JUDGMENT OF THE COURT (Fifth Chamber)
13 March 1997 *

In Case C-103/96,

REFERENCE to the Court for a preliminary ruling under Article 177 of the EC Treaty by the Tribunal d'Instance, Lille, in the proceedings pending before that court between

Directeur Général des Douanes et Droits Indirects

and

Eridania Beghin-Say SA,

on the validity of Article 9 of Council Regulation (EEC) No 3677/86 of 24 November 1986 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements (OJ 1986 L 351, p. 1),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, C. Gulmann (Rapporteur), D. A. O. Edward, J.-P. Puissochet and M. Wathelet, Judges,

* Language of the case: French.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Eridania Beghin-Say SA, by Jean Leygonie, of the Paris Bar,

— the French Government, by Catherine de Salins, Assistant Director, Directorate for Legal Affairs, Ministry of Foreign Affairs, and Frédéric Pascal, Attaché for Central Administration in the same Directorate, acting as Agents,

— the Council of the European Union, by Maria Cristina Giorgi, Adviser in its Legal Service, acting as Agent, and

— the Commission of the European Communities, by Fernando Castillo de la Torre, of its Legal Service, and Jean-Francis Pasquier, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Eridania Beghin-Say SA, represented by Yvon Martinet, of the Paris Bar, the French Government, represented by Frédéric Pascal, the Council of the European Union, represented by Maria Cristina Giorgi, and the Commission of the European Communities, represented by Fernando Castillo de la Torre and Jean-Francis Pasquier, at the hearing on 7 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 5 December 1996,

gives the following

Judgment

1 By judgment of 19 March 1996, received at the Court Registry on 28 March 1996, the Tribunal d'Instance (District Court), Lille, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the validity of Article 9 of Council Regulation (EEC) No 3677/86 of 24 November 1986 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements (OJ 1986 L 351, p. 1).

2 Those questions were raised in proceedings brought by Directeur Général des Douanes et Droits Indirect (Director General of Customs and Indirect Duties) against Eridania Beghin-Say SA (hereinafter 'Eridania') concerning the payment of customs duties, charges and levies required from that undertaking in respect of the import of raw cane sugar from non-member countries for which, after checks were made, equivalent compensation was disallowed in respect of raw beet sugar exported by the same undertaking, in the form of white sugar, outside the customs territory of the Community.

3 Article 1(2)(a) of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements (OJ 1985 L 188, p. 1, hereinafter 'the basic regulation') provides in particular that it is permitted under the inward processing arrangements, in accordance with the conditions laid down in that regulation, to subject to processing operations non-Community goods intended for re-export outside the customs territory of the Community in the form of compensating products, such goods not being subject to import duties. Article 1(3)(h) and (i) provide that 'compensating products' means all products resulting in particular from the processing or working of goods.

4 Article 1(3)(n) of the basic regulation describes that form of inward processing arrangement as the 'suspension system'.

5 Article 1(3)(a) defines 'import goods' as including non-Community goods which have undergone formalities for being placed under inward processing relief arrangements within the framework of the suspension system.

6 Pursuant to Article 1(3)(d), Community goods which are used instead of the import goods for the manufacture of compensating products are known as 'equivalent goods'.

7 According to Article 2(1)(a) and the first sentence of Article 2(2) of the basic regulation, the customs authority is to authorize compensating products to be obtained from equivalent goods provided that they are of the same quality and have the same characteristics as the import goods. That is the 'equivalent compensation system' as opposed to the 'identical compensation system' described in paragraph 3 of this judgment.

8 Article 2(4) of the basic regulation provides that measures designed to prohibit or limit recourse to equivalent compensation may be adopted in accordance with the 'Regulatory Committee' procedure laid down in Article 31(2) and (3).

9 The first sentence of Article 18(1) of the basic regulation provides: 'Inward processing relief arrangements for import goods shall be finally discharged when the compensating products have been exported outside the customs territory of the Community under customs control, provided that all the conditions for use of the relief arrangements have been complied with.'

10 Pursuant to Article 31(1) of the basic regulation '[T]he provisions required for the implementation of this regulation ... shall be adopted in accordance with the procedure laid down in paragraphs 2 and 3'.

11 Article 9 of Regulation No 3677/86 (hereinafter 'the implementing regulation'), adopted under the Regulatory Committee procedure, provides that, where use is to be made of equivalent compensation, the equivalent goods must fall within the same subheading of the Common Customs Tariff, be of the same commercial quality and have the same technical characteristics as the import goods.

