JUDGMENT OF THE COURT
11 June 1985 *

In Case 288/83

Commission of the European Communities, represented by Richard Wainwright, Legal Adviser, and Julian Currall, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georges Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Ireland, represented in the written procedure by Louis J. Dockery, Chief State Solicitor, acting as Agent, and in the oral procedure by J. O'Reilly, Barrister-at-law, with an address for service in Luxembourg at the Irish Embassy,

defendant,

APPLICATION for a declaration that, by requiring licences for the importation of potatoes originating in non-member countries and put into free circulation in another Member State, Ireland has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann, and Y. Galmot, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

after hearing the Opinion of the Advocate General delivered at the sitting on 20 March 1985,

gives the following

* Language of the Case: English.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 23 December 1983, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by requiring licences in respect of the import of potatoes originating in third countries and in free circulation in another Member State and by prohibiting imports of such potatoes in the absence of such a licence, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty.

Background to the dispute

2 On 5 March 1981, Ireland brought into force an order regulating imports of potatoes, the Potatoes (Regulation of Import) Order 1981, according to which importation of potatoes 'produced in any country or territory other than a country which is a Member State of the European Economic Community' is prohibited unless such potatoes are imported under a licence granted by the Minister for Agriculture.

3 It appears from the documents before the Court that Ireland has been traditionally self-sufficient in potatoes and that because of plant-health requirements there were in fact no imports until the Community plant-health system came into operation on 1 May 1980. In the following period the Irish market was affected by the importation of large quantities of potatoes coming from the Community of which a significant part was represented by new potatoes originating in Cyprus and imported into the United Kingdom under a tariff quota at a reduced rate of duty which had been granted to that country in the framework of agreements entered into with the Community. It was to deal with those difficulties that, on 5 March 1981, the Irish authorities, after oral consultation with the Commission, adopted the order at issue, a copy of which was later sent to the Commission.

4 Having received a complaint in April 1982 from an Irish trader who had been refused a licence for the importation of a quantity of potatoes originating in

Cyprus and in free circulation in the United Kingdom, the Commission addressed a letter to the Irish Government on 2 June 1982 drawing its attention to the incompatibility of the Order with Community law inasmuch as its effect was to restrict the importation into Ireland of potatoes which were in free circulation in the Community.

5 By a letter dated 13 October 1982, the Commission invited Ireland, pursuant to Article 169 of the Treaty, to submit its observations. In its reply of 22 February 1983 the Irish Government defended the measure which had been adopted. Since the Commission did not accept that defence, it delivered, on 1 August 1983, the reasoned opinion provided for in Article 169. In that opinion, the Commission stated that it had no objection to the Irish measure in so far as it concerned direct imports from non-member countries but it considered it incompatible with the rules of Community law in so far as it applied to products originating in non-member countries but in free circulation in another Member State. In its reasoned opinion the Commission also stated that it was open to the Irish Government to apply to it for an authorization under Article 115 of the EEC Treaty to exclude potatoes originating in a non-member country from Community treatment and that it would then be in a position to decide whether the conditions for the grant of such an authorization were fulfilled.

6 In its reply to the reasoned opinion, dated 25 October 1983, Ireland once again defended the measure which had been adopted and applied to the Commission for retroactive authorization under Article 115 in respect of the incidents complained of. The Commmision did not grant that application and it brought the present action on 23 December 1983.

The arguments of the parties

7 The arguments of the parties, as they appear from the documents relating to the procedure prior to the bringing of the action and from the pleadings in the action, may be summarized as follows.

8 The Commission considers that the Potatoes Order 1981 infringes Articles 9, 10 and 30 of the EEC Treaty inasmuch as it only exempts from the obligation to obtain an import licence potatoes originating in other Member States and thereby restricts the importation of potatoes originating in non-member countries but in free circulation in those States in accordance with the provisions of Community law relating to tariffs and trade. The Commission refers in this connection to the

judgment of 15 December 1976 (Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921) in which the Court defined the scope of the concept of free circulation.

9 The Commission emphasizes that the Irish Order is far from being purely formal because it expressly prohibits the importation of potatoes otherwise than under a licence, because it imposes substantial penalties for offences against it and because it applies permanently to all potatoes regardless of their origin.

10 Ireland advances the following arguments in defence of the contested measure.

(a) The Commission was made aware of the proposal to adopt the measure in question, gave its 'informal' approval during an oral exchange of views and did not raise any objections when the contested order was notified to it on 15 April 1981.

(b) The Commission has not proved that the Order was applied to potatoes which were properly in free circulation in a Member State. In reality, the potatoes were imported directly from a non-member country but routed through the territory of another Member State.

