JUDGMENT OF THE COURT (Sixth Chamber)
12 May 1989 *

In Case 246/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München for a preliminary ruling in the action pending before that court between

Continentale Produkten-Gesellschaft Erhardt-Renken GmbH & Co.

and

Hauptzollamt München-West (Principal Customs Office, Munich West)

on the validity of Commission Regulation No 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1981, L 347, p. 19) and Council Regulation No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1982, L 90, p. 1),

THE COURT (Sixth Chamber)

composed of: T. Koopmans, President of Chamber, G. F. Mancini, C. F. Kakouris, F. A. Schockweiler and M. Diez de Velasco, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

the Council of the European Communities, by H.-J. Lambers, a Director in the Legal Department of the Council, in the written and oral procedure, and by

* Language of the case German

E. Stein, Legal Adviser in that department, both acting as Agents, in the written procedure,

the Commission of the European Communities, by P. Gilsdorf, Legal Adviser, acting as Agent, in the written procedure, assisted by R. Wagner, a German judge on secondment under the programme for the exchange of officials, in the written and oral procedure,

the Hellenic Government, by Y. Kranidiotis, special secretary at the Ministry of Foreign Affairs, acting as Agent, in the written procedure, and by N. Frangakis, Head of the Legal Department at the Office of the Greek Permanent Representative at the European Communities and E. Marinou, a member of the special department for Community law at the Ministry of Foreign Affairs, both acting as Agents, in the oral procedure,

having regard to the Report for the Hearing and further to the Hearing on 24 January 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 February 1989,

gives the following

Judgment

1 By order of 23 July 1987, which was received at the Court on 13 August 1987, the Finanzgericht München (Finance Court, Munich) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the validity of Commission Regulation No 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1981, L 347, p. 19) and Council Regulation No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1982, L 90, p. 1).

2 The question was raised in the course of proceedings between Continentale Produkten-Gesellschaft Erhardt-Renken GmbH & Co., a company importing cotton yarn, the plaintiff in the main proceedings, and Hauptzollamt München-West, the defendant in the main proceedings, concerning four customs notices dated 15, 20, 27 and 28 April 1982, issued by the Hauptzollamt in connection with the importation between 14 and 27 April 1982 of four consignments of cotton yarn originating in Turkey.

3 In those notices the defendant in the main proceedings fixed an anti-dumping duty at 12% of the value of the goods imported.

4 In proceedings before the Finanzgericht München the plaintiff in the main proceedings challenged the validity of the abovementioned Regulations Nos 3453/81 and 789/82, on the basis of which the anti-dumping duty had been fixed; in essence, it argued that the regulations had been adopted in contravention of certain provisions of Council Regulation No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1979, L 339, p. 1, hereinafter referred to as 'the basic regulation').

5 The Finanzgericht München, taking the view that the validity of Commission Regulation No 3453/81 and Council Regulation No 789/82 was open to doubt, stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Are Commission Regulation (EEC) No 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1981, L 347, p. 19) and Council Regulation (EEC) No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1982, L 90, p. 1) valid?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the relevant provisions of Community law, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 It appears from the order of the national court that the plaintiff in the main proceedings first challenged the validity of Regulation No 789/82 on the grounds that the period laid down for the anti-dumping proceeding had been greatly exceeded, contrary to Article 7(9) of the basic regulation, which provides that the conclusion of the anti-dumping proceeding 'should normally take place within one year of initiation of the proceeding', and, secondly, that since that period had been exceeded, the reasons for which the normal period had not been observed should have been explained.

8 With regard to that objection it should be observed that the period mentioned in Article 7(9) of the basic regulation is a guide rather than a mandatory period. This is clear both from the wording of the provision in question, which uses the word 'normally', and from the nature of the anti-dumping proceeding itself, whose progress does not depend solely on the efforts of the Community authorities. However, it follows from Article 7(9) that the anti-dumping proceeding must not be extended beyond a reasonable period to be assessed according to the particular circumstances of each case.

9 In the case before the national court, it appears that the proceeding was longer than usual, since it lasted 32 months. However, it is clear from the documents before the Court that the Commission was prevented by a number of special circumstances from completing the investigations within the one-year period. They were in particular the political events and the currency depreciation occurring in Turkey at that time, the inadequate cooperation of the Turkish exporters with the Community authorities, the need for lengthy negotiations with the Association of Turkish Textile Exporters ('TTEA') and the fact that the Turkish exporters themselves had requested an extension of the investigation period, to which request the Commission acceded by including the last three months of 1981 in that period, which originally ran from 1 January to 30 September 1981. It should also be stressed that the recitals in the preamble to Regulation No 789/82 make sufficient reference to those circumstances.

10 In those circumstances, it must be concluded that, although the proceeding may have been unusually long, it did not exceed a reasonable period and its duration cannot therefore affect the validity of Regulation No 789/82.

11 The plaintiff in the main proceedings goes on to argue that the undertakings chosen for the purpose of determining the normal value of the goods, in accordance with Article 2B(3) of the basic regulation, and of ascertaining the dumping margin, were unrepresentative. In their view, this is shown *inter alia* by the fact that the Commission had to make specific adjustments to their production costs.

