OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 20 February 1997 *

Introduction

1. This case relates to the imposition of anti-dumping duty on imports into the Community of cotton yarn from Brazil. In particular, it concerns the calculation of the amount which is subject to the duty, in a context where the relevant Community legislation provides for that amount to be increased by 1% per month in cases of deferred payment, and where the deferred price was, as in the present case, greater than that payable upon importation.

Legal and factual background

2. This reference concerns the interpretation 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 [1] (hereinafter 'the Regulation'). Article 1(1) of the Regulation imposes a definitive anti-dumping duty on imports of cotton yarn within specified CN codes originating in Brazil and Turkey. Article 1(2)(a) states that the rate of the duty applicable to the net free-at-Community-frontier price before duty shall be 16.6% for cotton yarn originating in Brazil, subject to exceptions which are not relevant to the instant case. Article 1(3) of the Regulation states:

'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.'

3. The 'customs value' of imported goods is defined by Article 3 of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the

* Original language: English.

1 — OJ 1992 L 82, p. 1. This measure succeeded Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, OJ 1991 L 271, p. 17.

valuation of goods for customs purposes [2] as 'the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community'. 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 [3] states, in relevant part:

'2. Charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods shall not be included in the customs value determined under Regulation (EEC) No 1224/80 provided that:

(a) the charges are distinguished from the price actually paid or payable for the goods;

(b) the financing arrangement has been made in writing;

(c) where required, the buyer can demonstrate that:

— such goods are actually sold at the price declared as the price actually paid or payable, and

— 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.

....

4. The provisions of paragraphs 2 and 3 shall apply regardless of whether the finance is provided by the seller, a bank or other natural or legal person.'

2 — OJ 1980 L 134, p. 1.

3 — OJ 1980 L 154, p. 14. However, the original Article 3, which referred only to 'interest payable under a financing arrangement relating to the purchase of imported goods', was repealed and replaced by Article 1(2) of Commission Regulation (EEC) No 220/85 of 29 January 1985 amending Regulation (EEC) No 1495/80 implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes, OJ 1985 L 25, p. 7. The third and fourth recitals in the preamble to this measure indicate that it was adopted pursuant to a decision on the uniform treatment for customs valuation purposes of charges for interest under a financing arrangement relating to the purchase of imported goods adopted within the framework of the GATT. It is the amended text which is quoted.

4. Indústria e Comércio Têxtil SA (hereinafter 'the applicant') imported two lots of cotton yarn from Brazil in December 1991, at prices of US $3.26/kg and US $3.94/kg respectively and with 90 days for payment. These conditions were stated on the invoices, dated 3 December 1991. It appears from the order for reference, and from the preceding contracts, dated 4 August 1991, [4] that a lower cash-against-documents (CAD) price was also agreed in both cases (US $3.18/kg and US $3.85/kg respectively), but that the applicant exercised its option for a longer payment period, which choice was reflected in the invoices. The applicant states that the difference between the two possible prices for each lot arises from the cost of credit at the Lisbon inter-bank offered rate.

5. The Portuguese customs authorities applied the anti-dumping duty specified in the Regulation after adding 2% to the free-at-Community-frontier price [5] to take account of the 90-day delay in payment. The anti-dumping duty imposed was therefore greater than it would have been had the agreed CAD price been used as the basis of calculation. The applicant challenged this decision in an action against the Fazenda Pública (Revenue Authority) before the Tribunal Fiscal Aduaneiro do Porto (Customs Court, Oporto). The favourable decision of this court was reversed, on appeal, by the Tribunal Tributário de Segunda Instância (Tax Court of Second Instance), which took the view that financial charges could be excluded from the customs value only where there was a clear separation between the amount of interest and the price paid or to be paid. Although it acknowledged the difference between the CAD and 90-day prices, it did not consider that this difference could be equated with a separately stated credit cost.

6. The Supremo Tribunal Administrativo (the Portuguese Supreme Administrative Court, hereinafter 'the national court') has suspended proceedings in an appeal brought by the applicant against the decision of the Tribunal Tributário de Segunda Instância, and has referred three questions for a preliminary ruling by the Court pursuant to Article 177 of the Treaty establishing the European Community:

'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

4 — These contracts were included in the file forwarded to the Court with the order for reference in the instant case.

5 — The context indicates that the referring court meant by this the price specified in the invoices.

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?'

