Case C-136/88

French Republic
v
Commission of the European Communities

(Supplementary trade mechanism —
Withdrawal of a product from the STM list)

Report for the Hearing 4163
Opinion of Mr Advocate General Tesauro delivered on 14 November 1989 4173
Judgment of the Court, 7 December 1989 4177

Summary of the Judgment

Accession of new Member States to the Communities — Spain — Agriculture — Transitional measures — Supplementary trade mechanism — Procedure for withdrawing a product from the list laid down in the Act of Accession — Ad hoc *Committee — Rules for its composition and consultation*

(1985 Act of Accession, Arts 81 and 82; Commission Regulation No 530/88)

REPORT FOR THE HEARING
delivered in Case C-136/88 *

I — Facts and procedure

1. *Legal framework*

Article 81 of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties (Official Journal 1985, L 302, p. 23), hereinafter referred to as 'the Act of Accession', established a supplementary trade mechanism (STM) between the Community as constituted on 31 December 1985 (here-

* Language of the case: French

inafter referred to as 'the Community of Ten') and Spain. That mechanism applies to imports into the Community of Ten of fruit and vegetables, products of the wine sector and new potatoes and to imports into Spain of products of the cereals, milk, fruit and vegetables, beef and veal and certified seed potato sectors. However, under the second subparagraph of Article 81(1) of the Act of Accession, fruit and vegetables are covered by the STM only from 1 January 1990.

In the provisions of the Act of Accession, the STM is a system of supervision intended to avoid excessive imports likely to disturb markets. Its purpose is to ensure 'an harmonious and gradual opening up of the market and the full realization of free movement within the Community' on the expiry of the transitional period (Article 83(2) of the Act of Accession).

At the start of each marketing year, a 'forward timetable' is drawn up on the basis of production and marketing estimates for each of the products subject to the STM in accordance with the procedure provided for in Article 83 of the Act of Accession, the management committee procedure. On that basis and in accordance with the same procedure, an 'indicative import ceiling' is fixed; it must reflect an annual rate of progress such as will ensure a gradual opening up of the market. For new potatoes, Article 83(1) provides that the indicative ceiling is to be fixed by the Management Committee for Fruit and Vegetables set up by Regulation No 1035/72, since there is no common organization of the market for potatoes.

Should the developments in intra-Community trade show that a significant increase in imports has taken place or is forecast and if that situation should result in the indicative import ceiling being reached or exceeded for the current marketing year, special protective measures may be adopted under Article 85, permitting either the revision of the indicative ceiling, if the market in question has not suffered significant disturbances, or the limitation or suspension of imports in order to put an end to the disturbance.

Article 81(3) lays down the conditions for the withdrawal of products from the list of those subject to the STM. That provision is worded as follows:

'(3) In accordance with the procedures set out in Article 82 a decision may be made to withdraw from the list of products subject to the STM:

(a) Products from the wine sector, new potatoes and milk in powder or granules intended for human consumption at the start of the second year following accession and at the start of each of the following years.

(b) . . .

With regard to those products, account will be taken in particular of the situation at the level of the production and marketing structure of the products in question.'

The procedure set out in Article 82 of the Act of Accession may be seen from the terms of that article:

'(1) An *adhoc* Committee shall be established consisting of representatives of the Member States and presided over by a representative of the Commission.

(2) Within the *ad hoc* Committee the votes of Member States shall be weighted in accordance with Article 148(2) of the EEC Treaty. The chairman shall not vote.

(3) Where the procedure laid down in this article is to be followed, the chairman shall refer the matter to the *ad hoc* Committee, either on his own initiative or at the request of the representative of a Member State.

(4) The representative of the Commission shall submit a draft of the measures to be adopted. The Committee shall deliver its opinion on the draft within a time-limit set by the chairman according to the urgency of the matter. An opinion shall be delivered by a majority of 54 votes.

(5) The Commission shall adopt the measures and shall apply them immediately, where they are in accordance with the opinion of the Committee. If they are not in accordance with the opinion of the Committee or in the absence of any opinion, the Commission shall forthwith submit to the Council a proposal relating to the measures to be taken. The Council shall adopt the measures on a qualified majority.

