JUDGMENT OF THE COURT (Second Chamber)
29 May 1997 *

In Case C-93/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Supremo Tribunal Administrativo for a preliminary ruling in the proceedings pending before that court between

Indústria e Comércio Têxtil SA (ICT)

and

Fazenda Pública,

on the interpretation of Article 1(3) of Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey (OJ 1992 L 82, p. 1),

THE COURT (Second Chamber),

composed of: G. F. Mancini, President of the Chamber, G. Hirsch and R. Schintgen (Rapporteur), Judges,

* Language of the case: Portuguese.

Advocate General: N. Fennelly,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Indústria e Comércio Têxtil SA (ICT), by A. J. de Sousa Magalhães, of the Oporto Bar,

— the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate General for Community Affairs, and R. Barreira, Adviser in the Centre for Legal Studies of the Presidency of the Council of Ministers, acting as Agents,

— the Commission of the European Communities, by F. de Sousa Fialho and N. Khan, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1997,

gives the following

Judgment

1 By judgment of 14 February 1996, received at the Court on 25 March 1996, the Supremo Tribunal Administrativo referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 1(3) of Council Regulation (EEC) No 738/92 of 23 March 1992, imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey (OJ 1992 L 82, p. 1).

2 Those questions were raised in proceedings between Indústria e Comércio Têxtil SA (hereinafter 'ICT') and the Portuguese customs authorities concerning the calculation of anti-dumping duties in accordance with Regulation No 738/92.

3 Article 1(2)(a) of that regulation provides that the rate of the duty applicable to the net free-at-Community-frontier price before duty is to be 16.6% for cotton yarn originating in Brazil, with the exception of imports manufactured by certain named companies.

4 Article 1(3) provides: 'The free-at-Community-frontier price as indicated in paragraph 2 shall be net if the actual conditions of payment provide for payment within 30 days of the arrival of the goods on the customs territory of the Community. It shall be increased by 1% for each further month by which the period for payment is extended.'

5 In December 1991, ICT imported two consignments of cotton yarn from Brazil at prices of US $3.26/kg and US $3.94/kg respectively. The period for payment, as stated in two invoices dated 3 December 1991, was 90 days. It appears from the contracts of sale relating to these imports, dated 4 August 1991, that had the price been paid CAD (cash against documents) it would have been US $3.18/kg and US $3.85/kg respectively.

6 The Portuguese customs authorities applied the anti-dumping duty specified in Article 1(2)(a) of Regulation No 738/92 after adding 2% to the free-at-Community-frontier price to take account of the 90-day period for payment.

7 ICT considered that the increase provided for by Article 1(3) of the regulation could be applied only where the price for immediate payment of the goods and the price in the event of deferred payment were exactly the same. It therefore brought proceedings before the Tribunal Fiscal Aduaneiro do Porto (Customs Court, Oporto), which upheld its claim. The decision of the Customs Court was reversed by the Tribunal Tributário de Segunda Instância (Tax Court of Second Instance) and ICT subsequently appealed to the Supremo Tribunal Administrativo (Supreme Administrative Court), which stayed proceedings and referred the following three questions to the Court for a preliminary ruling:

'1. Is the increase (of 1% for each month that elapses without payment being made, following the 30th day after the arrival of the goods in the customs territory of the Community) provided for in Article 1(3) of Council Regulation (EEC) No 738/92 of 23 March 1992 applicable to the free-at-Community-frontier price whenever it is agreed that the price is payable on a date falling after that 30th day?

2. If the answer to the foregoing question cannot be unconditionally affirmative, as a result of the need for a distinction to be drawn, is the said increase applicable in circumstances like those of this case (see the facts proved) where the price of the imported goods, agreed as payable in 90 days, was about 2.3% (in one case) and 2.5% (in another case) greater than the price payable CAD (cash against documents)?

3. If the foregoing question is answered in the affirmative, must that increase be applied to the price corresponding to payment CAD or to the price agreed as payable in 90 days?'

8 By those three questions, which should be considered together, the national court is essentially asking whether the increase provided for in Article 1(3) of Regulation No 738/92 must be applied whenever it is agreed that the price for imported goods is payable on a date more than 30 days after their arrival in the customs territory of the Community, even if the difference between the price for deferred payment and that for payment CAD is greater, in percentage terms, than the increase to be

applied and, if so, whether that increase should be applied to the price CAD or to the price for deferred payment.

9 Firstly, it should be noted that Article 1(3) provides clearly and unconditionally that the free-at-Community-frontier price, to which the anti-dumping duty provided for by paragraph 2 is to be applied, is to be increased by 1% for each further month by which the period for payment is extended, following the 30th day after the arrival of the goods in the customs territory of the Community.

10 ICT none the less submits that the existence of dumping is an essential precondition for the increase provided for in Article 1(3) to be applied and that dumping only occurs where, notwithstanding the grant of deferred payment terms, the price of the goods is exactly the same as the price paid where payment is immediate, that is to say where the importer incurs no financial charges in respect of the deferred payment terms.

