural competition there. It stresses in this respect that the two producers share roughly 90% of the domestic market and that the one of them who manufactures products comparable to those imported from China is a subsidiary of a Community producer who took a leading part in the anti-dumping proceeding set in motion by the European producers.

28 The Commission contends that that does not imply the existence of an agreement, decision or concerted practice on prices or the absence of sufficient competition.

29 In this respect it must be emphasized that, although the sole fact that there are only two producers in the reference country does not, of itself, prevent prices from being the result of real competition, Nölle, without any objection from the Commission, drew price comparisons during the written procedure and at the hearing from which it is clear that the Sri Lankan producers charged prices higher than those of two representative Community producers. In addition, Nölle produced two documents from the Sri Lankan firms in question, showing that they could supply the Community only to a very limited extent as the production of brushes is adapted to the needs of the domestic market and that there is no price advantage in comparison with the prices which the parent company is able to offer in Europe.

30 It appears from the foregoing that Nölle has produced sufficient factors, already known to the Commission and the Council during the anti-dumping proceeding, to raise doubts as to whether the choice of Sri Lanka as a reference country was appropriate and not unreasonable.

31 However, the institutions came to the conclusion that Sri Lanka represented an appropriate and not unreasonable choice and did not therefore consider Taiwan, which had been suggested by the plaintiff.

32 It should be pointed out in this connection that although the institutions are not required to consider every reference country suggested by the parties during an anti-dumping proceeding, the doubts which arose in this case with regard to the choice of Sri Lanka ought to have led the Commission to examine the proposal made by the plaintiff in greater depth.

33 It may be seen from the preamble to the contested regulation that Taiwan was considered as a possible reference country but that the institutions did not pursue that possibility on the ground that the physical characteristics and the production costs of the products were different and that the Taiwanese producers who were approached refused to cooperate (recitals 16 and 17 in the preamble to the contested regulation).

34 These statements were not supported by any details and no facts were produced. As regards, in particular, the Taiwanese producers' alleged refusal to cooperate, it should be noted that the letter addressed to the two main producers in Taiwan, produced by the Commission during the hearing, cannot be regarded as a sufficient attempt to obtain information, regard being had to its wording and the extremely short period allowed for reply, which made it practically impossible for the producers in question to cooperate.

35 In view of all the circumstances set out above it appears, on the one hand, that various factors known to the institutions were in any event such as to raise doubts as to the appropriateness of Sri Lanka as a reference country and, on the other hand, that the institutions did not make a serious or sufficient attempt to determine whether Taiwan could be considered as an appropriate reference country.

36 In these circumstances it must be considered that the normal value was not determined 'in an appropriate and not unreasonable manner' within the meaning of Article 2(5)(a) of the basic regulation.

37 As the anti-dumping duty was therefore imposed in contravention of that provision, the contested regulation must be declared invalid and there is no need to consider the other grounds for invalidity put forward by the national court.

38 The answer to the question raised must therefore be that Regulation No 725/89 is invalid.

Costs

39 The costs incurred by the Commission and the Council of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question submitted to it by the Finanzgericht Bremen (Second Chamber), by order of 12 December 1989, hereby rules:

Council Regulation (EEC) No 725/89 of the Council of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty in such imports is invalid.

Slynn Grévisse

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 22 October 1991.

J.-G. Giraud

Registrar

Gordon Slynn

President of Chamber acting as
President of the Fifth Chamber