OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 8 November 1989 *

Mr President,
Members of the Court,

1. The Cour d'appel (Court of Appeal), Colmar, requests the Court to rule on the validity of Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of certain electric motors originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union. [1]

In the Opinion which I have delivered today in several direct actions [2] I have already stated my view on the validity of Regulation No 864/87. As regards the essential part of my reasoning in the present case, I may therefore refer to my Opinion in those cases, as well as to the Report for the Hearing. From a procedural point of view, the present case does raise two particular problems. These I shall examine before dealing with the substance of the case.

Special features of the preliminary question

2. In the first place, it should be stated that the question raised by the Cour d'appel, Colmar, is formulated in very general terms. It is this:

'Is Council Regulation (EEC) No 864/87 . . . valid in the light of Community law, in particular the basic regulation, Council Regulation No 2176/84, and the fundamental principles of Community law?' [3]

When a question in such general terms is referred to it, the Court examines whether the grounds of the decision making the reference can supply any clarification. Where those grounds disclose the submissions relied on by the applicant in the main proceedings before the national court, the Court endeavours to give a reply to the question referred for a preliminary ruling after examining those submissions. [4] In the present case the decision making the reference indicates the applicant's submissions only in very general terms: 'infringement of the principle of legal certainty; infringement of Regulation (EEC) No 2176/84 and of essential procedural requirements, particularly the lack of a statement of reasons; infringement of Regu-

* Original language: French.

1 — Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties (OJ 1987 L 83, p. 1).

2 — Opinions in Joined Cases C-304/86 and C-185/87 *Enital* v *Commission and Council*, [1990] ECR I-2939, in Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council*, [1990] ECR I-2945, in Joined Cases C-320/86 and C-188/87 *Stanko France* v *Commission and Council* [1990] ECR I-3013 and in Case C-157/87 *Electroimpex and Others* v *Council* [1990] ECR I-3021.

3 — The basic regulation referred to is Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1985 L 201, p. 1). That regulation has in the mean time been replaced by Council Regulation (EEC) No 2423/88 of 11 July 1988 (OJ 1988 L 209, p. 1).

4 — See *inter alia* the judgment in Case 246/87 *Continentale Produkten-Gesellschaft Erhardt-Renken* v *Hauptzollamt München-West* [1989] ECR 1151.

lation No 2176/84 and of fundamental principles, especially the rights of the defence; and infringement of the general principles of law, in particular those of equality, objectivity, administrative fairness and the proper administration of justice, misuse of powers and infringement of the principles of equal treatment and non-discrimination.' I should point out that these submissions do not specify the provisions of Regulation No 2176/84 which are said to have been infringed.

3. The second special feature relates to the *locus standi* of Sermes SA, the appellant in the main proceedings. That company imports electric motors into France from the German Democratic Republic. In 1986 it brought an application for the annulment of Commission Regulation (EEC) No 3019/86 imposing a provisional anti-dumping duty on imports of certain electric motors originating in State-trading countries.[5] By order of 8 July 1987 the Court dismissed that application as inadmissible.[6] Since Sermes was not associated with an exporter of electric motors, the Court considered that in relation to it the contested decision constituted a regulation of general scope and not a decision of direct and individual concern to it, as provided for in the second paragraph of Article 173 of the Treaty.

Following the entry into force of the definitive anti-dumping duty, Sermes continued to export into France electric motors originating in the German Democratic Republic. In respect of imports during the month of April 1987 the French customs authorities claimed anti-dumping duties from it amounting to more than FF 400 000. Sermes SA disputed the amount claimed and brought proceedings against the customs authorities. At the hearing, counsel for Sermes did not conceal the fact that the company had done so in order to induce the national court to refer to the Court of Justice for a preliminary ruling a question which would afford it the opportunity of submitting to the Court its observations challenging the validity of Regulation No 864/87, in a situation where a direct action for annulment had been precluded.

4. Having regard to these two special features of the case, it is important as a preliminary matter to determine from what points of view Council Regulation No 864/87 must be examined in order to enable the Court to give a reply to the national court. It goes without saying, I think, that that reply must include the findings resulting from examination of the various submissions made by the applicants in the abovementioned direct actions seeking the annulment of Regulation No 864/87. Do other submissions need to be taken into account? In particular, do the submissions made by the appellant in the main proceedings in its observations presented to the Court which differ from those made in the context of the direct actions fall to be examined? It could be argued that parties are not entitled to request the Court to rule on submissions of invalidity other than those mentioned in the decision making the reference.[7] In this case, the decision making

5 — Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Romania and the Soviet Union (OJ L 280, p. 68).