11 That argument cannot be accepted.

12 As the Advocate General has correctly pointed out at paragraph 12 of his Opinion, the grant by the seller of a very low rate of interest, relative to those prevailing on the market, would also afford an advantage to the buyer and would, to the extent of that advantage, amount to a form of credit dumping.

13 There is thus no reason inherent in the aims of the anti-dumping rules to depart from the express provisions of Article 1(3) of Regulation No 738/92 and to apply

the increase only where the price payable for imported goods is exactly the same whether payment is CAD or deferred.

14 Secondly, as the Portuguese Government and the Commission have pointed out, the free-at-Community-frontier price, to which the anti-dumping duty is applied, corresponds to the customs value of the imported goods, as defined by Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1), namely the transaction value, that is to say, the price actually paid or payable for the goods when sold for export to the customs territory of the Community.

15 Article 3(2) of Commission Regulation (EEC) No 1495/80 of 11 June 1980 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 (OJ 1980 L 154, p. 14), as amended by Commission Regulation (EEC) No 220/85 of 29 January 1985 (OJ 1985 L 25, p. 7), provides that charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods are not to be included in the customs value determined under Regulation No 1224/80, provided that the charges are distinguished from the price actually paid or payable for the goods, that the financing arrangement has been made in writing and that, where required, the buyer can demonstrate not only that such goods are actually sold at the price declared as the price actually paid or payable, but also that the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided.

16 In Case C-21/91 *Wünsche* v *Hauptzollamt Hamburg-Jonas* [1992] ECR I-3647, paragraphs 18 and 19, the Court held that, where a seller of goods allows the buyer time to pay, that constitutes a 'financing arrangement' within the meaning of Article 3 of Regulation No 1495/80 as soon as the buyer accepts the deferred

payment, and that it is not necessary for such deferred payment to be the subject of a specific agreement between the seller and the buyer, separate from the agreement relating to the sale of the imported goods.

17 The Court further held, at paragraph 19, that, where charges for interest payable as consideration for the deferred payment agreed by the seller are a separate item on the invoice sent to the buyer, it must be considered that, where there is no objection on the part of the buyer, he has in effect agreed to the charges for interest relating to the deferred payment. That is also true where, as in the main proceedings, the charges for interest can be inferred from the difference between the prices for payment CAD and deferred payment respectively and those prices are specified in the agreement between the two parties relating to the sale, rather than on the invoice.

18 If, therefore, the conditions set out in Article 3(2) of Regulation No 1495/80, as amended by Regulation No 220/85, are fulfilled — which is a matter for the national court to determine — the increase provided for in Article 1(3) of Regulation No 738/92 must be based on the price actually paid or payable for the goods when they are sold for export to the customs territory of the Community, excluding charges for interest payable as consideration for the deferred payment terms granted by the seller to the buyer.

19 The increase is thus specifically intended to offset, automatically and at a standard rate, the commercial advantage which can result from deferred payment terms for goods, in order to prevent a form of credit dumping and the circumvention thereby of the purpose of the anti-dumping duty.

20 It must further be borne in mind that, as stated at paragraph 15 above, one of the conditions set out in Article 3(2) of Regulation No 1495/80, as amended by

Regulation No 220/85, is that the claimed rate of interest must not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided.

21 That condition makes it possible to prevent operators from artificially reducing the basis of assessment of the anti-dumping duty, and thus the duty itself, by specifying an excessively high, and possibly fictitious, rate of interest not in line with prevailing rates.

22 The answer to the national court's questions must therefore be that the increase provided for in Article 1(3) of Regulation No 738/92 must be applied whenever it is agreed that imported goods are to be paid for more than 30 days after their arrival in the customs territory of the Community, even where the difference between the price for deferred payment and that for payment CAD is greater, in percentage terms, than the increase to be applied. That increase must be based on the price actually paid or payable for the goods when they are sold for export to the customs territory of the Community, excluding charges for interest as consideration for the deferred payment terms granted, provided that those terms are the subject of a 'financing arrangement' within the meaning of Article 3(2) of Regulation No 1495/80, as amended by Regulation No 220/85, and that the level of charges reflects prevailing interest rates.

Costs

23 The costs incurred by the Portuguese Government and the Commission 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 (Second Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by judgment of 14 February 1996, hereby rules:

The increase provided for in Article 1(3) of Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey must be applied whenever it is agreed that imported goods are to be paid for more than 30 days after their arrival in the customs territory of the Community, even where the difference between the price for deferred payment and that for payment CAD is greater, in percentage terms, than the increase to be applied. That increase must be based on the price actually paid or payable for the goods when they are sold for export to the customs territory of the Community, excluding charges for interest as consideration for the deferred payment terms granted, provided that those terms are the subject of a 'financing arrangement' within the meaning of Article 3(2) of Commission Regulation (EEC) No 1495/80 of 11 June 1980 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes, as amended by Commission Regulation (EEC) No 220/85 of 29 January 1985, and that the level of charges reflects current prevailing rates.

Mancini Hirsch Schintgen

Delivered in open court in Luxembourg on 29 May 1997.

R. Grass

Registrar

G. F. Mancini

President of the Second Chamber