JUDGMENT OF THE COURT (Third Chamber)

11 May 2006 *

In Case C-11/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 28 December 2004, received at the Court on 14 January 2005, in the proceedings

Friesland Coberco Dairy Foods BV, trading as Friesland Supply Point Ede

v

Inspecteur van de Belastingdienst/Douane Noord/kantoor Groningen,

THE COURT (Third Chamber),

composed of A. Rosas (President of the Chamber), J. Malenovský, J.-P. Puissochet, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 December 2005,

after considering the observations submitted on behalf of:

— Friesland Coberco Dairy Foods BV, by J.G. Olijve and J.P. Scholten, adviseurs,

— the Netherlands Government, by H. Sevenster and M. de Grave, acting as Agents,

— the Greek Government, by I. Chalkias and S. Papaioannou, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Albenzio, avvocato dello Stato,

— the Commission of the European Communities, by J. Hottiaux, acting as Agent, and by Y. van Gerven, avocat,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 133(e) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17), ('the Customs Code') and Articles 502(3) and 504(4) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1) ('the implementing regulation').

2 The reference was made in the course of proceedings between the Dutch company Friesland Coberco Dairy Foods BV ('Coberco Dairy Foods') and the Inspecteur van de Belastingdienst/Douane Noord/kantoor Groningen (Tax Inspector/Customs North/Groningen Office) ('the Inspector'), concerning an application for the grant of an authorisation for processing under customs control ('the application').

Legal background

The Customs Code

3 The Customs Code establishes a number of customs procedures with economic impact, including, in Articles 130 to 136, 'Processing under customs control'.

4 Article 130 of the Customs Code is worded as follows:

'The procedure for processing under customs control shall allow non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without their being subject to import duties or commercial policy measures, and shall allow the products resulting from such operations to be released for free circulation at the rate of import duty appropriate to them. Such products shall be termed processed products.'

5 Under Article 132 of the Customs Code:

'Authorisation for processing under customs control shall be granted at the request of the person who carries out the processing or arranges for it to be carried out.'

6 Article 133 of the Customs Code provides:

'Authorisation shall be granted only:

...

(e) where the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are

fulfilled. The cases in which the economic conditions are deemed to have been fulfilled may be determined in accordance with the committee procedure.'

7 In accordance with Articles 247 to 249 of the Customs Code, the Commission of the European Communities is to be assisted by a Customs Code Committee ('the Committee') under the conditions set out in those articles.

8 As regards the Committee, Article 249 of the Customs Code provides:

'The Committee may examine any question concerning customs legislation which is raised by its chairman, either on his own initiative or at the request of a Member State's representative.'

The implementing regulation

9 Article 496 of the implementing regulation defines an 'authorisation' as permission by the customs authorities to use the arrangements.

10 Article 502 of the implementing regulation provides:

'1. Except where the economic conditions are deemed to be fulfilled pursuant to Chapters 3, 4 or 6, the authorisation shall not be granted without examination of the economic conditions by the customs authorities.

2. For the inward processing arrangements (Chapter 3), the examination shall establish the economic unviability of using Community sources taking account in particular of the following criteria, the details of which are laid down in Part B of Annex 70:

(a) unavailability of Community-produced goods sharing the same quality and technical characteristics as the goods intended to be imported for the processing operations envisaged;

(b) differences in price between Community-produced goods and those intended to be imported;

(c) contractual obligations.

3. For the processing under customs control arrangements (Chapter 4), the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community.

...'

11 According to Article 503 of the implementing regulation:

'An examination of the economic conditions involving the Commission may take place:

(a) if the customs authorities concerned wish to consult before or after issuing an authorisation;

(b) if another customs administration objects to an authorisation issued;

(c) on the initiative of the Commission.'

12 Article 504 of the implementing regulation provides:

'1. Where an examination in accordance with Article 503 is initiated, the case shall be sent to the Commission. It shall contain the results of the examination already undertaken.

2. The Commission shall send an acknowledgement of receipt or notify the customs authorities concerned when acting on its own initiative. It shall determine in consultation with them whether an examination of the economic conditions in the Committee is required.

3. Where the case is submitted to the Committee, the customs authorities shall inform the applicant, or holder, that such a procedure has been initiated and, if the handling of the application is not completed, that the time-limits laid down in Article 506 have been suspended.

4. The Committee's conclusion shall be taken into account by the customs authorities concerned and by any other customs authorities dealing with similar authorisations or applications.

