JUDGMENT OF THE COURT
14 July 1988 *

In Case 188/85

EEC Seed Crushers' and Oil Processors' Federation (Fediol), 74 rue de la Loi, Brussels, acting throught its President, D. Billing, represented by D. Ehle, U. C. Feldmann, V. Schiller and H. Nehm, Rechtsanwälte, 13 Mehlemer Strasse, 5000 Cologne 51, with an address for service in Luxembourg at the Chambers of E. Arendt, Avocat, 4 avenue Marie-Thérèse, Luxembourg,

applicant,

v

Commission of the European Communities, represented by P. Gilsdorf, Legal Adviser, assisted by H. J. Rabe, Rechtsanwalt, of Schön & Pflüger, Hamburg and Brussels, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

and

Federation Brasileira das Industrias de Oleos Vegetais (Abiove), represented by I. Van Bael and J. F. Bellis, of the Brussels Bar, 222 avenue Louise, 1050 Brussels, with an address for service in Luxembourg at the Chambers of Elvinger & Hoss, Avocats, 15 côte d'Eich,

intervener,

APPLICATION for a declaration that Commission Decision 85/233 of 16 April 1985 terminating the anti-subsidy proceeding concerning imports of soya meal originating in Brazil (Official Journal L 106, p. 19) is void,

* Language of the Case: German.

THE COURT

composed of: G. Bosco, President of Chamber, acting as President, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, Y. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet and F. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 13 October 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 March 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 18 June 1985, the EEC Seed Crushers' and Oil Processors' Federation (hereinafter referred to as 'Fediol') brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 85/233 of 16 April 1985 terminating the anti-subsidy proceeding, initiated on the basis of a complaint submitted by the applicant, concerning imports of soya meal originating in Brazil for the period from 1 January to 30 December 1983 (Official Journal L 106, p. 19) is void.

2 Fediol's complaint was submitted by letter of 6 January 1984 in accordance with Article 5 of Council Regulation 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 L 201, p. 1) and dealt with the following practices: (a) concessionary financing for imports of soya beans; (b) concessionary export financing through a programme of aid for the development of exports; (c) differential taxation of exports of soya-based products; (d) obstacles in the way of exports of soya beans; (e) concessionary financing for storage of soya beans;

(f) concessionary financing for exports of soya oil; (g) income-tax relief on profits from exports of soya oil; (h) concessionary financing for exports of soya meal; (i) tax benefits in respect of hedging transactions on foreign markets.

3 In its decision of 16 April 1985, cited above, the Commission found that the first two of the above practices had not occurred during the period covered by the investigation. As regards the practices indicated under (c), (d), (e), (f) and (g), the Commission found that they did not constitute subsidies in respect of soya meal. Finally, as regards the last two practices, mentioned under (h) and (i), the Commission found that they constituted subsidies but considered that the interest of the Community did not require the introduction of a countervailing duty.

4 The application contests on the one hand, that part of the decision of 16 April 1985 which concerns the Commission's refusal to regard as subsidies the practices mentioned under (c), (d), (e), (f) and (g) and, on the other, that part of the said decision in which the Commission concluded that the last two of the abovementioned practices ((h) and (i)), notwithstanding the fact that they constituted subsidies, did not justify the introduction of countervailing duties.

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The scope of judicial review

6 Having regard to the observations of the Commission and the intervener as to the possible limits of judicial review of the decision, it should be noted that the Court has already held (see, in particular, the judgment of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913) that, even though a discretion has been conferred on the Commission in the matter at issue, the Court is required to verify whether or not it has observed the procedural guarantees granted to complainants by the Community provisions in question, has committed manifest

errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to a misuse of powers.

7 It is in that context that the Court must consider the applicant's submissions to the effect that the Commission failed to take account of essential factors of such a nature as to give rise to the belief that there was a subsidy within the meaning of Regulation No 2176/84 and that there was an interest of the Community calling for the introduction of a countervailing duty.

