JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
6 December 2001 *

In Case T-44/98,

Emesa Sugar (Free Zone) NV, established in Oranjestad (Aruba), represented by G. van der Wal, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P.J. Kujper and T. Van Rijn, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Council of the European Union, represented by J. Huber and G. Houttuin, acting as Agents,

* Language of the case: Dutch.

by

Kingdom of Spain, represented by M. López-Monís Gallego and R. Silva de Lapuerta, acting as Agents, with an address for service in Luxembourg,

by

French Republic, represented by K. Rispal-Bellanger, acting as Agent, with an address for service in Luxembourg,

and by

United Kingdom of Great Britain and Northern Ireland, represented by R. Magrill, acting as Agent, with an address for service in Luxembourg,

interveners,

APPLICATION for annulment of the Commission's decision of 23 December 1997 (VI/51329), addressed to the Hoofdproductschap Akkerbouw, rejecting an application for the issue of import licences for 3 010 tonnes of sugar submitted under Commission Regulation (EC) No 2553/97 of 17 December 1997 on rules for issuing import licences for certain products covered by CN codes 1701, 1702, 1703 and 1704 and qualifying as ACP/OCT originating products (OJ 1997 L 349, p. 26),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2001,

gives the following

Judgment

Legal background

1 Under Article 3(r) of the EC Treaty (now, after amendment, Article 3(1)(s) EC), the activities of the Community are to include the association of overseas countries and territories ('the OCTs') 'in order to increase trade and promote jointly economic and social development'.

2 Aruba is one of the OCTs.

3 The association of the OCTs with the Community is governed by Part Four of the EC Treaty.

4 Pursuant to the second and third paragraphs of Article 131 of the EC Treaty (now, after amendment, the second and third paragraphs of Article 182 EC):

'The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.'

5 To that end, Article 132 of the EC Treaty (now Article 183 EC) sets out a number of objectives, which include the application by the Member States 'to their trade with [those] countries and territories [of] the same treatment as they accord each other pursuant to this Treaty'.

6 Article 133(1) of the EC Treaty (now, after amendment, Article 184(1) EC) provides that customs duties on imports into the Member States of goods originating in the OCTs are to be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of the Treaty.

7 According to Article 136 of the EC Treaty (now, after amendment, Article 187 EC):

'For an initial period of five years after the entry into force of this Treaty, the details of and procedure for the association of the countries and territories with the Community shall be determined by an Implementing Convention annexed to this Treaty.

Before the Convention referred to in the preceding paragraph expires, the Council shall, acting unanimously, lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty.'

8 On the basis of the second paragraph of Article 136 of the Treaty, on 25 February 1964 the Council adopted Decision 64/349/EEC on the association of the OCTs with the European Economic Community (*Journal Officiel* 1964, 93, p. 1472). That decision was intended to replace, as from 1 June 1964 (the date of the entry into force of the internal agreement on the financing and management of Community aid signed in Yaoundé on 20 July 1963), the Implementing Convention on the association of the overseas countries and territories with the European Economic Community, annexed to the Treaty and concluded for a period of five years.

9 Following several decisions relating to the same subject, the Council adopted Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1, 'the OCT Decision') which, by virtue of Article 240(1) thereof, is to be applicable for a period of 10 years from 1 March 1990. Article 240(3)(a) and (b) provides, however, that before the end of the first five years, the Council, acting unanimously on a proposal from the Commission, is to establish, where necessary, in addition to Community financial assistance, any amendments to be made for the next five-year period to the association of the OCTs with the Community. Thus it was that the Council adopted Decision 97/803/EC of 24 November 1997 amending at mid-term the OCT Decision (OJ 1997 L 329, p. 50).

10 In its original version, Article 101(1) of the OCT Decision provided:

'Products originating in the OCT shall be imported into the Community free of customs duties and charges having equivalent effect.'

11 Article 102 of the same decision provided:

'The Community shall not apply to imports of products originating in the OCT any quantitative restrictions or measures having equivalent effect.'

12 The first indent of Article 108(1) of the OCT Decision refers to Annex II thereto ('Annex II') for definition of the concept of originating products and the methods of administrative cooperation relating thereto. Under Article 1 of Annex II, a product is to be considered as originating in the OCTs, the Community or the African, Caribbean and Pacific States ('the ACP States') if it has been either wholly obtained or sufficiently worked or processed there.

13 Article 3(3) of Annex II lists a number of operations that are to be considered as insufficient working or processing to confer the status of OCT originating products.

14 Article 6(2) of Annex II states, however:

'When products wholly obtained... in the ACP States undergo working or processing in the OCT, they shall be considered as having been wholly obtained in the OCTs.'

15 By virtue of Article 6(4) of Annex II, the rule cited above, the 'ACP/OCT cumulation of origin' rule, is to apply 'to any working or processing carried out in the OCT, including the operations listed in Article 3(3)'.

16 Decision 97/803 confined the application of the ACP/OCT cumulation of origin rule to sugar from the OCTs.

17 In the seventh recital in the preamble to the contested decision, the Council explains:

'[T]he introduction pursuant to [the OCT] Decision of free access for all products originating in the OCTs and the maintenance of cumulation for ACP and OCT originating products has given rise to the risk of conflict between two Community policy objectives, namely the development of the OCTs and the common agricultural policy;... serious disruption on the Community market for certain products subject to a common organisation of the market has led on a number of occasions to the adoption of safeguard measures;... fresh disruption should be avoided by taking measures to create a framework conducive to regular trade flows and at the same time compatible with the common agricultural policy'.