If, onthe expiry of one month from the date on which the matter was referred to it, the Council has not adopted any measures, the Commission shall adopt the proposed measures and apply them immediately, save in the case where the Council has decided by a simple majority against the said measures.'

2. *Background to the dispute*

At the end of 1987, consideration of developments in trade in the products at issue led the Commission to envisage the withdrawal from the STM list of certain products in the wine sector and new potatoes. The procedure by which this was done was as follows.

By telex of 10 December 1987, the Commission informed the Member States that a meeting of the Management Committee for Wine would take place on 15 December 1987 and that it would be preceded by a 'meeting of the *ad hoc* STM Committee (Article 82 of the Act of Accession)'.

The agenda for the meeting of the *ad hoc* STM Committee was as follows:

'(1) Opinion on a draft internal regulation for the *ad hoc* Supplementary Trade Mechanism Committee for the wine sector (Doc. VI/5852/87).

(2) Opinion on a draft regulation withdrawing certain products in the wine

sector from the list of products covered by the supplementary trade mechanism (Doc. VI/5851/87).

(3) Other matters.'

At its meeting on 15 December 1987, the *ad hoc* Committee adopted its internal regulation by a qualified majority. Article 1 of that regulation reads as follows:

'The *ad hoc* Committee shall be convened by its chairman, either at the latter's initiative or at the request of the representative of a Member State. Joint meetings of two or more *ad hoc* Committees may be convened on matters of common responsibility.'

At that meeting, the *ad hoc* Committee also adopted an opinion favourable to the withdrawal from the STM list of certain wine-sector products. Subsequently, the Commission adopted a regulation withdrawing those wine-sector products from the list of products subject to the supplementary mechanism applicable to trade (Regulation No 52/88 of 5 January 1988, Official Journal 1988, L 6, p. 11).

With regard to new potatoes, the Commission sent a telex to the Member States on 11 December 1987 informing them that the '155th meeting of the Management Committee for Products Processed from Fruit and Vegetables' would take place on 17 December 1987, 'followed by *ad hoc* Management Committee No 2 and Management Committee for Fruit and Vegetables No 347'. The agenda contained, *inter alia*, the following item (following Item 7):

'from 4 to 5 p. m. — Joint Committee: *ad hoc* Committee (Article 82 of the Act of Accession)/Management Committee for Seeds and Management Committee for Fruit and Vegetables.

7a Exchange of views and, possibly, opinion on the draft regulation fixing the list of products subject to the STM (new potatoes).

8 Exchange of views and, possibly, opinion on the draft regulation fixing the indicative import ceiling for new potatoes in 1988 (Doc. VI/4920/87).

9 Exchange of views and, possibly, opinion on the draft regulation concerning the suspension of the issue of STM certificates for seed potatoes (Doc. VI/6269/87)'.

On 17 December 1987, the two draft regulations concerning new potatoes were in fact discussed.

By telex of 30 December 1987, the Commission informed the Member States that a meeting would take place on 8 January 1988 of the 'Second Joint Committee — *ad hoc* Committee (Article 82 of the Act of Accession) — Management Committee for Seeds and Management Committee for Fruit and Vegetables', for the purpose of considering and, possibly, voting on the two drafts already considered. At that meeting, the *ad hoc* Committee adopted an opinion favourable to the draft providing for the withdrawal of new potatoes from the STM list. Subsequently, the Commission adopted Regulation No 530/88 withdrawing new potatoes from the

list of products covered by the supplementary trade mechanism.

3. *Procedure*

The French Government's application was received at the Court Registry on 17 May 1988.

By order of 27 October 1988, the Court granted the Kingdom of Spain leave to intervene in support of the Commission's conclusions.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The French Government claims that the Court should:

(1) annul space/Commission Regulation (EEC) No 530/88 of 26 February 1988 withdrawing new potatoes from the list of products covered by the supplementary trade mechanism;

(2) order the defendant to pay the costs.

The Commission and the Spanish Government contend that the Court should:

(1) dismiss the application as unfounded;

(2) order the applicant to pay the costs.