...'

13 As regards the arrangements for processing under customs control, the first subparagraph of Article 551(1) of the implementing regulation provides:

'The arrangements for processing under customs control shall apply for goods the processing of which leads to products which are subject to a lower amount of import duties than that applicable to the import goods.'

14 According to Article 552 of the implementing regulation:

'1. For the types of goods and operations mentioned in Annex 76, Part A, the economic conditions shall be deemed to be fulfilled.

For other types of goods and operations examination of the economic conditions shall take place.

2. For the types of goods and operations mentioned in Annex 76, Part B and not covered by Part A, the examination of the economic conditions shall take place in the Committee. Article 504(3) and (4) shall apply.'

15 Annex 76, Part B, to the implementing regulation includes all the goods subject to agricultural policy measures.

Regulation (EC) No 1260/2001

16 In order to achieve the objectives of the common agricultural policy, and in particular to ensure that Community growers of sugar beet and sugar cane continue to benefit from the necessary guarantees in respect of employment and standards of living, measures to stabilise the market in sugar have been adopted by Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ 2001 L 178, p. 1).

The main proceedings and the questions referred for a preliminary ruling

17 Coberco Dairy Foods produces fruit drinks using as raw materials fruit juice concentrates, sugars, flavourings, minerals and vitamins, purchased from companies, some of which are established in Member States and others in third countries. Processing consists largely of mixing the fruit juices with water and sugar, pasteurising the product and then packaging it.

18 In accordance with Article 132 of the Customs Code, on 23 July 2002, Coberco Dairy Foods made an application for authorisation for processing under customs control to the Dutch customs authorities in respect of three products: apple juice containing added sugar, orange juice containing added sugar and white sugar, other than cane sugar. It was stated in that application, under the heading of economic conditions, that the use of materials from third countries enabled processing activities to be maintained in the Community.

19 As the goods and the processing envisaged feature in Annex 76, Part B, to the implementing regulation, the file was submitted to the Committee for examination of whether the economic conditions had been fulfilled.

20 On 22 August 2003, the Commission lodged a working document with the Committee, from which it appears that Coberco Dairy Foods made its application for authorisation on account of serious competition from producers from Central and Eastern Europe. It was considering an initial investment of approximately EUR 750 000 in the construction of a processing plant which was expected to create two jobs. Without the application of the arrangements for processing under customs control, Coberco Dairy Foods would probably have decided to process the products in Central or Eastern Europe rather than in the Netherlands.

21 The Committee examined that document at its meeting on 18 September 2003. The minutes of that meeting state that a representative of the Commission's Directorate-General for Agriculture had informed the Committee, first, of reductions in guarantees for the disposal of sugar in order to comply with the Community's international commitments and, second, of the fact that Community sugar producers were 'under pressure' and that 'duty-free' imports under the processing under customs control arrangements would increase that pressure. Consequently, the Directorate-General for Agriculture did not support the application. Therefore, the Committee decided that the economic conditions were not fulfilled in this case.

22 By decision of 27 October 2003, the Dutch customs authorities based their decision on the Committee's conclusion recommending refusal of Coberco Dairy Foods' application. The complaint brought by the latter was dismissed by the Inspector on 2 April 2004.

23 Coberco Dairy Foods therefore brought an action, on 10 May 2004, before the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal).

24 It is in those circumstances that by order of 28 December 2004 the Gerechtshof te Amsterdam decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) How should the words "without adversely affecting the essential interests of Community producers of similar goods" in Article 133(e) [of the Customs

Code] be interpreted? Can only the market for the finished product be considered or must the economic situation with regard to the raw materials for processing under customs control also be investigated?

(2) In relation to the assessment of the "processing activities to be created or maintained" under Article 502(3) [of the implementing regulation], is there a specific number of jobs which must, as a minimum, be made possible by the activities? What other criteria also apply to the interpretation of the cited text of the regulation?

(3) In the light of the answers to Questions 1 and 2, can the Court of Justice examine the validity of a conclusion of the Committee in preliminary ruling proceedings?

(4) If so, is the conclusion in this case valid with respect to both the reasons and the economic arguments adduced?

(5) If the Court of Justice cannot examine the validity of a conclusion, what interpretation should then be given to the words "[t]he Committee's conclusion shall be taken into account by the customs authorities" in Article 504(4) [of the implementing regulation] if — in the first instance — the customs authorities and/or — on appeal — the national courts consider that the Committee's conclusion cannot justify the rejection of the application for processing under customs control?'