Differential taxes on exports of soya-based products

8 In the contested measure (paragraph 12), the Commission states that according to Fediol, transaction tax is levied at a rate of 13% on soya beans, 11.1% on soya meal and 8% on soya oil. The effect of that differential taxation is to restrict exports of beans and thus to guarantee to the Brazilian oil-seed crushing industry supplies of the raw material at low cost. That, in terms of cost price, constitutes an advantage in the exportation of soya meal to the Community, to which must be added the advantage resulting from the taxation of meal at a rate lower than that applied to beans. The contested measure accepts that Fediol's allegations of fact were correct.

9 However, in the grounds of the contested decision it is stated on that point that 'as far as international trade is concerned, the crucial characteristic of a subsidy is that it involves a financial contribution by government', that 'any subsidy must involve a charge on the public account' and that the 'concept of a charge on the public account includes the waiving by the authorities of taxes or other dues owed'. In this case, however, according to the decision, no dues are owed and, in particular, the Brazilian authorities have not waived any tax debt owed to them.

10 In the proceedings before the Court, the Commission explained that the tax in question was not an export tax but the Brazilian turnover tax (ICM) which is, in principle, levied at all stages of the marketing or processing of products on Brazilian territory. As a general rule, exports of processed products are not liable to ICM. Consequently, the tax levied on the raw materials contained in the exported products should have been taken into account. However, by way of exception to the general rule and as a result of the Commission's intervention, Brazil, in 1977, agreed to levy ICM on the export of the processed products, namely soya meal and soya oil, at the rates of 11% and 8% respectively. According to the Commission, the ICM system constitutes general taxation which applies to soya-based products at different rates. That differential taxation does not give rise, so far as beans are concerned, to an advantage which may be regarded as a subsidy within the meaning of Regulation No 2176/84 because there is in any event no charge on the public account.

11 According to the applicant, the concept of subsidy in Article 3 of Regulation No 2176/84 does not necessarily presuppose a charge on the public account and should be construed broadly: there is a subsidy if the result of all the measures adopted is to provide an advantage to those who benefit from them.

12 It should be pointed out in the first place that the concept of subsidy in Article 3 of Regulation No 2176/84 is not expressly defined, either in that regulation or in other Community measures. However, an 'illustrative list' of export subsidies, referred to in Article 3 (2) of the regulation, is annexed thereto. The last paragraph of that list defines as constituting an export subsidy in the sense of Article XVI of the GATT 'any other charge on the public account'. It follows both from the terms of that general provision and from the other examples mentioned in the list that in the mind of the Community legislature the concept of export subsidy necessarily implied a financial burden borne directly or indirectly by public bodies. It also follows from Article 3 (3) of the said regulation, which expressly excludes from the concept of subsidy the exemption of a product from certain export charges or taxes, that the concept of a charge covers not merely cases in which the State advances funds but also those in which it waives recovery of tax debts thereby introducing an exception to a generally applicable rule of taxation.

13 The concept of subsidy thus understood is not incompatible with the Community's obligations under international law, in particular under GATT and agreements concluded in the framework thereof. It should be pointed out in that regard that neither GATT nor the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade has contained or now contains an express definition of the term 'subsidy' and the list mentioned above is merely a verbatim reproduction of the 'illustrative list' annexed to the latter agreement.

14 It follows from the foregoing that the Commission was not wrong or arbitrary in concluding that the concept of subsidy in Article 3 of Regulation No 2176/84 presupposes the grant of an economic advantage through a charge on the public account.

Barriers to soya bean exports

15 In the contested measure (paragraph 13), it is mentioned that a possible restriction on exports of soya beans does not constitute a subsidy in favour of soya meal because there is no charge on the public account.

16 The applicant states that exports of soya beans are subject in Brazil to registration under rules providing for quotas and are thereby impeded. That practice thus has effects similar to and convergent with those of the abovementioned system of differential taxation.

17 It is sufficient to note in that regard that in putting forward that submission, the applicant starts from the premiss that a subsidy may exist even where there is no charge on the public account. Since that premiss has been refuted above, this submission must fail.

Concessionary financing for storage of soya beans

18 In the contested measure (paragraph 7) it is stated that in order to finance the preparation and in particular the storage of 27 agricultural commodities, the Brazilian Government operates a system of loans at 45% which is less than the cost of money to the Brazilian Government and lower than ordinary market rates, and thus constitutes a concessionary rate. Since such a practice does not amount to

an export subsidy, the contested measure examines the question whether it constitutes a domestic subsidy.