6 — Order in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109.

7 — See judgment in Joined Cases 50 to 58/82 *Administrateur des affaires maritimes, Bayonne* v *Dorca Marina* [1982] ECR 3949, at p. 3959. In that case the Court refused to examine the validity of a Community measure from the point of view of its compliance with the general principles of law. It was, however, clear that the submission made did not fall within the context of the question raised, which cannot be argued in the present case.

the reference does not mention any submission as to invalidity and the grounds of the decision indicate the appellant's submissions only in very general terms. In such a situation it seems to me that the notion of judicial cooperation which characterizes preliminary ruling proceedings militates in favour of the examination of the submissions raised in observations of the appellant in the main proceedings. The reply concerning the validity of the Community measure will be all the more useful to the national court if it appears from the grounds of the judgment that those submissions have been duly examined.

The fact remains that the preliminary ruling procedure cannot function in a wholly satisfactory manner when neither the questions raised by the national court nor the grounds of the decision making the reference give any details of the submissions alleging invalidity. In such circumstances the other parties, the Member States, the Commission and, in appropriate cases, the Council will be unable to make proper use of the right conferred on them by Article 20 of the Statute of the Court of Justice to submit observations in the context of the preliminary ruling procedure.

Substance

5. In the Opinion which I have delivered today on the direct actions seeking the annulment of Council Regulation No 864/87, I examined a large number of submissions made by the applicants. None of those submissions led me to propose that the Court should annul the regulation in question.

In its observations Sermes set out six submissions alleging the invalidity of Regulation No 864/87, certain of which overlap in part with submissions which I was required to examine in the context of the direct actions. It also had the opportunity of making some observations on the replies given by the Commission and the Council to certain questions put to them by the Court, which I covered in my analysis of the matter in the context of the direct actions. In accordance with the approach set out in the preceding section, I shall successively examine the submissions made by the appellant in the main proceedings, referring as I do so to my Opinion in the direct actions as regards the submissions which have already been examined in that context. However, I shall not examine the submissions challenging the validity of the provisional regulation, Regulation No 3019/86, since the question submitted for a preliminary ruling concerns the validity only of the definitive regulation, Regulation No 864/87.

First submission: Infringement of Article 14 of Regulation No 2176/84 and the principle of legal certainty

6. According to Article 14 of Regulation No 2176/84 a decision to accept an undertaking may, where warranted, be reviewed either at the request of a Member State or on the initiative of the Commission. A review may also take place at the request of any interested party who submits evidence of changed circumstances sufficient to justify the need for a review, provided that at least one year has elapsed since the conclusion of the investigation.

7. Sermes argues that Regulation No 864/87 should be annulled on the ground that it imposed a definitive anti-dumping duty following a review of undertakings previously given which was carried out in

the absence of sufficient evidence of changed circumstances, contrary to Article 14 of Regulation No 2176/84 and the principle of legal certainty.

8. In order to understand this argument properly it is necessary to recall that in 1982 in the context of an earlier anti-dumping proceeding the Council and the Commission had accepted undertakings given by exporters of electric motors originating in State-trading countries.[8] The exporters undertook to raise their prices on importation to the Community. The institutions accepted the undertakings because they considered that they were likely to eliminate the injurious effects of the imports found to have been dumped.[9]

In October 1985 Gimelec asked the Commission to review the decisions to accept price undertakings. The evidence submitted by Gimelec in support of its request was summarized by the Commission in Regulation No 3019/86 (point 3) and by the Council in Regulation No 864/87 (point 4). The Commission, supported by the Council on this point, considered that the evidence disclosed a change of circumstances and was sufficient to justify review of the undertakings given during the previous proceeding.

On the basis of the foregoing the submission made by Sermes must be rejected. In the first place, it should be observed that Article 14 of Regulation No 2176/84 would have allowed the Commission on its own initiative to review the decisions to accept the undertakings given, without having to produce evidence of changed circumstances. Secondly, the information available to the Court in no way shows, in my view, that the Community institutions misdirected themselves in the assessment of the evidence put forward by Gimelec in order to show that there had been a change in circumstances. Finally, the decision to substitute an anti-dumping duty for a price undertaking does not in itself infringe the principle of legal certainty. As the Court has held, in particular in its judgment of 7 May 1987 in the *Nippon Seiko* case,[10]

'where the institutions enjoy a margin of discretion in the choice of the means needed to achieve their policies, traders cannot claim to have a legitimate expectation that the means originally chosen will be maintained, since these may be altered by the institutions in the exercise of their powers'.

In my opinion that is all the more true when it appears that the means originally chosen, namely the acceptance of a price undertaking, does not bring an end to the injurious effects stemming from imports found to have been dumped.

8 — Commission Regulation (EEC) No 724/82 of 30 March 1982 (OJ 1982 L 85, p. 9), Council Regulation (EEC) No 2075/82 of 28 July 1982 (OJ 1982 L 220, p. 36) and Commission Decision 84/189/EEC of 2 April 1984 (OJ 1984 L 95, p. 28).

9 — See in particular the 11th recital to Council Regulation No 2075/82 of 28 July 1982.

10 — Judgment in Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, paragraph 34.

Second submission: Infringement of Regulation No 2176/84 and certain general principles of Community law

(i) *Determination of normal value*

9. Article 2(5) of Regulation No 2176/84 contains rules for the determination of the normal value of a product in the case of imports originating in non-market-economy countries. In such a case, the normal value is to be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market-economy third country is actually sold for consumption on the domestic market of that country or to other countries, including the Community; or

(b) the constructed value of the like product in a market-economy third country; or

(c) where none of the criteria under (a) or (b) above provides an adequate basis, the price actually paid or payable in the Community for the like product.

10. Sermes maintains that the Council could not determine the normal value of the imported motors on the basis of the domestic selling prices of Yugoslav producers (criterion (a)), but ought to have determined it in accordance with the prices paid in the Community (criterion (c)).

11. In my Opinion in the direct actions, I have already stated that the Council was entitled to determine the normal value on the basis of the domestic selling prices of Yugoslav producers. Consequently, the Community institutions properly refrained from determining the normal value on the basis of prices paid in the Community. This criterion should only be used when neither the prices nor the constructed value as determined in accordance with subparagraphs (a) or (b) of Article 2(5) of Regulation No 2176/84 provides an adequate basis.

(ii) *Determination of injury*

12. Sermes maintains that the institutions have not established that Community producers suffered injury because of the imports of electric motors.

In my Opinion in the direct actions I have already examined the question of injury. There I stated that, having regard to all the factors relevant to injury examined by the Commission (points 18 to 33 of the provisional regulation, Regulation No 3019/86) and its own analysis (points 17 to 32 of the definitive regulation, Regulation No 864/87), the Council did not go beyond the limits of its discretion in determining that imports originating in State-trading countries had caused significant injury to the Community industry.

Sermes put forward only one new argument in relation to the assessment of the question of injury. It concerns the sampling method used for determining injury. Having regard to the large number of motors covered by

the proceeding (more than 64 types), the Commission chose a sample of six types of motor of the category most frequently sold in the Community in order in particular to determine the price-linked factors affecting injury (see point 11 of Regulation No 3019/86). The Council based itself on the same sample.

Sermes observes that that sample is not representative as far as its own sales in France of motors originating in the German Democratic Republic are concerned. Accordingly, in its view, the motors imported by it are sold to a different clientele from that of the large Community manufacturers and there is no causal link between imports originating in the German Democratic Republic and losses suffered by Community producers.

13. In my Opinion in the direct actions I stated that the Council was entitled to assess injury to the Community industry on the basis of the impact made by all dumped imports of electric motors originating in seven State-trading countries. That being the case, there is no need to examine whether the sampling method used by the Community institutions was representative for imports originating in one only of the relevant countries. The argument concerning the sample could only be taken into consideration if it were to appear that the sample was not representative for all imports. However, in the light of the information available to the Court, there is nothing to show that was the case.

Third submission: Misuse of powers

14. Sermes maintains that the definitive regulation is vitiated by misuse of powers, since the institutions allowed themselves to be guided not by the Community interest but by the interest in sectorial protection of a Community industry, in particular a French industry.