The fifth question

25 By the fifth question, which it is appropriate to examine first, the national court raises the question of the interpretation of the words '[t]he Committee's conclusion shall be taken into account by the customs authorities' in Article 504(4) of the implementing regulation. It asks, essentially, whether that provision means that the Committee's conclusion is binding on national customs authorities determining an application for authorisation for processing under customs control.

26 It must be observed, first, that it is not apparent from the wording of Article 504(4) of the implementing regulation that the Committee's conclusion is binding on the national customs authorities. According to the wording of that provision, the Committee's conclusion need only be taken into account by the customs authorities dealing with the application, as well as by any other customs authorities dealing with similar authorisations or applications.

27 That provision does not by any means require the national customs authorities automatically to follow the Committee's conclusion. The national customs authorities may disregard the conclusion adopted by the Committee provided that they give reasons for their decision in that respect.

28 That assessment of the legal nature of the Committee's conclusion, and the extent of the obligation on the customs authorities when they consider that conclusion, is supported by the objective pursued by the establishment of the Committee. As is clear from the seventh recital in the preamble to the Customs Code, the establishment of the Committee seeks merely to ensure close and effective cooperation between the Member States and the Commission in the field of the Customs Code. As far as concerns applications for processing under customs control, that cooperation may and, sometimes, must give rise to an examination of the economic conditions referred to in Article 133(e) of the Customs Code and

Article 502 of the implementing regulation and a consultation with the Committee before the customs authorities concerned issue an authorisation or after that authorisation has been issued.

29 Although the Committee's conclusion is intended to inform the customs authorities as to the economic conditions at issue, as provided by the Customs Code and the implementing regulation, it is not apparent anywhere in the implementing regulation, in particular in Article 504(4) thereof, or from the Committee's role or the objective pursued by consultation with the Committee that the customs authorities concerned are thereby bound by the Committee's conclusion.

30 Furthermore, both Article 133(e) of the Customs Code, which provides that the cases in which the economic conditions are deemed to have been fulfilled may be determined in accordance with the committee procedure, and Article 249 thereof, which provides that the Committee may examine any question concerning customs legislation, confirm that the Committee's role consists, in general, in assisting the competent national authorities to take decisions, not in imposing constraints on them.

31 That interpretation of Article 504(4) of the implementing regulation, according to which the Committee's conclusion is not binding, cannot be called into question by the fact that in certain circumstances, particularly where, as in the main proceedings, goods subject to agricultural policy measures are concerned, consultation with the Committee is compulsory by virtue of Article 552(2) of the implementing regulation. Even in such cases, the competent national authorities must only take account of the Committee's conclusion and are not bound by it. A duty to consult the Committee cannot be treated as a duty to adopt its conclusion.

32 As regards the practice followed by a number of Member States, particularly the Kingdom of the Netherlands, by which the customs authorities concerned automatically follow the Committee's conclusion when it is negative, it must be observed that, under the relevant provisions of the Customs Code and the implementing regulation, those authorities are none the less free to adopt a position different from that of the Committee after making their own assessment of the circumstances and having given adequate reasons for their decision in that respect.

33 In those circumstances, the answer to the fifth question must be that the Committee's conclusion is not binding on national customs authorities when they are determining an application for authorisation for processing under customs control.

The third and fourth questions

34 By its third question, which it is appropriate to examine next, the national court asks essentially whether the validity of a conclusion of the Committee issued pursuant to Article 133(e) of the Customs Code may be examined in proceedings under Article 234 EC. If the Court rules that it has jurisdiction to undertake such an examination, the national court asks, by its fourth question, about the validity of the Committee's conclusion at issue in the main proceedings, both as regards its statement of reasons and the economic arguments relied on therein.

35 Article 234 EC provides that the Court has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the Community institutions and the European Central Bank.

36 According to settled case-law, that provision confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception (Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraph 8).

37 In that connection, it is not disputed that the Committee's conclusion cannot be imputed to the Commission. Since the Commission and the Member States may and, sometimes, must consult the Committee in the course of examining an application for authorisation for processing under customs control, the Committee's conclusion cannot be regarded as constituting an act of the institutions, within the meaning of that case-law. That conclusion also follows from the objective pursued by the establishment of the Committee, which seeks merely to ensure close and effective cooperation between the Member States and the Commission in the field of the Customs Code.