III — Submissions and arguments of the parties

Lack of powers on the part of the Commission

According to the French Government, Articles 81 and 82 of the Act of Accession provide for a single, specific committee, the purpose of which is to ensure centralized management of all decisions withdrawing products from the list of those subject to the STM, in order to permit progressive and balanced liberalization of trade without giving priority to the withdrawal either of continental products or of Spanish or Portuguese products. Regulation No 530/88 was adopted after the adoption of an opinion not by a single, specific *ad hoc* STM committee but by the Management Committee for Fruit and Vegetables, renamed '*ad hoc* STM Committee' for the circumstances.

The Commission has based itself on an incorrect reading of Articles 81 and 82 by seeking, in reality, an opinion from the Management Committee for Fruit and Vegetables. It has therefore exceeded its implementing powers under Article 155 of the Treaty. In the absence of an opinion adopted by an *ad hoc* committee duly constituted, it did not have power to adopt the contested regulation.

With regard to the precise facts of the case, the French Government points out that according to the telex of 10 December 1987 convening the meeting of 15 December 1987, the agenda for the *ad hoc* Committee consisted of an 'opinion on a draft internal regulation for the *ad hoc* Supplementary Trade Mechanism Committee for the wine sector'. That reference to the wine sector also appeared in the Minutes of the first meeting of the *ad hoc* STM Committee of 15 December 1987 (first paragraph). Under those circumstances, the internal regulation of the *ad hoc* STM Committee was adopted by the Management Committee for Wine, renamed '*ad hoc* STM Committee'. That internal regulation is therefore of no legal value and manifestly contrary to Article 82.

The French Government adds that the Commission did not even take the trouble to comply with the internal regulation, since it provides only for the possibility of 'joint meetings of two or more *ad hoc* committees'. However, on 17 December 1987 and 8 January 1988, the meetings which took place were of joint committees of the *ad hoc* Committee and management committees.

The Commission points out first that there is no management committee for new potatoes and that the forward estimate and indicative import ceiling were drawn up after consulting the Management Committee for Fruit and Vegetables under the procedure laid down in Article 33 of Regulation No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables (Official Journal, English Special Edition 1972 (II), p. 437), as is provided for under Article 83(1) of the Act of Accession. Although the application of the STM to new potatoes is decided on in accordance with the 'management committee' procedure, they may be withdrawn from the list of products subject to that mechanism only under specific conditions. The decision may be adopted only at the start of the second year following accession, on condition that the *ad hoc* Committee has delivered a favourable opinion, adopted by a qualified majority. In the context of that procedure, unlike that of the management committee, the absence of a favourable opinion delivered by the *ad hoc* Committee is equivalent to an unfavourable opinion and the Commission is required to submit the matter to the Council. It is therefore in accordance with a procedure requiring the intervention of two distinct committees, namely the *ad hoc* Committee and the management committee, that the Commission must carry out consultations concerning either the continued application of the STM to new potatoes, by the fixing of indicative ceilings for 1988, or their withdrawal at the beginning of that year.

The Commission considers that joint meetings of the *ad hoc* Committee with the Management Committee for Seeds and the Management Committee for Fruit and Vegetables can neither surprise the Member States nor give rise to confusion as to the nature of the committee which delivered the opinion favourable to the proposed withdrawal. Furthermore, such a joint meeting was necessary having regard to the fact that the measures proposed by the Commission were linked to each other, since the measures concerned all dealt with the application of the STM to potatoes, whether seed potatoes or new potatoes. The purpose of calling a meeting of the Management Committee for Fruit and Vegetables was to obtain the necessary opinion on the indicative ceilings for 1988 if the *ad hoc* Committee was unable to deliver a favourable opinion on the withdrawal of new potatoes from the list of products subject to the STM. Furthermore, a joint meeting of the *ad hoc* Committee and one or more management committees in no way affects the Member States' opportunity to choose their representatives on the *ad hoc* Committee.

The Commission points out that on 8 January 1988 the Management Committee for Seeds and the *ad hoc* Committee met successively and that the Commission's representative expressly submitted the draft withdrawal measure to the *ad hoc* Committee. The meeting of the *ad hoc* Committee was the subject of a separate Minute. Under those circumstances, therefore, the Commission respected the general and specific nature of the powers of the *ad hoc* Committee by making it possible for the withdrawal measure to be adopted in accordance with the need to achieve the gradual and balanced integration of the market, pursuant to Articles 81 and 82 of the Act of Accession.