Observations

7. Written observations were submitted by the applicant, the Portuguese Republic and the Commission. None of them having asked to present oral argument, the Court decided, pursuant to Article 104(4) of the Rules of Procedure, to dispense with an oral hearing.

8. The applicant argued before the national court that the increase of 1% on the free-at-Community-frontier price for each month allowed for payment should only be applied where the result is that the price paid by the Community importer where payment is immediate and the price on credit terms are exactly the same. It repeats this argument in its observations to the Court, contending that only in these circumstances does the extension of credit constitute an additional form of dumping. In the alternative, the applicant submits that the agreed CAD price, rather than the actual 90-day price paid, should be subject to the 1% monthly increase. [6]

9. Both Portugal and the Commission submit that the increase should be applied in any case where the price is paid more than 30 days after delivery in the Community. As the Commission sees it, a deferral of payment, without more, constitutes a real reduction in price. Article 1(3) of the Regulation imposes an automatic increase in the duty designed to counteract a commercial advantage of that type, and thus to prevent the circumvention of the anti-dumping duty. In order to identify the free-at-Community-frontier price which is subject to the increase, both Portugal and the Commission seek to rely on the concept of customs value, as defined by Article 3 of Council Regulation No 1224/80 and as further elaborated by Article 3(2) of Commission Regulation No 1495/80.

6 — It appears that this would be more beneficial to the applicant than using even the unincreased 90-day price as the basis for calculating the anti-dumping duty, as this was, as the second question indicates, over 2% greater than the CAD price in the case of both lots.

10. Portugal submits that the conditions set out in Article 3(2) of Commission Regulation No 1495/80 are not satisfied simply by demonstrating the existence of two distinct prices the application of which depends on the period for payment. The Commission, on the other hand, submits that the existence of two prices corresponding to a choice between an immediate and a deferred payment permits the establishment of the existence of a financing arrangement, in accordance with the interpretation of Article 3(2) of Commission Regulation No 1495/80 given in *Wünsche* v *Hauptzollamt Hamburg-Jonas*. [7] The Court stated that 'in the absence of any provision to the contrary, it must be considered 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'. [8] The Court added that 'it is not necessary for the 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'. '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'. [9]

11. In the Commission's view, the conditions set out in Article 3(2) are satisfied whenever a choice exists between immediate and delayed payment and both prices are clearly indicated, so that the customs authorities can compute the interest rate applied and compare it, if necessary, with that prevailing for such transactions in the country in question. In this case, the agreed CAD price would constitute the proper price to be taken into account for determining the customs value of the goods in question. In response to a question from the Court, the Commission submitted that this would be the case even if the two possible prices were set out, not in the invoice, but in a preceding contract document, the buyer having in the meantime exercised his option of paying the deferred price. The Commission argues that the increase of the net free-at-Community-frontier price by 1% for every additional month by which the period for payment is extended provides an objective criterion for identifying the sum which is subject to anti-dumping duty. The increase of the 90-day price by 2% would result in a double penalization, as it already contains provision for the cost of credit.

Analysis

12. It is necessary, in the first place, to address the applicant's argument that the free-at-Community-frontier price should be increased by 1% for each month allowed for payment only where the prices in the case of immediate and deferred payment are exactly the same. I do not accept this. First, Article 1(3) of the Regulation is expressed in imperative and unconditional terms. There is

7 — Case C-21/91 [1992] ECR I-3647.
8 — Paragraph 18 of the judgment.
9 — Paragraph 19 of the judgment.

no indication that it is to be applied only where no credit cost is imposed on the buyer as consideration for deferred payment. Secondly, this is not the only conceivable form of credit-dumping, as 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. Indeed, the imposition of a very high interest rate, if it were already agreed that payment would be deferred, would permit the seller artificially to depress the ostensible basic price of the goods in question, and, thus, the anti-dumping duty payable. [10] Thirdly, Article 1(3) of the Regulation does not appear to have been designed to counter credit-dumping as such, as the imposition of a 16.6% duty on the estimated monthly credit cost would be a very inadequate response to free or very cheap credit.