38 As regards the legal nature of the Committee's conclusion, it must be recalled, first of all, as is clear from paragraphs 26 to 33 of this judgment, that it is not binding on national customs authorities which are determining an application for authorisation for processing under customs control.

39 That interpretation is confirmed by the case-law of the Court relating to other types of opinions, of a similar kind, such as, in particular, the opinions of the Committee on Common Customs Tariff Nomenclature established by Council Regulation (EEC) No 97/69 of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (OJ, English Special Edition 1969(I), p. 12). It must be observed, as far as concerns the Committee's conclusions, that, although they constitute an important means of ensuring the uniform application of the Customs Code by the customs authorities of the Member States and as such they may be considered as a valid aid to the interpretation of the Code, they do not have legally binding force (see, to that effect, Joined Cases 69/76 and 70/76 *Dittmeyer* [1977] ECR 231, paragraph 4; Case 798/79 *Chem-Tec* [1980] ECR 2639, paragraphs 11 and 12; and Case C-35/93 *Dr. Eisbein* [1994] ECR I-2655, paragraph 21).

40 Since the Committee was established in order to ensure close and effective cooperation between the Member States and the Commission in the field of the Customs Code, the customs authorities of the Member States are only required to take its conclusions into account and are not bound to follow them when adopting a final decision. It is in fact the latter decision which must, if necessary, be subject to judicial review by the national court.

41 Therefore, the answer to the third question must be that the validity of conclusions of the Committee issued in accordance with Article 133(e) of the Customs Code cannot be examined within the framework of Article 234 EC.

42 In the light of the answer to the third question, there is no need to reply to the fourth question.

The first question

43 By its first question, the national court raises the question of the interpretation of the terms 'without adversely affecting the essential interests of Community producers of similar goods' in Article 133(e) of the Customs Code. It asks, essentially, whether, in the assessment of an application for authorisation for processing under customs control under that provision, account must be taken not only of the market for the finished products but also of the economic conditions of the market for raw materials used to produce those goods.

44 Coberco Dairy Foods takes the view that the notion of 'essential interests of Community producers of similar goods', within the meaning of Article 133(e) of the Customs Code, must be interpreted as covering only an assessment of the interests of the Community producers of processed goods, that is to say finished products.

45 The Greek and Netherlands Governments and the Commission take the view that, having regard to the terms, the context and the objectives of Article 133(e) of the Customs Code, an examination of the economic conditions requires that both the interests of the producers of the processed goods and those of the producers of goods similar to those used in the processing be taken into account.

46 The Italian Government submits, first, that the examination of the economic conditions must cover raw materials, since they are goods which benefit from the arrangements for processing under customs control and that the protection measures in these advantageous arrangements were provided for those goods. Second, and for the same purposes, that examination should be conducted by taking account of the Community market. Third, the decision which is taken should be applied in the same manner in all the Member States.

47 It must be observed that the wording of Article 133(e) of the Customs Code, which refers to 'the essential interests of Community producers of similar goods' without stating whether it refers to producers of finished products or whether it also includes producers of raw materials used to produce those goods, does not provide a clear answer to the question referred, so that the context of that provision must be taken into account, namely the customs procedure with economic impact to which that provision applies and the objectives pursued by that procedure.

48 Under Article 130 of the Customs Code, the procedure for processing under customs control allows non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without their being subject to import duties or commercial policy measures, and allows the products resulting from such operations to be released for free circulation at the rate of the import duty appropriate to them. That procedure applies, in accordance with the first subparagraph of Article 551(1) of the implementing regulation, to goods the processing of which leads to products which are subject to a lower amount of import duty than that applicable to the import goods.

49 The arrangements for processing under customs control were adopted in order to avoid negative consequences for processing operations in the Community from an automatic application of the Community Customs Tariff. However, by conferring an advantage on Community processors, who are not, under those arrangements, bound to pay customs duties on goods imported from third countries, those arrangements may none the less adversely affect the essential interests of any Community producers of the raw materials used in the processing.

50 Given that potential conflict of interests, it is clear that the examination of the economic conditions laid down in Article 133(e) of the Customs Code is intended to take account of those various interests, namely those of the processors of raw materials and those of Community producers of similar goods. The objective of that provision is, as the Commission rightly submits, that the advantages of an authorisation for processing under customs control in respect of processing operations should be assessed in the light of the possible impact of the issue of such an authorisation on the situation of the Community producers of goods similar to those being processed.