In its reply, the French Government refers to the *travaux préparatoires* for the conference which negotiated the Act of Accession and points out that they clearly distinguished between the different tasks and powers of the management committees for the products at issue and of the *ad hoc* Committee in regard to the application of the STM. It clearly emerges that the existence of a single *ad hoc* committee is to be distinguished from the large number of management committees.

The French Government claims that the way in which the meetings were arranged and the procedure followed, at the Commission's instigation, have deprived the concept of an *ad hoc* committee of any substance. That committee is intended to be a horizontal committee, meeting only for the purpose of considering problems common to the various products. The Commission's approach is to act product by product rather than in regard to all the products subject to the STM. Accordingly, joint meetings of the *ad hoc* Committee with one or two management committees are contrary to the idea of a single committee. In that regard, it may be asked whether the Commission did not wish to accelerate the procedure in order to prevent Member States having a particular interest in the matter under discussion from coming to an agreement intended to avoid decisions to withdraw products. With 25 votes between them, France, Italy and Greece could possibly have blocked the measure at issue.

In its rejoinder, the Commission observes first that the arguments based on the *travaux préparatoires* for the Act of Accession are based on a passage which refers to products which may not be withdrawn from the list of products subject to the STM during the first four years of he transitional period.

It repeats that at the various meetings, the points coming within the powers of the *ad hoc* Committee were clearly distinguished from those in regard to which the opinion of the relevant management committee was being sought. It has complied with both the letter and the spirit of the Act of Accession by calling a meeting first of the *ad hoc* Committee for the purpose of adopting its rules of procedure and by then consulting it on a draft regulation providing for the withdrawal of certain products in the wine sector and on a draft concerning the withdrawal of new potatoes. It is true that the *ad hoc* Committee is a single, specific and horizontal committee, as is suggested by its very name, the limits of its powers and the matters on which it must be consulted. However, the French Government has in no way shown how such characteristics imply that the *ad hoc* Committee may not be consulted product by product but must necessarily be consulted in the course of a single meeting dealing at one time with all proposals for the withdrawal of products subject to the STM in respect of which such withdrawal was possible with effect from 1988. First, none of the provisions of Articles 81(3) or 82 of the Act of Accession require that a single meeting must be held in order to consider all proposed withdrawals

at the same time. Furthermore, the purpose of the STM, namely to ensure a gradual and balanced transition to the free movement of the products to which it applies, in no way requires that products as different as those referred to in Article 81(3)(a) of the Act of Accession should be the subject of a single examination in the course of a single meeting of the *ad hoc* Committee. The practice of several committees meeting together makes it possible to consider, in a balanced and comprehensive manner, the development of trade between Spain and the Community of Ten in respect of each of the two types of products at issue.

With regard to the internal regulation of the *ad hoc* Committee, the Commission admits that the provision in Article 1 permitting it to call meetings of 'two or more *ad hoc* Committees' is an error. There is in fact only one *ad hoc* committee. That provision must therefore be removed.

The Spanish Government complains that the French Government has adopted contradictory positions. No action was brought against Commission Regulation No 52/88 withdrawing certain wine-sector products from the list of products subject to the STM even though a favourable opinion was delivered by the same *ad hoc* Committee and even though the French representatives voted against that opinion at the meeting of 15 December 1987. During that meeting, the French delegation raised no objection to the adoption of the internal regulation of the *ad hoc* STM Committee. It merely took no part in the vote. Also, the French Government has not cast doubt on the fact that the necessary balance in trade, by virtue of which new potatoes could be withdrawn from the STM list, has been maintained, which confirms that the measures adopted by the Commission are well founded. To claim, as the French Government does in this case, that joint consideration of the proposed withdrawals of wine-sector products and new potatoes from the STM list could be justified by the opportunity thus given to the Member States concerned to reach an agreement permitting them to form a blocking minority, thereby preventing the adoption of the Commission's proposals, amounts to elevating practices of a political nature to the level of rules of law. Moreover, between the telex of 11 December 1987, convening the meeting, and 8 January 1988, the date on which the withdrawal was approved, 28 days elapsed, and the Spanish Government considers that that constitutes a sufficient period of reflection for the Member States concerned.