12 Eridania imported 11 923 910 kg of raw cane sugar from Cuba, placing it under inward processing arrangements on 22 April 1991 on the basis of the suspension system.

13 It then re-exported, in discharge of those arrangements, before August 1991, 11 268 097 kg of white sugar, obtained from raw beet sugar or sugarbeet.

14 Following inspections by the Direction des Douanes, the Directeur Général des Douanes et Droits Indirects considered that, having regard to Article 9 of the implementing regulation, the suspension system under the inward processing arrangements was not applicable because raw cane sugar and raw beet sugar fell within two separate tariff subheadings. By notice of 4 October 1994 he therefore initiated proceedings against Eridania before the Tribunal d'Instance, Lille, to recover the sum of FF 38 476 561 in respect of unpaid duties, charges and levies.

15 Before that court, the defendant contested the validity of Article 9 of the implementing regulation, contending that it conformed neither with the basic regulation nor with the general principles of Community law such as those concerning the hierarchy of norms, proportionality, protection of legitimate expectations and legal certainty.

16 The Tribunal d'Instance, Lille, observes in that regard that, according to Article 2 of the basic regulation, the equivalent compensation mechanism is applicable where the compensating products are obtained from equivalent products, namely goods of the same quality and having the same technical characteristics as the import goods. However, Article 9 of the implementing regulation provides that, for recourse to equivalent compensation to be available, the equivalent goods must in any event fall within the same Common Customs Tariff subheading as the import goods.

17 It was precisely that condition which prompted the national court to query the validity of Article 9 of that regulation having regard to the principles of:

— the hierarchy of norms, in that it adds a third condition not provided for in the basic regulation;

— proportionality, in that the requirement of classification under the same subheading of the Common Customs Tariff constitutes an obstacle to attainment of the objective pursued by the basic regulation of promoting exports by Community undertakings;

— protection of legitimate expectations, in that three legal situations arose successively within a few years. The national court points out that, according to the Common Customs Tariff in force in 1987 (Council Regulation (EEC) No 3618/86 of 24 November 1986, OJ 1986 L 345, p. 1), raw beet sugar and raw cane sugar fell within the same subheading; that the combined nomenclature (CN) established by Council Regulation (EEC) No 2658/87 of 23 July 1987 (OJ 1987 L 256, p. 1) placed raw beet sugar and raw cane sugar under separate subheadings as from 1 January 1988; and that, as from 1 January 1992, Commission Regulation (EEC) No 3709/92 of 21 December 1992, amending Commission Regulation (EEC) No 2228/91 laying down provisions for the implementation of Regulation No 1999/85 (OJ 1992 L 378, p. 6), authorized

recourse to the equivalent compensation system as between raw cane sugar and raw beet sugar, even though those two products are classified under two different subheadings (codes);

— legal certainty, in that the application of Article 9 of the implementing regulation and of the combined nomenclature from 1 January 1988 to 1 January 1992 made it impossible to treat cane sugar and beet sugar as compensating products under the inward processing arrangements.

18 The Tribunal d'Instance, Lille, therefore stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'(1) Is Article 9 of Council Regulation (EEC) No 3677/86 of 24 November 1986 laying down provisions for the implementation of Regulation (EEC) No 1999/85 valid, in that it provides that, in order for goods to rank as equivalent goods, they must fall within the same subheading of the Common Customs Tariff as the import goods, notwithstanding that the basic regulation, Regulation No 1999/85 of 16 July 1985, does not lay down any such condition?

(2) Is Article 9 of Council Regulation (EEC) No 3677/86 of 24 November 1986 valid, in that it provides that, in order for goods to rank as equivalent goods, they must fall within the same subheading of the Common Customs Tariff as the import goods, notwithstanding that such a condition gives rise to disproportionate effects for economic operators?

(3) Is Article 9 of Council Regulation (EEC) No 3677/86 of 24 November 1986 valid, having regard to the principles of the protection of legitimate expectations and legal certainty, in that it provides that, in order for goods to rank as equivalent goods, they must fall within the same subheading of the Common Customs Tariff as the import goods, notwithstanding that that article,

combined with the provisions of Regulation No 2658/87 on the combined nomenclature, suddenly made it impossible, with effect from 1 January 1988 and only until 1 January 1992, for persons to avail themselves of the inward processing relief arrangements in respect of compensation on an equivalent basis as between cane sugar and beet sugar?'