12 In this connection it is necessary to point out, as the Commission does, that it is clear from the recitals in the preamble to Regulation No 789/82 that the undertakings in question were chosen on account of their representativity as regards their exports to the Community market and in agreement with the Association of Turkish Textile Exporters and the complainants. It subsequently transpired that those undertakings sold only limited quantities of the products in question on the domestic market and that their sales on the Turkish domestic market did not allow the normal value to be determined, in accordance with Article 2B(3)(a), from the price actually paid or payable in the ordinary course of trade on the domestic market. Since no valid comparison was possible, the calculations were carried out on the basis of the constructed value, in accordance with Article 2B(3)(b) of the basic regulation, that is to say, on the basis of the costs of the representative undertakings. Consequently, it does not appear that the validity of Regulation No 789/82 can be called in question in this respect.

13 The plaintiff in the main proceedings further asserts that there was no injury justifying the imposition of the anti-dumping duty and that the anti-dumping duty introduced was applied for the sole purpose of protecting Community production.

14 It must be pointed out in this regard that the recitals in the preamble to Council Regulation No 789/82 give a detailed account, with figures, of the injury suffered by the Community industry as a result of the imports in question. The recitals in question set out precisely, in absolute figures and in percentage terms, the increase in the volume of imports of cotton yarn originating in Turkey, the decline in the volume of Community output, the utilization of capacity by the Community industry, which had fallen below 65% in several Member States, and the appreciable fall in employment in Community undertakings in the cotton-yarn sector. The plaintiff in the main proceedings has not seriously challenged the accuracy of those facts and figures. Consequently, the validity of Regulation No 789/82 cannot be called in question in this respect.

15 Lastly, the plaintiff in the main proceedings pleads in the alternative that Regulation No 789/82 was partly invalid because it was retroactive as regards contracts concluded prior to its entry into force but performed thereafter. It was therefore invalid inasmuch as it made no provision for a total exemption from anti-dumping duties of imports carried out pursuant to 'old' contracts. This was an infringement of the principle of the protection of legitimate expectation.

16 It should be observed first of all that a regulation imposing definitive anti-dumping duties has retroactive effect in so far as it provides that it applies to imports which took place before the date of its publication. It should further be noted that, as is apparent from Article 13(4)(a) of the basic regulation and its provisions concerning the imposition of provisional anti-dumping duties, the definitive introduction of a retroactive anti-dumping duty, although generally not allowed, is none the less permitted *inter alia* when the retroactive effect covers the period of application of the provisional anti-dumping duty introduced by an earlier regulation. In the case before the national court, a provisional anti-dumping duty of 16% was imposed by Regulation No 3453/81 as from 2 December 1981. Regulation No 789/82 imposed a definitive anti-dumping duty at the lower rate of 12% commencing only on 1 January 1982, which was four weeks after the imposition of the provisional duty. Consequently, no unlawful retroactivity is involved.

17 Next, as regards the lack of any transitional provision in Regulation No 789/82 according special treatment to imports carried out pursuant to 'old contracts', it must be stated that the lack of such a provision cannot contravene the principle of the protection of legitimate expectation. Since an anti-dumping proceeding was still in progress, a circumspect and prudent trader knew, or ought to have known, that the imposition of an anti-dumping duty was possible and could therefore have taken that possibility into account when signing contracts with his suppliers. Consequently, the legitimate expectation of traders was not infringed.

18 It must be concluded from all the foregoing that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Council Regulation No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey.

19 The Finanzgericht also raises the question of the validity of Regulation No 3453/81, mentioned above, imposing the provisional anti-dumping duty.

20 It is clear from Article 11 of the basic regulation that the validity of regulations imposing provisional duties expires either within a given period or through the introduction of definitive duties.

21 It should also be pointed out that Article 2 of Regulation No 789/82 provides as follows: 'The amounts secured by way of provisional duty pursuant to Regulation (EEC) No 3453/81 shall be definitively collected up to the amount of the definitive duty, that is, 75% of the amount of the provisional duty. The balance of these sums, that is 25% of the amount of the provisional duty, is released.' The article goes on to provide: 'However, as far as the products released for consumption before 1 January 1982 are concerned, the amounts secured by way of provisional anti-dumping duty shall be released.'

22 It follows that, after the entry into force of Regulation No 789/82, all imports governed by Regulation No 3453/81 were either released from the anti-dumping duties or became subject to the provisions of Regulation No 789/82.

23 In those circumstances and in the absence of any specific objections to Regulation No 3453/81, there are no grounds for considering its validity.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question submitted to it by the Finanzgericht München, by order of 23 July 1987, hereby rules as follows:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Council Regulation No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey.

Koopmans Mancini

Kakouris Schockweiler Diez de Velasco

Delivered in open court in Luxembourg on 12 May 1989.

J.-G. Giraud
Registrar

T. Koopmans
President of the Sixth Chamber