Breach of essential procedural requirements

The French Government observes that inasmuch as a management committee does not possess any of the characteristics which the *ad hoc* Committee is required to possess, the essential procedural requirement represented by the opinion of the *ad hoc* STM Committee has not been fulfilled. Referring to the judgment of the Court of 29 October 1980 in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, the French Government considers that consultation of a committee which does not fulfil the criteria laid down in the Act of Accession is an act of such a nature as to render void the measure at issue.

The Commission considers that that submission covers the same complaints as those put forward in support of the submission alleging a lack of powers on its part. It merely refers to the arguments it put forward in that connection.

Misuse of procedure

The French Government considers that by adopting the contested regulation on the basis of the opinion of a committee which was not properly constituted, the Commission also misused the procedure, disregarding the specific procedures required for the adoption of the contested regulation. It substituted the consultation of a management committee for that of the *ad hoc* Committee. The existence of the procedural defect can be seen by reading the internal regulation of the *ad hoc* STM Committee in conjunction with the telexes convening the meetings: the multiplicity of *ad hoc* STM committees, the time of day at which the meeting of 15 December 1987 was to be held, making it impossible to hold a separate meeting of the *ad hoc* STM Committee, and the holding of joint committee meetings on 17 December 1987 and 8 January 1988.

The Commission considers that this submission requires evidence that in adopting the contested measure, it did not follow the procedure laid down for the adoption of such a measure and therefore used its powers for a purpose other than that for which they were conferred on it, as the Court pointed out in its judgment of 4 February 1982 in Case 817/79 *Buyl* v *Commission* [1982] ECR 245. The French Government has produced no evidence of that nature but merely repeats the formal complaints already raised.

Manifest error of assessment

In the alternative, the French Government observes that by adopting the contested regulation, the Commission committed a serious and manifest error of assessment. It adopted the regulation on the basis of the opinion of a committee the composition and tasks of which were not those of the *ad hoc* Committee and it therefore deprived itself of the possibility of making an overall assessment of the markets at issue.

According to the Commission such a complaint cannot of itself be sufficient to call into question the assessment which led the Commission to adopt the regulation, since the submission is once again based on the same argument of a formal nature.

IV — Replies to questions put by the Court

In reply to a question put by the Court as to whether the Commission had information concerning the names of the persons who took part in the meetings of the various committees on 17 and 23 December 1987 and 8 January 1988, the Commission informed the Court that no committee met on 23 December 1987. The Minutes of the second meeting of the *ad hoc* STM Committee indicate that date in error, the correct date being 17 December 1987.

The Commission submitted two informal lists of participants: one list for the 155th meeting on 17 December 1987 of the Management Committee for Products Processed from Fruit and Vegetables and a list for the second meeting of the *ad hoc* STM Committee held on 8 January 1988.

The Court asked the French Government to indicate whether it could confirm the information provided by the Spanish

Government to the effect that at the meetings of 17 and 23 December 1987, the composition of the French delegation changed entirely when the *ad hoc* Committee was constituted.

The French Government observed first that no meeting took place on 23 December 1987.

The French Government supplied the names of the members of the French delegation at the meetings of the various committees on 15 and 17 December 1987 and 8 January 1988. It states that during all the meetings held on 15 December 1987 and 8 January 1988, no member of the French delegation was replaced.

In the agenda for the meetings of 17 December 1987, meetings of three different committees were called by the Commission. During the 155th meeting of the Management Committee for Products Processed from Fruit and Vegetables, the Ministry of Agriculture was represented by an official of the Directorate-General for Food. Since that directorate does not deal with fresh products, two other officials of the Directorate for Production and Trade represented the Ministry of Agriculture during the meetings which followed, namely the meetings of the joint committee (*ad hoc* Committee, Management Committee for Seeds and Management Committee for Fruit and Vegetables) and the Management Committee for Fresh Fruit and Vegetables. The French delegation was therefore partly replaced on that day by reason of the division of responsibilities between two different directorates of the Ministry of Agriculture. In addition, the French representative of the Office national interprofessionnel des fruits et légumes et de l'horticulture (Oniflhor) (National intertrade office for fruit, vegetables and horticulture) attended all the meetings which took place on 17 December 1987.

T. Koopmans
Judge-Rapporteur