The first question

19 By its first question the national court seeks to determine whether Article 9 of the implementing regulation, in so far as it makes recourse to equivalent compensation subject to the condition that the equivalent goods must fall within the same subheading of the Common Customs Tariff as the import goods, is invalid on the ground that it infringes the basic regulation, in particular Article 2(1)(a) and the first sentence of Article 2(2).

20 It must first be noted that, in adopting provisions for the implementation of a basic regulation, the Community authority empowered to do so is required not to exceed the powers conferred upon it for the implementation of the rules which it contains (see, to that effect, Case C-162/82 *Cousin* [1983] ECR 1101, paragraph 15).

21 According to Eridania, Article 9 of the implementing regulation contravenes the principle of the hierarchy of norms since, to the two conditions laid down by the basic regulation for recourse to equivalent compensation, it adds *ex nihilo* the condition that the goods must fall within the same tariff subheading. Eridania states that the third condition is not intended to clarify the other two conditions for recourse to equivalent compensation but constitutes a new criterion which is more restrictive than the two criteria laid down by the basic regulation and, moreover, is associated with objectives different from those of that regulation. The inward processing arrangements operate in the economic sphere, in that they seek to promote

exports by Community undertakings, and thus the basic regulation, according to Eridania, allows equivalent compensation provided that the goods concerned meet certain criteria of an economic nature. However, the customs nomenclature pursues objectives such as, first, the application of customs duties and, secondly, the need to record, for statistical purposes, the movements of goods.

22 In that regard, although it is true that, under Article 2(1)(a) and the first sentence of Article 2(2), recourse to equivalent compensation is possible only if the equivalent goods meet two conditions, namely that they are of the same quality and have the same characteristics as the import goods, the fact nevertheless remains that paragraph 4 of that article gives the competent authority a wide power to adopt, under the Regulatory Committee procedure provided for in Article 31(2) and (3), measures to prohibit or limit recourse to equivalent compensation.

23 Article 9 of the implementing regulation adopted under that procedure, in so far as it provides that, for recourse to equivalent compensation to be available, the equivalent goods must not only display the same commercial quality and have the same technical characteristics as the import goods, but must also fall within the same Common Customs Tariff subheading, is intended to limit, in the manner provided for by Article 2(4) of the basic regulation, recourse to the equivalent compensation system. If the equivalent goods and the import goods had the same commercial quality and technical characteristics but did not come within the same tariff subheading, recourse to the equivalent compensation system would be precluded.

24 Moreover, the possibility of restricting the scope of the equivalent compensation system is consistent with the fact that that system derogates from the inward processing arrangements, as reflected by the general scheme of the basic regulation, and, in particular, by the fact that the latter, as is clear from the eighth recital in its preamble, reiterates the principles of Council Directive 69/73/EEC on the harmo-

nization of the provisions laid down by law, regulation or administrative action in respect of inward processing arrangements (OJ, English Special Edition 1969 (I), p. 75), Article 24 of which described the equivalent compensation system as constituting a derogation.

25 It must also be pointed out that the criterion of tariff classification makes it possible to delimit, in accordance with a clear and precise guideline, the groups of goods between which equivalent compensation is possible and, contrary to what, in essence, Eridania has argued, it has no connection with the economic nature of the goods which it covers. In any event, that criterion appears to be capable of contributing to the attainment of, in particular, the objective referred to in the fourth recital in the preamble to the basic regulation, which is to avoid abuse of inward processing arrangements.

26 In those circumstances, the general objective of the inward processing arrangements, namely the promotion of exports by Community undertakings, as mentioned in the second recital in the preamble to the basic regulation and referred to by Eridania, does not conflict with recourse to the criterion at issue.

27 The answer to the first question must therefore be that consideration of the points raised has disclosed no factor of such a kind as to affect the validity of Article 9 of the implementing regulation.

The second question

28 By its second question the national court asks whether Article 9 of the implementing regulation, in so far as it makes recourse to equivalent compensation subject to the condition that the equivalent goods must fall within the same subheading as the import goods, is invalid on the ground that it contravenes the principle of proportionality.

29 Eridania claims essentially that since two products having the same commercial quality and the same technical characteristics are excluded from equivalent compensation solely because they fall within two different subheadings, Article 9 of the implementing regulation goes further than is necessary to avoid abuse of that system. In support of that view, it argues that the criterion of the tariff subheading is not sufficiently precise to attain that objective; it was also for that reason, it claims, that the Council included in Annex IV to the implementing regulation additional criteria for rice falling within the same subheading. According to Eridania, the tariff subheading criterion could only be valid if it were purely indicative, that is to say if it were a sufficient, but not a necessary, precondition for the availability of the equivalent compensation system.

