JUDGMENT OF THE COURT (Fifth Chamber)
11 July 1990 *

In Case C-323/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'appel (Court of Appeal), Colmar (Third Civil Chamber), for a preliminary ruling in the proceedings pending before that court between

SA Sermes, Strasbourg,

and

Directeur des services des douanes de Strasbourg,

on the validity of 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 (Official Journal 1987 L 83, p. 1),

THE COURT (Fifth Chamber)

composed of: Sir Gordon Slynn, President of Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: W. Van Gerven
Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of

SA Sermes, by Jean-Pierre Spitzer, of the Paris Bar,

* Language of the case: French.

the French Government, by Edwige Belliard, Deputy Director responsible for economic law at the Ministry of Foreign Affairs, and Géraud de Bergues, Principal Deputy Secretary at the Ministry of Foreign Affairs, acting as Agents,

the Council, by Erik Stein, Legal Adviser, acting as Agent,

the Commission, by Marie-José Jonczy, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument by the applicant in the main proceedings, represented by Jean-Pierre Spitzer, by the Council, represented by Erik Stein, Legal Adviser, and by the Commission, represented by Marie-José Jonczy, Legal Adviser, assisted by Marc de Pauw, acting as an expert, at the hearing on 13 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 November 1989,

gives the following

Judgment

1 By a judgment of 5 September 1988, which was received at the Court Registry on 4 November 1988, the Cour d'appel, Colmar (Third Civil Chamber), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the validity of 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 (Official Journal 1987 L 83, p. 1, hereinafter referred to as the 'Council regulation').

2 That question was raised in proceedings between Sermes SA, a company incorporated under French law, and the directeur des services des douanes (Director of Customs), Strasbourg, with regard to anti-dumping duties claimed under the Council regulation.

3 Sermes is a company whose activities include *inter alia* the importation of electric motors originating in the German Democratic Republic and exported from that country by AHB Elektrotechnik.

4 In October 1985 the Groupement des industries de matériels d'équipement électrique et de l'électronique industrielle associée (Association of electric equipment and associated industrial electronic industries, hereinafter referred to as 'Gimelec'), supported by four other national electronics associations, requested the Commission to review certain anti-dumping measures in accordance with Article 14 of 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 (Official Journal 1984 L 201, p. 1), which was the basic regulation in force at the time (hereinafter referred to as 'the basic regulation'). That request sought the review of decisions whereby price undertakings given by the exporters in question had been accepted by the institutions in the context of an earlier anti-dumping proceeding concerning imports of electric motors originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the Soviet Union.

5 On 30 September 1986, the Council and the Commission withdrew their acceptance of the abovementioned undertakings and the Commission imposed, by Regulation (EEC) No 3019/86 of the same date, 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, Hungary, Poland, Romania and the USSR (Official Journal 1986 L 280, p. 68).

6 By an application lodged at the Court Registry on 17 November 1986, Sermes brought proceedings under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Regulation No 3019/86 (Case 279/86).

7 By order of 8 July 1987, the Court dismissed that action as inadmissible on the ground that the contested measure constituted, as far as the applicant was concerned, a regulation of general application and not a decision within the meaning of the second paragraph of Article 173 of the Treaty, since the applicant was not connected with the exporter in question.

8 On 23 March 1987 the Council adopted the regulation imposing a definitive anti-dumping duty on the abovementioned imports and definitively collecting the amounts secured as provisional duties.

9 Following the imposition of the definitive anti-dumping duty, the French customs authorities claimed anti-dumping duties amounting to FF 419 720 from Sermes in respect of imports in April 1987 of electric motors originating in the German Democratic Republic.

10 Challenging the validity of the Council regulation, Sermes brought proceedings on 7 May 1987 against the directeur des services des douanes, Strasbourg, before the Tribunal d'instance (District Court), Strasbourg, to recover the amount wrongly paid.

11 By a judgment of 16 June 1987 its action was dismissed, and Sermes appealed to the Cour d'appel, Colmar, which stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Is 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, valid in the light of Community law, in particular the basic regulation, Council Regulation No 2176/84, and the fundamental principles of Community law?'

12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

13 It should be stated at the outset that the judgment making the reference is worded in general terms and gives no indication of the grounds on which the national court doubts the validity of the Council regulation. In its observations submitted to the Court, Sermes, the applicant in the main proceedings, raised certain objections to the validity of that regulation. Its validity must therefore be examined in the light of those observations.

Infringement of Article 14 of the basic regulation and the principle of legal certainty

14 Sermes argues first of all that the Council regulation in issue should be declared invalid on the ground that it imposed an anti-dumping duty following a review of price undertakings previously given which was carried out without sufficient evidence of a change in circumstances, contrary to Article 14 of the basic regulation.

15 In accordance with Article 14(1) of the basic regulation, a decision to accept an undertaking is subject to review, where warranted, either at the request of a Member State or on the initiative of the Commission. A review is also to be held where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such review, provided that at least one year has elapsed since the conclusion of the investigation.

16 As stated in point 4 of the regulation in issue, the proceeding in the present case was reopened on the basis of an assessment (which is specifically summarized in point 4 of that regulation) of evidence produced by Gimelec in support of its request for a review of the undertakings given. The Commission and the Council consider that that evidence disclosed a change in circumstances and justified a review of the price undertakings given during the earlier proceeding.

17 Neither the documents before the Court nor the arguments presented to it indicate that the Commission and the Council misdirected themselves in the assessment of the evidence thus produced.

18 Sermes goes on to submit that by substituting an anti-dumping duty for a price undertaking, the regulation in issue contravened the principle of legal certainty, inasmuch as the economic circumstances had not changed since the acceptance of the price undertakings in 1982, or if they had they had deteriorated, and consequently the imposition of an anti-dumping duty was not justified by a general Community interest.

19 In that respect it must be observed that under Article 14 of the basic regulation, undertakings which have been accepted may be subject to a review which, in accordance with paragraph 3 of that provision, may result in the amendment, repeal or annulment of measures adopted in connection with those undertakings.

20 The arguments advanced by Sermes in regard to infringement of Article 14 of the basic regulation and the principle of legal certainty are therefore unfounded.

Infringement of the provisions of the basic regulation relating to the calculation of normal value and the definition of injury suffered; error of assessment

21 Sermes contends first of all that the normal value was not determined in an appropriate and reasonable manner, as required by Article 2(5) of the basic regulation, since Yugoslavia, which was chosen as the reference country for that purpose, is not a market-economy country, inasmuch as prices are not free on that market.

22 In that connection it must be stated that Article 2(5) of the basic regulation provides that in the case of imports from non-market economy countries, the normal value is to be determined essentially on the basis of the price actually charged for the like product in a market-economy country.

23 The aim of that provision is to prevent account from being taken of prices and costs in non-market-economy countries which are not normally the result of market forces (judgment in Joined Cases 294/86 and 77/87 *Technointorg* v *Commission and Council* [1988] ECR 6077, paragraph 29).

24 However, as the Court held in its judgment in Joined Cases C-305/86 and C-160/87 *Neotype* v *Commission and Council* [1990] ECR I-2945, paragraphs 26 and 27, Yugoslavia cannot be regarded as a country which does not have a market economy. During the period under consideration, there was no general system for the fixing of prices in Yugoslavia, and in any event there was no such system in the electric motors sector.

25 The argument by Sermes that Yugoslavia is not a market-economy country within the meaning of Article 2(5) of the basic regulation is therefore unfounded.

26 Secondly, Sermes contends that the institutions did not establish that Community producers had suffered injury as a result of the imports in issue. It submits first that by comparing the cost price on the Community market with the selling price of motors originating in East European countries, the institutions infringed Article 4(2)(b) of the basic regulation, which requires any price undercutting to be evaluated in relation to the price of a like product in the Community. It goes on to stress that it was never demonstrated that nearly all Community producers sold their electric motors at a loss. On the contrary, Community production regained 3% of the market during the period under consideration.

27 In accordance with Article 4(2) of the basic regulation, an examination of the injury suffered by the Community must involve a series of factors no one of which can give decisive guidance.

28 As the Court held in its judgment in *Neotype* v *Commission and Council*, cited above, the Council, whilst recognizing that the market share of imports of electric motors originating in the same East European countries as those referred to in the main proceedings had gone down from 23% in 1982 to 19.6% in 1985, made a determination of injury in accordance with several factors mentioned in Article 4(2) of the basic regulation. As is stated in point 25 of Regulation No 3019/86, to which point 19 of the contested regulation refers, the volume of imports of electric motors originating in the countries in question increased from 716 000 units in 1982 to 784 300 units in 1985, having fallen to 604 000 and 689 000 units respectively in 1983 and 1984. At points 21 to 24 of the contested regulation it is also shown that the resale prices of imported electric motors significantly undercut cost prices and selling prices of Community producers. The Council goes on to find at points 25 and 26 of the regulation in question that in spite of an increase in sales and production since 1982, Community producers of electric motors sustained operating losses of between 2 and 25% of the cost price, with the exception of only two undertakings, one of which is situated in a Member State in which the relevant imports are very low. Finally, it is stated at point 26 of the regulation in issue that employment directly related to the production of electric motors in the Community continued to decline between 1982 and 1985.

29 Sermes contends finally that the sampling of electric motors on which the Council based itself is not representative as regards its own sales in France of motors originating in the German Democratic Republic. Motors imported by it are sold to a different clientele from that of the large Community manufacturers and, consequently, there is no causal link between imports originating in the German Democratic Republic and losses incurred by Community producers.

30 Since the Council rightly assessed the injury to the Community industry by taking as its basis the impact of all dumped imports of electric motors originating in the countries in question, the argument as to sampling could be taken into consideration only if that sampling was clearly unrepresentative as regards the imports as a whole. There is nothing in the documents before the Court to support that hypothesis.