13. I find much more convincing the Commission's submission that Article 1(3) of the Regulation is intended to provide a rational and objective criterion for the imposition of the anti-dumping duty regarding the goods themselves, rather than to address any abuses arising from the credit terms actually accorded to importers. In fact, the automatic nature of its application and the fixed amount of the increase imposed mean that it can have little to do with the actual credit terms agreed by the buyer and seller, irrespective of whether these reflect prevailing credit costs. Article 1(3) is designed to identify the notional 'real' cost to the buyer of goods imported into the Community when payment of the free-at-Community-frontier price is deferred. That revised cost is then the proper basis for the imposition of the anti-dumping duty. This is an appropriate policy choice so long as the objective criterion — a fixed rate of 1% per additional month's credit — does not diverge unreasonably from prevailing market rates, to the detriment of the party responsible for paying the duty.

14. I agree with the submissions on the part of Portugal and the Commission that the net free-at-Community-frontier price should be identified having regard to the criteria set out in Article 3 of Council Regulation No 1224/80 and in Article 3(2) of Commission Regulation No 1495/80 for the calculation of customs value. The Court stated in *Nakajima* v *Council* [11] that '[a]nti-dumping duties ... are imposed on the net free-at-Community-frontier price before duty, that is to say, on the customs value (c. i. f. price)

10 — The verification procedures outlined in Article 3(2)(c) of Commission Regulation No 1495/80 are designed to counter such methods of reducing the customs duty payable.

11 — Case C-69/89 [1991] ECR I-2069, paragraph 105 of the judgment.

of the imports'. The Council has also, on occasion, defined the net-free-at-Community-frontier price, in an anti-dumping measure, expressly by reference to the customs value of the goods, as determined in accordance with Council Regulation No 1224/80. [12]

15. I accept the Commission's submission, in the light of the decision of the Court in *Wünsche*, that where two distinct prices can be identified from the invoice or some other contractual document, the one applicable in the case of immediate payment and the other in the case of deferred payment, the conditions set out in Article 3(2)(a) and (b) of Commission Regulation No 1495/80 are satisfied. The only potentially relevant factual differences between the circumstances of the present case and those of *Wünsche* are that the differences in price are expressed by absolute amounts rather than by percentages of the prices on immediate payment, and that the different prices appear in the contracts of sale rather than in the final invoices, the option of deferred payment having already been exercised. The first point is not material, so long as the absolute difference in price is not attributable to any factor other than the extension of credit. The second point is equally immaterial, so long as there is no evidence that the rejected option in the preceding contract was not purely fictitious, an abuse which Article 3(2)(c) of Commission Regulation No 1495/80 is intended to remedy. There has been no suggestion that either the agreed CAD prices or the charges for deferred payment were fictitious.

16. The solution to be found requires a balance to be struck between the possible use of delayed payment as a disguised price reduction and delay in payment related to a genuine financing arrangement. The requirements of Article 3(2) of Commission Regulation No 1495/80 are intended to strike that balance by demanding objective evidence of an arrangement's authenticity. First, it must be possible to distinguish the interest charges from 'the price actually paid or payable for the goods' (Article 3(2)(a)). Secondly, and closely related, the 'financing arrangement' must be made in writing (Article 3(2)(b)). In the present case, the national court states that a lower cash-against-documents price could have been paid regarding both lots. The applicant, however, chose to avail of the right, as agreed, to delay payment by 90 days and had to pay the higher prices shown on the invoices. Provided that the price difference can be identified as relating to interest

12 — See, for example, Article 1(3) and (4) of Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of electric motors originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, OJ 1987 L 83, p. 1. This measure was reviewed by the Court in Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945.

for late payment and this arrangement was made in writing — which are matters for the national court to verify — the conditions of Article 3(2)(a) and (b) are satisfied. These elements do not have to appear on the invoice upon which the importer pays. Finally, the importer may be required, where necessary, pursuant to Article 3(2)(c), to show that 'the goods are actually sold at the price declared as the price paid or payable' and 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'.

Conclusion

17. In the light of the foregoing analysis, I recommend that the Court answer the questions referred by the national court as follows:

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 is applicable to the free-at-Community-frontier price whenever it is agreed that the goods are to be paid for on a date falling after the 30th day after their arrival in the customs territory of the Community. In such circumstances, the increase shall be applied to the customs value of the goods, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, exclusive of financing charges distinguished in accordance with Article 3 of Commission Regulation (EEC) No 1495/80 of 11 June 1980. Such financial charges shall include the difference between the prices required by the seller upon immediate and deferred payment, where this contractual difference in prices is evidenced in writing and reflects prevailing prices for the goods in question and current interest rates.