(c) With regard to the substance of the problem, Ireland refers to the uncertainties inherent in the *Donckerwolcke* judgment with regard to the scope of the rules concerning free movement of goods originating in non-member countries. Since this case is concerned with an agricultural product, the special rules of Articles 39 to 46 of the Treaty prevail over the general rules relating to free movement of goods with the result that the principles relating to free movement are not applicable.

(d) In particular, Ireland draws attention to the restriction inherent in the tariff quota accorded to Cyprus for the importation of new potatoes at reduced rates of duty. That quota was intended to be used exclusively for importation into the United Kingdom. The Commission failed to take the necessary measures to prevent potatoes imported within the framework of that quota being re-exported to Ireland. No action was taken on the application for such measures under Article 115 which was made following delivery of the Commission's reasoned opinion. Ireland cannot therefore be criticized for having taken unilaterally the measures necessary to protect its markets.

(e) Finally, Ireland contends that the measure adopted is justified by Article 36, which allows Member States to introduce restrictions on imports which are justified on grounds of public policy. The importation of potatoes into Ireland would have had such disastrous consequences for the disposal of the Irish potato crop that protection of the domestic market became a matter of public policy, particularly since the consequences of that situation were likely to continue indefinitely.

11 For its part, the Commission denies that it ever approved the Irish measure, even informally. Prior consultations cannot take the place of consent. Moreover, it was not obliged to respond at once to the notice which was given to it of the contested measure. The Commission also emphasizes that its application to the Court is concerned with the principle of the Potatoes Order 1981 and not with particular cases of importation. It does not therefore need to produce evidence concerning such importations.

12 With regard to the relationship between the rules governing free movement laid down in Article 9 and 10 of the Treaty, on the one hand, and the provisions of Article 39 *et seq.* on the common agricultural policy, on the other, the Commission draws attention to the fact that potatoes are not subject to a common organization of the market and that they therefore come within the ambit of the general rules of the Treaty relating to the customs union and to the free movement of goods. It refers to the Court's established case-law on that subject, particularly the judgment of 16 March 1977 (Case 68/76 *Commission* v *French Republic* [1977] ECR 515 — 'potatoes'), the judgment of 29 March 1979 (Case 231/78 *Commission* v *United Kingdom* [1979] ECR 1447 — 'potatoes') and the judgment of 25 September 1979 (Case 232/78 *Commission* v *French Republic* [1979] ECR 2727 — 'mutton and lamb').

13 With regard in particular to the importation of potatoes originating in Cyprus, the Commission maintains that they took place under Community quotas, negotiated by the Community and allocated by Council regulations (Regulation No 3746/81 of 21 December 1981 laying down the arrangements applicable to trade with Cyprus, Official Journal L 374, p. 4; Regulation No 671/82 of 22 March 1982 opening, allocating and providing for the administration of a Community quota for potatoes originating in Cyprus, Official Journal L 79, p. 3; Regulation No 1226/83 of 16 May 1983 on the same subject, Official Journal L 131, p. 3).

14 With regard to the application of Article 115, the Commission points out that Ireland never submitted to it a request accompanied by all the information necessary to enable it to consider whether the conditions laid down in that article had been fulfilled, having regard to Commission Decision No 80/47 of 20 December 1979 on surveillance and protective measures which Member States may be authorized to take in respect of imports of certain products originating in third countries and put into free circulation in another Member State (Official Journal L 16, p. 14). In any event, the Commission considers that a derogation under Article 115 cannot be granted retroactively.

15 Finally, the Commisssion considers that the exception of public policy contained in Article 36 of the Treaty may never be relied upon for the purpose of protecting the economic interests of a Member State.

The substance of the case

16 The circumstances of the case require, in the first place, that the subject-matter and scope of the dispute be clearly defined.

17 The letter inviting Ireland to submit its observations and the reasoned opinion show that, subject to the requirements resulting from any commercial agreements concluded by the Community, the Commission did not raise any objection to the Potatoes Order 1981 so long as it was applied only to direct imports from non-member countries. Since the Commission has not indicated the reasons for its position on that point, that question, which has not been argued between the parties, must be reserved.

18 Ireland's arguments alleging that the order at issue was put into effect because of imports of new potatoes into the United Kingdom under a tariff quota accorded to Cyprus must also be placed in their proper perspective. Even if such imports were the cause of the measure at issue, it is none the less true that the Order itself is of a permanent and general nature inasmuch as it deals with imports of potatoes regardless of their origin other than those originating in the Member States, at all times of the year, and thus regardless of whether the potatoes in question are new potatoes or belong to another category.

19 It follows from the foregoing that the order at issue must be considered in terms of its principle, having regard to the requirements of Community law, but only with

regard to potatoes originating in non-member countries and put into free circulation in the Community. The question of direct imports must therefore be reserved. It is within the framework thus defined that the Irish Government's submissions must be examined.

20 Under Article 30 of the Treaty 'quantitative restrictions on imports', that is to say all prohibitions of imports and all other restrictive measures in the form of import licences or other similar procedures, are, without prejudice to the exceptions laid down in the Treaty itself, to be prohibited between Member States.

21 Ireland none the less advances a series of arguments, outlined above, to justify the requirement under the order at issue that an import licence be obtained for potatoes produced in any country or territory other than the Member States.

22 Ireland's argument based on prior consultations with the Commission and the Commission's failure to act in the initial period after notification of the Order cannot be accepted. Even if Ireland may have obtained the impression that its measure gave rise to no objection, the Commission cannot, even by approving expressly or by implication a measure adopted unilaterally by a Member State, confer on that State the right to maintain provisions which are objectively contrary to Community law.

23 With regard to the argument based on the uncertainty which is said to surround the scope of the provisions of the Treaty relating to free movement of products imported from non-member countries, it should be observed in the first place that according to a consistent line of decisions of the Court, beginning with the judgment of 10 December 1974 (Case 48/74, *Charmasson* v *Minister for Economic Affairs and Finance* [1974] ECR 1383) and confirmed by the judgments of 16 March 1977, 29 March 1979 and 25 September 1979, cited above, agricultural products in respect of which a common organization of the market has not been established are subject to the general rules of the common market with regard to importation, exportation and movement within the Community. A Member State may not therefore rely on the special rules of Article 39 *et seq.*, the purpose of which is to define the basis of a common agricultural policy, in order to establish or to maintain on its territory provisions derogating from the principles of the common market in respect of a product not subject to a common organization of the market.

24 In accordance with those principles, laid down in Articles 9, 10 and 30 of the Treaty, the measures intended to free intra-Community trade are applicable, as the Court pointed out in its judgment of 15 December 1976 (*Donckerwolcke*, cited above), without distinction to products originating in the Member States and to those coming from non-member countries which have been put into 'free circulation' in the Community. Once the latter products have been duly imported into the Community in accordance with the provisions in force relating to tariffs and trade, they are, as the Court emphasized, 'definitively and wholly assimilated to products originating in Member States' (judgment cited above, paragraph 17).

25 Those considerations also apply to products imported into the Community under a Community quota even if that quota is more particularly intended for the market of a specific Member State either by virtue of an agreement or of a later allocation. Once goods forming part of such a quota have been duly imported into the Member State of destination, they are assimilated to the products which are in free circulation in that State and it must therefore be possible for them to be imported without hindrance into the other Member States, except where an express provision to the contrary has been adopted by a competent institution of the Community.

26 With regard to the possible application of Article 115 of the Treaty to a situation of this kind, the Commission pointed out that it was not possible to consider that question because Ireland had not requested such an application at the appropriate time. Ireland's argument to the effect that the measure adopted is substantially equivalent to a derogation of the kind which might be granted under Article 115 must be rejected, particularly since a Member State may not act unilaterally in that respect.

27 It follows from the foregoing that Ireland was not entitled to adopt unilaterally a protective measure defined in terms which enable it to limit the importation of potatoes originating in non-member countries and in free circulation in the Community. It is of little importance whether that measure concerns products subject to the general rules laid down in the applicable provisions relating to tariffs and trade or products subject to special rules under an agreement, such as the tariff quota accorded to the Republic of Cyprus. The Irish measure thus constitutes, as such, a quantitative restriction prohibited by Article 30 of the Treaty.

28 Finally, Ireland may not rely, in support of the measure at issue, on the exception of public policy provided for in Article 36 of the Treaty. That provision, as the Court has consistently pointed out in its decisions, may not be relied on by a Member State to protect its economic interests (see judgment of 19 December 1961 in Case 7/61 *Commission* v *Italy* [1961] ECR 317, and most recently, judgment of 7 February 1984 in Case 238/82 *Duphar* v *Netherlands State* [1984] ECR 523, paragraph 23).

29 It follows from the foregoing that the alleged breach of a Treaty obligation has been proved and that it must therefore be found that, by requiring licences in respect of the import of potatoes originating in non-member countries and in free circulation in another Member State and by prohibiting imports of such potatoes in the absence of such a licence, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty.

Costs

30 Under Article 69 (2) the Rules of Procedure provide that the unsuccessful party is to be ordered to pay the costs. Since Ireland has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by requiring licences in respect of the import of potatoes originating in non-member countries and in free circulation in another Member States and by prohibiting imports of such potatoes in the absence of such a licence, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;

(2) Orders Ireland to pay the costs.

Mackenzie Stuart Bosco Due Kakouris

Pescatore Koopmans Everling Bahlmann Galmot

Delivered in open court in Luxembourg on 11 June 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President