30 In view of the fact that the authority empowered to adopt provisions concerning application of the basic regulation is vested, as noted in paragraph 22 of this judgment, with wide powers to adopt measures intended to prohibit or limit equivalent compensation, the measures can be considered invalid only if they are manifestly disproportionate in relation to the objective pursued (see, to that effect, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 14).

31 Article 9 of the implementing regulation, in so far as it makes recourse to equivalent compensation subject to the condition that the equivalent goods must fall within the same subheading as the import goods, does not appear to be manifestly disproportionate to the objective of avoiding abuse of the inward processing arrangements.

32 It should also be noted that the fact that the Council included additional conditions in Annex IV to the implementing regulation in order to allow rice falling within the same Common Customs Tariff subheading to qualify for equivalent compensation is not such as to raise doubts as to whether the subheading criterion is appropriate to attainment of the abovementioned objective. It is in fact a measure designed to make recourse to the equivalent compensation system subject to greater limitations.

33 It must therefore be ruled that examination of the second question has disclosed no factor of such a kind as to affect the validity of Article 9 of the implementing regulation.

The third question

34 By its third question the national court seeks to ascertain whether Article 9 of the implementing regulation, in so far as it makes recourse to equivalent compensation subject to the condition that the equivalent goods must fall within the same subheading of the Common Customs Tariff as the import goods, is invalid on the ground that it infringes the principles of the protection of legitimate expectations and of legal certainty, since, following the adoption of Regulation No 2658/87 on the combined nomenclature, it became impossible from 1 January 1988 to 31 December 1991 inclusive to have recourse to equivalent compensation between beet sugar and cane sugar (see paragraph 17 of this judgment).

The alleged breach of the principle of the protection of legitimate expectations

35 According to Eridania, the principle of the protection of legitimate expectations was not observed in the inward processing system in relation to sugar since, in the space of a few years, no fewer than three legal situations arose successively. It states that from 1 January 1987 to 31 December 1987 inward processing arrangements with equivalent compensation between cane sugar and beet sugar were available since those two products fell within the same tariff subheading; that, since the new tariff nomenclature placed raw beet sugar and raw cane sugar under separate subheadings that operation became impossible as from 1 January 1988; and that, finally, such an operation became possible again as from 1 January 1992 by virtue of Regulation No 3709/92.

36 In that regard, it must be observed that Article 9 of the implementing regulation, in so far as it makes recourse to equivalent compensation subject to the condition that the goods concerned must fall within the same subheading, makes the availability of that system dependent upon a criterion forming part of rules other than those relating to inward processing and liable to vary in scope, in particular as a result of periodical changes to the tariff nomenclature.

37 Consequently, with regard to the requirement of identity of subheading, an economic operator such as Eridania cannot, by virtue of the abovementioned provision, entertain any legitimate expectation other than that of being able to have recourse to equivalent compensation where the goods concerned fall, under the nomenclature in force at the material time, within the same subheading.

The alleged breach of the principle of legal certainty

38 According to Eridania, the principle of legal certainty was contravened in this case since the conditions applicable to the equivalent compensation operations were affected indirectly, and thus in an ambiguous manner, by the changes to the customs nomenclature.

39 That argument must be rejected.

40 As the Advocate General states, in substance, in point 51 of his Opinion, Article 9 of the implementing regulation provides economic operators with a clear and precise criterion, that of tariff classification, to determine whether or not equivalent compensation between two products is possible under the inward processing arrangements. The fact that the tariff nomenclature may change, as pointed out

in paragraph 36 of this judgment, is not such as to detract from the clarity and precision of that criterion.

41 The reply to the question must therefore be that consideration of the third question has disclosed no factor of such a kind as to affect the validity of Article 9 of the implementing regulation.

Costs

42 The costs incurred by the French Government, the Council of the European Union 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 proceedings 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 questions submitted to it by the Tribunal d'Instance, Lille, by judgment of 19 March 1996, hereby rules:

Consideration of Council Regulation (EEC) No 3677/86 of 24 November 1986 laying down provisions for the implementation of Regulation (EEC)

No 1999/85 on inward processing relief arrangements has not, in the light of the order for reference, disclosed any factor of such a kind as to affect its validity.

Moitinho de Almeida Gulmann Edward

Puissochet Wathelet

Delivered in open court in Luxembourg on 13 March 1997.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber