JUDGMENT OF THE COURT (Fifth Chamber)
23 February 1995 *

In Case C-334/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht, Düsseldorf, Germany, for a preliminary ruling in the proceedings pending before that court between

Bonapharma Arzneimittel GmbH

and

Hauptzollamt Krefeld,

on the interpretation of the Agreement between the European Economic Community and the Republic of Austria, signed in Brussels on 22 July 1972 and approved by Regulation (EEC) No 2836/72 of the Council of 19 December 1972 concluding an Agreement between the European Economic Community and the Republic of Austria and adopting provisions for their implementation (OJ, English Special Edition 1972 (31 December), p. 3), in particular Protocol No 3 annexed thereto concerning the definition of the concept of 'originating products' and methods of administrative cooperation,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Fifth Chamber, J. C. Moitinho de Almeida and D. A. O. Edward (Rapporteur), Judges,

Advocate General: C. O. Lenz,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Belgian Government, by Patrick Duray, Deputy Adviser at the Ministry of Foreign Affairs, External trade and Development Cooperation, acting as Agent,

— the Commission of the European Communities, by Jörn Sack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Bonapharma Arzneimittel GmbH, represented by Günther Kroemer II, of the Düsseldorf Bar, and of the Commission at the hearing on 8 December 1994,

after hearing the Opinion of the Advocate General at the sitting on 15 December 1994,

gives the following

Judgment

1 By an order of 12 May 1993 received at the Court on 29 June 1993, the Finanzgericht (Finance Court), Düsseldorf, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the Agreement between the European Economic Community and the Republic of Austria, signed in Brussels on 22 July 1972 and approved by Regulation (EEC) No 2836/72 of the Council of 19 December 1972 concluding an Agreement between the European Economic Community and the Republic of Austria and adopting provisions for implementation (OJ English Special Edition 1972 (31 December), p. 3), in particular Protocol No 3 annexed thereto concerning the definition of the concept of 'originating products' and methods of administrative cooperation.

2 Protocol No 3 has been amended in particular by Council Regulation (EEC) No 1598/88 of 24 May 1988 on the application of Decision No 1/88 of the EEC-Austria Joint Committee amending Protocol No 3 concerning the definition of 'originating products' and methods of administrative cooperation (OJ 1988 L 149, p. 1).

3 Under the terms of Article 8(1) of Protocol No 3, products originating in the Community or in Austria are to benefit, on import into the Community or Austria, from the Agreement, that is to say from preferential terms, on submission of (a) a EUR.1 movement certificate or, in specific cases (b) and (c) invoices meeting certain criteria. In accordance with Article 9(1) a EUR.1 movement certificate 'shall be issued by the customs authorities of the exporting state when the goods to which it relates are exported.'

4 In accordance with Article 10(3) of Protocol No 3 the EUR.1 certificate constitutes the documentary evidence for the application of the preferential tariff and quota arrangements laid down in the Agreement, and it is for the customs authorities of the exporting country to take the steps necessary to verify the origin of the goods and to check the other statements on the EUR.1 certificate.

5 As regards the EEC-Austria Agreement, Article 13(1) thereof provides:

'No new quantitative restriction on imports or measures having equivalent effect shall be introduced in trade between the Community and Austria.'

6 Finally, Article 23(1) of the same agreement provides:

'The following are incompatible with the proper functioning of the Agreement in so far as they may affect trade between the Community and Austria:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof;

...'

7 It appears from the order for reference that Bonapharma Arzneimittel GmbH (hereinafter 'Bonapharma') between 14 April 1989 and 15 January 1991 imported eighteen consignments of medicinal products from Austria. Declarations of origin were included on the invoices, and six of the consignments were accompanied by EUR.1 movement certificates. After the Austrian Ministry of Finance informed the German customs authorities that the documentary evidence concerning origin had been issued in error, the Hauptzollamt (Principal Revenue Office), Krefeld, claimed from Bonapharma payment of customs duties amounting to DM 20 743, 36 and declined to accept as proof of origin of the medicinal products any documentary evidence other than the EUR.1 certificates.

8 Consequently, Bonapharma brought proceedings against the notice of amended assessment by which post-clearance recovery customs duty on the medicinal products was sought.

9 Bonapharma is not in a position to provide EUR.1 certificates because its supplier, an Austrian pharmacy, was unable to obtain from its own suppliers, namely Austrian stockists and wholesalers, any indication of the origin of the medicinal products. Only a small number of the 39 wholesalers to whom that pharmacy wrote replied informing it that they had received instructions not to reveal any information as to origin.

10 As regards the Austrian customs authority it takes the view that it is not for it to conduct investigations into the origin of goods.

11 None of the legal proceedings brought in Austria against the suppliers (stockists and wholesalers) and the customs authorities on account of their conduct resulted in a successful outcome.

12 In its objection against the claim for recovery Bonapharma submitted that the Austrian stockists had been instructed by manufacturers established in the Com-

munity not to supply to the exporting Austrian pharmacy documents evidencing the origin of the products. However, the Hauptzollamt Krefeld dismissed that objection stating that, in accordance with Protocol No 3, only submission of the EUR.1 certificate enabled preferential treatment to be granted with the result that it refused to accept as proof of origin of the medicinal products documents other than that certificate.