19 According to the contested measure, the existence of a domestic subsidy presupposes that the State intervention from which it arises is not general in nature but seeks to grant an advantage only to certain undertakings, thus distorting competition. In this case, the programme of loans at concessionary rates is not directed specifically at the soya sector but applies to 27 agricultural commodities. Even if certain agricultural commodities are not covered by the programme, the latter is none the less of general application because all agricultural commodities requiring or suitable for storage aids are eligible.

20 In response to that reasoning, set out in the contested measure, the applicant argues that the practice at issue is specific in nature because the essential beneficiaries of it are industries which process agricultural products, in particular in the soya sector. By refusing to regard that practice as a domestic subsidy, the Commission has infringed Articles 3 and 7 of Regulation No 2176/84. It has also failed to seek out and take account of certain essential factors and has committed manifest errors in its assessment of the facts.

21 The Commission contends essentially that the practice in question has no 'sectoral specificity' because it is applied to all the main agricultural commodities (27 products) without being of specific benefit to soya beans, which represent 31.9% of agricultural production and absorb 31.7% of the financing.

22 The Commission's argument must be upheld since the applicant has not shown that the concessionary financing granted by the Brazilian State is intended to favour specifically a particular sector of agriculture or of the agri-foodstuffs industry. It appears from the documents before the Court that the financing at issue constitutes a general measure applicable to 27 agricultural commodities.

23 This submission must therefore be rejected.

Concessionary financing for exports of soya oil and income-tax relief on profits from such exports

24 In the contested measure (paragraph 10), it is stated that in 1983, Brazilian exporters obtained financing for exports of certain products, including soya oil, at a rate varying between 40 and 60%. Those rates were concessionary because they were lower than both the cost of money to the Brazilian exchequer and the rates available on the market. However, that concession was withdrawn with effect from 2 January 1984.

25 According to the contested measure, such concessionary financing cannot be held to constitute a subsidy on soya meal exports because its purpose is to promote exports of soya oil and it is linked to the quantity of oil actually exported. Furthermore, the investigation produced no evidence of such financing having any influence on exports of soya meal and, in any event, such an influence is indirect and impossible to prove.

26 The contested measure (paragraph 11) also states that Fediol's allegations to the effect that profits from exports of soya oil are exempt from income tax are well founded. It notes that the Brazilian Government confirmed the existence of that practice. However, the practice in question does not, according to the contested measure, constitute a subsidy on exports of soya meal but a subsidy on exports of soya oil.

27 The applicant alleges that the Commission has infringed Articles 3 and 7 of Regulation No 2176/84 by not seeking to determine the precise effects produced in regard to soya meal by the subsidy and the income tax relief granted in respect of soya oil. In particular, the applicant claims that Brazilian exporters were entitled to transfer the benefit they obtained from the subsidy and the tax relief on soya oil to soya meal (of which 80% is exported, compared to 40% of soya oil), an associated product, which thus benefits from indirect subsidy.

28 It is sufficient to point out in that regard that the fact that a trader obtains benefits in the context of the activities of his business, taken as a whole, by taking advantage *inter alia* of the concessionary rate of the financing granted for exports of soya oil and of tax relief does not mean that such benefit provides a specific advantage in regard to soya meal. Consequently, the submission must be rejected.

The two practices recognized as constituting subsidies

29 In the contested measure (paragraphs 5 and 6), the Commission accepted that subsidies had been granted (a) through concessionary financing for exports of soya meal by way of loans at concessionary rates of 40% (60% since 10 June 1983) whereas the cost of money to the Brazilian Government was 156.6% and (b) through tax benefits in respect of hedging transactions carried out by exporters of soya meal. The Commission calculated the amount of the first subsidy as being 7.66% and that of the second as being 0.09% of the fob value of exports of soya meal (7.75% in total).

30 In the contested measure, the Commission also found that the European vegetable oil industry had suffered significant damage as a result of the low prices for Brazilian soya meal brought about by the two subsidies mentioned above.

31 However, it considered that the Community interest did not require the imposition of countervailing duties because the first advantage, representing practically the entire amount of the subsidy and of the consequent damage to the European industry, was withdrawn in regard to soya meal with effect from 14 September 1983.