31 It must therefore be held that by concluding that considerable injury was being caused to Community producers by the imports in question, despite a reduction in their market share to the extent mentioned above, the Council committed no error of assessment.

Misuse of powers

32 Sermes contends that the contested regulation is vitiated by a misuse of powers inasmuch as the Council allowed itself to be guided not by the Community interest but by the interests of a Community industry — in particular a French industry.

33 A decision is vitiated by a 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 (judgment in Case C-198/87 *Kerzmann* v *Court of Auditors* [1989] ECR 2083 — see summary of the judgment, paragraph 2).

34 In points 33 to 35 of its regulation the Council set out the reasons which led it to take the view that the interests of the Community required, in accordance with the basic regulation, the adoption of a measure capable of defending Community producers against dumped imports.

35 Furthermore, Sermes, in challenging the existence of a Community interest, merely made certain assertions without substantiating them.

36 In those circumstances and on the basis of the information available to it, the Court cannot consider the argument put forward by Sermes that there was a misuse of powers to be valid.

Infringement of essential procedural requirements and failure to state reasons

37 Sermes argues that the statement of the reasons on which the contested regulation is based is not sufficient to enable the Court to carry out judicial review, particularly as regards the evidence produced by Gimelec justifying a review of the undertakings, the sampling of motors, injury and causality.

38 As the Court has consistently held (see in particular the judgments in Case 255/84 *Nashi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39 and in Case C-156/87 *Gestetner* v *Commission* [1990] ECR I-781, paragraph 67), 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.

39 That requirement was satisfied in this case. Point 4 of the contested regulation mentions all the evidence produced by the complainants which, in the Council's view, justified the reopening of the anti-dumping proceeding. The sample of motors chosen is mentioned in point 8 of the regulation, where reference is made to point 11 of Commission Regulation No 3019/86, which sets out clearly and exhaustively all the explanations necessary in that regard. The same is true of points 17 to 32 of the Council regulation as regards the existence of injury and causality.

40 The argument put forward by Sermes that the contested Council regulation contains an insufficient statement of reasons must therefore be rejected.

Infringement of Article 7 of the basic regulation and of the right to a fair hearing

41 Sermes considers that in the course of the preparatory enquiries which led to the adoption of the contested Council regulation the Community institutions did not observe Article 7 of the basic regulation or the right to a fair hearing, inasmuch as they did not give it an opportunity to confront the complainants.

42 Under the terms of Article 7(6) of the basic regulation, the Commission must, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward.

43 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 appears from the order of the Court in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109, Sermes does not belong to any of the categories of traders who the Court has held are entitled to bring proceedings directly against regulations imposing an anti-dumping duty in respect of imports of certain electric motors originating in certain State-trading countries. Moreover, Sermes has produced no evidence to show that it did in fact request a meeting.

44 Consequently, the argument that the Community institutions infringed Article 7 of the basic regulation and the right to a fair hearing must be rejected.

Infringement of the principle of equal treatment

45 Finally, Sermes submits that the application of specific provisions relating to German internal trade, which enable exports from the German Democratic Republic to the Federal Republic of Germany to continue to be carried out at the selling price prevailing prior to the entry into force of the contested Council regulation, entails discrimination which is not justified by objective differences between importers established in the Federal Republic of Germany on the one hand and those established in the other Member States on the other.

46 As the Court has already held (see judgment in Case 12/88 *Schäfer Shop* v *Minister van Economische Zaken* [1989] ECR 2937, paragraph 14) it is pursuant to the 'Protocol on German internal trade and connected problems' of 25 March 1957, annexed to the EEC Treaty, that the Federal Republic of Germany is exonerated

from applying the rules of Community law to German internal trade and that the German Democratic Republic, while not a member of the Community, is not a non-member country *vis-à-vis* the Federal Republic of Germany.

47 Accordingly, the difference of treatment referred to by Sermes has a legislative basis in that Protocol, which forms an integral part of the Treaty and cannot therefore be regarded as discriminatory.

48 Sermes's argument that there has been an infringement of the principle of equal treatment must therefore be rejected.

49 It follows from all the foregoing considerations that the arguments put forward by Sermes have disclosed no factor of such a kind as to affect the validity of the contested Council regulation. It must, moreover, be stated that the documents before the Court disclose no other matter of such a kind as to call in question the validity of that regulation.

50 The reply to be given to the national court must therefore be that examination of the question has revealed no factor of such a kind as to affect the validity of Council Regulation 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.

Costs

51 The costs incurred by the French Government, the Council of the European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Cour d'appel, Colmar, by judgment of 5 September 1988, hereby rules:

Examination of the question raised has revealed no factor of such a kind as to affect the validity of 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.

Slynn Zuleeg

Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 11 July 1990.

J.-G. Giraud
Registrar

Gordon Slynn
President of the Fifth Chamber