13 The national court considers, on the basis of the attestations issued by the Regierungspräsident (Administrative District Officer), Düsseldorf, under Articles 72a and 73(6) of the Arzneimittelgesetz (Law on medicinal products) which confirm the German origin of the medicinal products reimported from Austria, that the pharmaceutical products imported by Bonapharma are manufactured in Germany. It also had regard to the Austria-Codex, a publication providing technical information published pursuant to the provisions of the Federal Austrian law on the production and marketing of medicinal products, and to the regulation on technical and utilization information concerning proprietary medicinal products, which confirmed the Community origin of the medicinal products.

14 The national court also considers that the conduct of the Austrian wholesalers (who act on the instigation of producers established in the Community) constitutes a concerted practice which, in breach of Article 23(1)(i) of the EEC-Austria Agreement restricts competition in trade between the Community and Austria and/or constitutes an abuse of a dominant position on the market incompatible with Article 23(1)(ii) of that Agreement. In its view the refusal to issue certificates of origin or to assist in their issuance is also in breach of Article 13 of the Agreement since it introduces quantitative restrictions on imports or measures having equivalent effect.

15 The national court asks whether in such exceptional circumstances proof of origin may not be adduced in a form other than that provided for in the Agree-

ment and therefore referred the following question to the Court for a preliminary ruling:

'Where imports from Austria are in fact re-imports from the Community, is it permissible to dispense with production of the documents establishing proof of favoured origin as provided for in Title II of Protocol No 3 of the Agreement between the European Economic Community and the Republic of Austria where a cartel in breach of Article 23(1) of that Agreement prevents those documents from being issued and the Austrian customs authorities, without undertaking their own investigations, leave it to the exporter alone to prove his entitlement to preferential treatment?'

16 Under the actual terms of the EEC-Austria Agreement only goods originating in the Community or Austria may benefit from the preferential arrangements and the EUR.1 movement certificate constitutes the documentary evidence of that origin. As was rightly pointed out by the Advocate General in his Opinion, to allow other means of proof in addition to those proofs of origin would affect the unity and security of the application of the EEC-Austria Agreement.

17 However, in its judgment in Case C-12/92 *Huygen and Others* [1993] ECR I-6381 the Court permitted exceptions from the arrangements laid down in Protocol No 3 where the trader in question is confronted with quite exceptional circumstances which are outside his control and whose consequences could not have been avoided in spite of all care taken.

18 It is clear from the findings of the national court contained in the order for reference that three characteristic features of this case may be identified.

19 First, the origin of the goods in issue was established beyond doubt on the basis of objective evidence which could not have been manipulated or falsified by those involved.

20 Secondly, both the importer and the exporter concerned took the steps necessary to obtain the EUR.1 certificates.

21 Thirdly, it is impossible for them to obtain those certificates for reasons which are beyond their control.

22 In that connection the circumstances described by the national court indicate that it was as a result of anticompetitive conduct by other persons concerned contrary both to the objective and the terms of the Agreement that it was impossible to obtain the EUR.1 certificates.

23 Those circumstances must be deemed to be such as to justify an exception to the requirement of production of EUR.1 certificates for the purpose of the arrangements provided for under the EEC-Austria Agreement.

24 The reply to the question submitted for a preliminary ruling must therefore be that it is permissible to dispense with production of the documents mentioned in Title II of Protocol No 3 to the EEC-Austria Agreement where the origin of the goods in issue has been established beyond doubt on the basis of objective evidence which could not have been manipulated or falsified by those involved, where both the importer and the exporter concerned took the steps necessary to obtain the documents referred to in the Protocol, and where it was for reasons beyond their control, such as anticompetitive conduct by other persons concerned contrary both to the objective and the terms of the Agreement, that it was impossible for them to produce those documents.

Costs

25 The costs incurred by the Belgian Government and by 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 (Fifth Chamber),

in answer to the question submitted to it by the Finanzgericht, Düsseldorf, by order of 12 May 1993, hereby rules:

It is permissible to dispense with production of the documents mentioned in Title II of Protocol No 3 to the EEC-Austria Agreement in the version contained in Council Regulation (EEC) No 1598/88 of 24 May 1988 on the application of Decision No 1/88 of the EEC-Austria Joint Committee amending Protocol No 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation, where the origin of the goods in issue has been established beyond doubt on the basis of objective evidence which could not have been manipulated or falsified by those involved, where both the importer and the exporter concerned took the steps necessary to obtain the documents referred to in the Protocol, and where it was for reasons

beyond their control, such as anticompetitive conduct by other persons concerned contrary both to the objective and the terms of the Agreement, that it was impossible for them to produce those documents.

Gulmann Moitinho de Almeida Edward

Delivered in open court in Luxembourg on 23 February 1995.

R. Grass

Registrar

C. Gulmann

President of the Fifth Chamber