51 That interpretation of the objective pursued by Article 133(e) of the Customs Code, that the interests of all Community producers must be protected, namely both those of the producers of finished products and those of the producers of raw materials used to produce those products, is, moreover, the only interpretation capable of

taking account of the requirements of the common Community policies, including those of the common agricultural policy, as required by the third and fourth recitals in the preamble to the Customs Code.

52 Therefore, the answer to the first question must be that, in the assessment of an application for authorisation for processing under customs control pursuant to Article 133(e) of the Customs Code, account must be taken not only of the market for the finished products but also of the economic situation of the market for the raw materials used to produce those products.

The second question

53 By its second question, the national court asks what criteria are to be applied in order to interpret the expression 'processing activities to be created or maintained' in Article 502(3) of the implementing regulation, and whether, in particular, account must be taken of the creation, on account of the processing operations envisaged, of a minimum number of jobs.

54 Coberco Dairy Foods argues that since that provision does not provide for any limit as to the number of jobs to be maintained or created, the number of jobs does not constitute therefore a relevant criterion.

55 Before granting an authorisation for processing under customs control, the national customs authorities have a duty, in accordance, in particular, with Article 133(e) of the Customs Code and Article 502(3) of the implementing regulation, to examine whether certain economic conditions have been fulfilled, in particular as regards goods subject to agricultural policy measures, such as sugar.

56 Pursuant to Article 133(e) of the Customs Code, that examination must establish whether the authorisation for processing under customs control may help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods. The criterion that the authorisation must be such as to enable processing activities in the Community to be created or maintained is repeated in Article 502(3) of the implementing regulation.

57 While the provisions of the Community rules applicable to the arrangements for processing under customs control do not state the various criteria to be taken into consideration in the assessment of the economic conditions for which they provide, it is appropriate to recall the objectives pursued by those arrangements, set out in paragraphs 50 to 52 of this judgment, and the fact that the examination of those conditions is designed to take account of the different interests of the processors of raw materials and those of the Community producers of similar goods, while complying with the requirements of common policies.

58 Having regard to those considerations, the Court observes, like the Netherlands and Greek Governments and the Commission, that the economic conditions referred to by those provisions must be assessed by reference to a number of factors, such as the value of the investment made, the permanence of the activity and its viability, the stability of the jobs created and any other relevant factor relating to the creation or maintenance of a processing activity. Although the creation of a minimum number of jobs on account of the processing activities envisaged constitutes a relevant factor in the examination of the economic conditions required by the Customs Code and the implementing regulation, it is not necessarily the only factor to be taken into consideration. The criteria to consider in that examination depend on the nature of the processing activity concerned and each examination of the economic conditions must be undertaken in the light of the specific circumstances of the situation.

59 Accordingly, the answer to the second question must be that the criteria to be taken into consideration when assessing 'processing activities to be created or maintained' within the meaning of Article 133(e) of the Customs Code and Article 502(3) of the implementing regulation, may include the criterion relating to the creation of a minimum number of jobs on account of the processing activities envisaged, but is not limited to that criterion. Those criteria depend on the nature of the processing activity concerned, and the national customs authority responsible for examining the economic conditions under those provisions must make an overall assessment of all the relevant factors, including those concerning the number of jobs created, the value of the investment made and the permanence of the activity envisaged.

Costs

60 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. In the assessment of an application for authorisation for processing under customs control pursuant to Article 133(e) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000, account must be taken not only of the market for the finished products but also of the economic situation of the market for the raw materials used to produce those products.

2. **The criteria to be taken into consideration when assessing 'processing activities to be created or maintained' within the meaning of Article 133(e) of Regulation No 2913/92, as amended by Regulation No 2700/2000, and Article 502(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001, may include the criterion relating to the creation of a minimum number of jobs on account of the processing activities envisaged, but is not limited to that criterion. Those criteria depend on the nature of the processing activity concerned, and the national customs authority responsible for examining the economic conditions under those provisions must make an overall assessment of all the relevant factors, including those concerning the number of jobs created, the value of the investment made and the permanence of the activity envisaged.**

3. **The validity of conclusions of the Customs Code Committee issued in accordance with Article 133(e) of Regulation No 2913/92, as amended by Regulation No 2700/2000, cannot be examined within the framework of Article 234 EC.**

4. **The Customs Code Committee's conclusion is not binding on national customs authorities when they are determining an application for authorisation for processing under customs control.**

[Signatures]