15. As the Court has consistently held,[11] a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent indications, to have been adopted in order to achieve purposes other than those for which it was intended. In that respect it should be observed that Regulation No 2176/84 is intended precisely to enable the institutions to adopt measures capable of defending Community producers who suffer significant injury because of dumped imports of like products. In accordance with Article 12(1) of the regulation an anti-dumping duty may, however, be imposed only if the interests of the Community call for Community action. In points 33 to 35 of the definitive regulation, Regulation No 864/87, which follow on from points 34 to 38 of the provisional regulation, Regulation No 3019/86, the Council set out the reasons which led it to the view that the interests of the Community required the adoption of a commercial protective measure. For its part Sermes has merely made assertions without substantiating them.

11 — See *inter alia* the judgment in Case 198/87 *Kerzmann* v *Court of Auditors* [1989] ECR 2083 (summary of the judgment, paragraph 2).

The evidence available to the Court thus does not allow it, in my view, to conclude that there was a misuse of powers.

Fourth submission: Infringement of essential formal requirements and failure to state reasons

16. Sermes argues that the statement of the reasons on which Regulation No 864/87 is based is deficient in several respects and thus does not enable the Court to carry out judicial review.

17. In that connection it should be recalled that, as the Court has consistently held, [12] the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction.

In my opinion that requirement was satisfied in the present case with regard to the points raised by the appellant in the main proceedings:

(i) as regards the complaint made by Gimelec, by point 4 of Regulation No 864/87;

(ii) as regards the sampling method, by point 8 of that regulation, which refers to point 11 of Regulation No 3019/86;

(iii) as regards injury, by points 17 to 32 of that regulation.

Fifth submission: Infringement of Article 7 of Regulation No 2176/84 and the rights to a fair hearing

18. Since the arguments concerning the preliminary steps leading to the adoption of the provisional regulation, Regulation No 3019/86, may be left aside, the fifth submission may be reduced to the single argument that the institutions infringed Article 7 of Regulation No 2176/84 and the right to a fair hearing by refusing to give Sermes an opportunity to confront the complainants.

In that connection it should be observed that under Article 7(6) of Regulation No 2176/84, the Commission must, on request, give the parties directly concerned an opportunity to meet. It seems to me that the expression 'parties directly concerned' must be understood in the sense given to it by the Court in regard to the admissibility of actions brought against an anti-dumping regulation. As I pointed out above in Section 3, the Court has held that the regulation challenged by Sermes did not concern it directly and individually. Moreover, Sermes has not proved that it requested a meeting.

Sixth submission: Infringement of the principle of equal treatment

19. Finally, Sermes observes that exports from the German Democratic Republic to the Federal Republic of Germany may continue to be carried out at the selling

12 — See *inter alia* the judgment in Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39.

price which prevailed before the entry into force of Regulation No 864/87. Sermes does not indicate the legal basis for that situation. It merely asserts that in those circumstances the regulation in question deals differently with comparable situations and infringes the principle of equal treatment.

The situation described by Sermes originates in the 'Protocol on German internal trade and connected problems' of 25 March 1957, annexed to the EEC Treaty. Paragraph 1 of that Protocol provides that:

'Since trade between the German territories subject to the Basic Law for the Federal Republic of Germany and the German territories in which the Basic Law does not apply is a part of German internal trade, the application of this Treaty in Germany requires no change in the treatment currently accorded this trade.'

The Court has already had occasion to hold that that provision is intended to exonerate the Federal Republic of Germany from applying the rules of Community law to German internal trade. [13]

It follows that the Federal Republic of Germany is entitled not to apply Regulation No 864/87 to exports from the German Democratic Republic.

Suggested reply

20. In conclusion I suggest that the Court should reply as follows to the question raised:

'Examination of Council Regulation (EEC) No 864/87 of 23 March 1987 in the light of Community law and in particular Council Regulation (EEC) No 2176/84 of 23 July 1984 has disclosed no factor of such a kind as to affect the validity of that regulation.'

13 — See the judgments in Case 14/74 *Norddeutsches Vieh- und Fleischkontor* v *Hauptzollamt Hamburg-Jonas* [1974] ECR 899, in Case 23/79 *Geflügelschlachterei Freystadt* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 2789 and in Case 12/88 *Schäfer Shop* v *Minister van Economische Zaken* [1989] ECR 2937.