32 The applicant puts forward the following submissions against that part of the contested measure.

33 In its first submission, the applicant claims that the Commission did not have the power to terminate the proceeding without proposing anti-subsidy measures on the basis of the 'interests of the Community'. After a definitive finding had been made that a subsidy existed and damage resulted therefrom, the interests of the Community could be considered and taken into account only by the Council under Article 12 of Regulation No 2176/84 with a view to the imposition of definitive countervailing duties. The Commission, too, may consider the interests of the 'interests of the Community', but only in regard to the imposition of provisional duties under Article 11 of Regulation No 2176/84 and not in order to terminate the proceeding.

34 According to the second submission, having itself admitted that there was a need to impose countervailing duties and having proposed to the Council on 4 January 1985 the imposition of a countervailing duty of 7.27%, application of which was suspended, the Commission could no longer withdraw that proposal and thus prevent the Council from adopting a decision on that subject.

35 It should be observed in regard to the Commission's powers that Article 9 (1) of Regulation No 2176/84 provides that the proceeding is to be terminated 'if it becomes apparent after consultation that protective measures are unnecessary [and] where no objection is raised within the Advisory Committee'. That provision does not require the Commission to terminate the proceeding only where no subsidy or injury has been found to exist but in all cases in which the adoption of protective measures does not prove to be necessary and thus also in cases in which the assessment made of the interests of the Community shows that the adoption of protective measures would be inappropriate.

36 That interpretation of Article 9 (1) is not contradicted by the fact that, under Article 12, it is for the Council to decide, on the basis of a proposal submitted by the Commission, whether or not protective measures are to be adopted, because the purpose of that measure is merely to confer on the Council alone the power to adopt a definitive decision on the imposition of protective measures and only in cases in which the Commission considers it necessary to adopt such measures and has submitted a proposal to the Council for that purpose.

37 Moreover, the Commission is free to amend or withdraw its proposal as long as the Council has not adopted a decision if, as a result of a new assessment of the interests of the Community, it considers the adoption of protective measures superfluous.

38 In its third submission, the applicant maintains that, having regard to Articles 7 (1) (c) and 12 (1) of Regulation No 2176/84, the finding that a subsidy exists and that Community industry has suffered injury is decisive and cannot be set at naught by the subsequent withdrawal of the subsidy. The concept of the interests of the Community, as a criterion for a decision, cannot be so wide as to permit the existence of genuine injury, the continuance of the subsidy and its probable reintroduction after being withdrawn to be disregarded.

39 In this case, according to the applicant, the findings made during the investigation show the necessity for the adoption of protective measures within the meaning of Article 9 (1) of Regulation No 2176/84 and any other decision would amount to a misuse of powers, since the Brazilian Government's practice is to grant cumulative and disguised subsidies which are constantly withdrawn and reintroduced in various forms.

40 It should be pointed out that although it is true that the Commission is under a duty to establish objectively the facts concerning the existence of subsidization practices and of injury caused thereby to Community undertakings, it has a very wide discretion to decide, in terms of the interests of the Community, whether or not to terminate the proceeding in accordance with Article 9 (1) of Regulation No 2176/84 (see the judgment of 4 October 1983, *Fediol* v *Commission*, cited above).

41 In this case, the Commission considered that the interests of the Community did not justify the adoption of protective measures since the Brazilian Government had, during the reference period, withdrawn the concessionary financing in question, which constituted practically the entire amount of the subsidy which had caused the injury suffered by the Community industry concerned. That asssessment does not exceed the powers conferred on the Commission by Article 9 (1) of Regulation No 2176/84 and cannot therefore be regarded as constituting a misuse of powers.

42 Consequently, the submissions put forward by the applicant in regard to the two subsidies found to exist cannot be upheld.

43 For all of the foregoing reasons, the application must be dismissed.

Costs

44 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicant to pay the costs, including those of the intervener.

Bosco Due Moitinho de Almeida Rodríguez Iglesias Koopmans
Everling Bahlmann Galmot Kakouris Joliet Schockweiler

Delivered in open court in Luxembourg on 14 July 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President