18 To that end, Decision 97/803 inserted into the OCT decision, *inter alia*, Article 108b which allows the ACP/OCT cumulation of origin for a fixed annual quantity of sugar. Article 108b provides:

'1. The ACP/OCT cumulation of origin referred to in Article 6 of Annex II shall be allowed for an annual quantity of 3 000 tonnes of sugar...

2. For the purposes of implementing the ACP/OCT cumulation rules referred to in paragraph 1, forming sugar lumps or colouring shall be considered as sufficient to confer the status of OCT-originating products' (but sugar-milling is not mentioned as well).

19 On 17 December 1997 the Commission adopted Regulation (EC) No 2553/97 on rules for issuing import licences for certain products covered by CN codes 1701, 1702, 1703 and 1704 and qualifying as ACP/OCT originating products (OJ 1997 L 349, p. 26). In accordance with that regulation, sugar imports under the ACP/OCT cumulation of origin provided for in Article 108b of the OCT decision are conditional upon the production of an import licence.

20 Regulation (EC) No 2552/97 entered into force, in accordance with the first paragraph of Article 8 thereof, on 19 December 1997. By virtue of the second paragraph of Article 8, it was applicable as from 1 January 1998. A transitional scheme was, however, provided for by the third paragraph of Article 8, which provides:

'... [I]mport licences [for products referred to in Article 108b of the OCT decision] applied for between 10 and 31 December 1997 shall be issued by the competent authorities of the Member States, after prior authorisation has been

granted by the Commission departments, in the order in which the applications are submitted and for quantities not exceeding the total maximum of 3 000 tonnes for the Community.'

Facts, procedure and forms of order sought

21 Since April 1997 the applicant has operated a sugar factory on the island of Aruba and exported sugar to the Community. According to the applicant, the factory has a minimum processing capacity of 34 000 tonnes a year. Since Aruba produces no sugar, the applicant buys white sugar from cane-sugar refineries established in ACP States. The sugar purchased is shipped to Aruba where it is worked and processed before being exported to the Community.

22 By letter of 19 December 1997 the applicant submitted to the Netherlands competent authority, the Hoofdproductschap voor Akkerbouwproducten ('the HPA'), an application for import licences for 3 010 tonnes of sugar from Aruba. The sugar had been imported from an ACP State and processed in the applicant's plant in Aruba. On 22 December 1997 the HPA forwarded that application to the Commission.

23 By letter of 23 December 1997 (VI/51329, 'the contested decision') the Commission informed the HPA that, by virtue of Article 8 of Regulation No 2553/97, Emesa's application was 'inadmissible, on the ground that it related to a quantity greater than the maximum specified'.

24 By letter of 24 December 1997 the HPA informed the applicant of the decision declaring its application to be inadmissible under Article 8 of Regulation No 2553/97.

25 By application lodged at the Registry of the Court of First Instance on 10 March 1998, the applicant brought this action for annulment of the contested decision.

26 By a separate document lodged at the Court Registry on 10 April 1998, the applicant also initiated proceedings under Article 185 of the EC Treaty (now Article 242 EC) seeking suspension of the operation of the contested decision until the Court should have given a ruling on the merits of the case and, under Article 186 of the EC Treaty (now Article 243 EC), for interim measures prohibiting the Commission from applying, during the same period, the provisions of Regulation No 2553/97 and/or Article 108b of the OCT decision, as amended, in so far as those provisions had the effect of limiting imports of sugar from the OCTs into the Community.

27 By order of 14 August 1998 in Case T-44/98 R *Emesa Sugar* v *Commission* [1998] ECR II-3079, the President of the Court of First Instance dismissed those applications.

28 By orders of, respectively, 7 July 1998, 9 July 1998 and 21 October 1998, the Court granted the Council and the Kingdom of Spain, the French Republic and the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the forms of order sought by the Commission, in accordance with their applications under Article 115 of the Rules of Procedure of the Court of First Instance.

29 The interveners, with the exception of the French Republic, lodged statements in intervention on which the principal parties were requested to submit their observations.

30 On an appeal brought by the applicant, the order in Case T-44/98 R *Emesa Sugar* v *Commission*, cited above in paragraph 27, was set aside by order of the President of the Court of Justice of 17 December 1998 in Case C-364/98 P(R) *Emesa Sugar* v *Commission* [1998] ECR I-8815 and the matter was referred back to the Court of First Instance.

31 By order of 30 April 1999 in Case T-44/98 R II *Emesa Sugar* v *Commission* [1999] ECR II-1427, the President of the Court of First Instance gave the applicant authority for a period of six months from the date of the order to export to the Community 7 500 tonnes of milled sugar under the ACP/OCT cumulation of origin rule, on condition however that the applicant should furnish security in the form of a bank guarantee for a sum of USD 28 per tonne of sugar exported. The measure was extended to 29 February 2000 by order of the President of the Court of First Instance of 29 September 1999 in Case T-44/98 R II *Emesa Sugar* v *Commission* [1999] ECR II-2815. By order of the President of the Court of First Instance of 6 April 2000 in Case T-44/98 R II *Emesa Sugar* v *Commission* [2000] ECR II-1941, the President refused to grant a further extension and ordered the security provided by the applicant to be released for the benefit of the Community.

32 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— dismiss the application for annulment as unfounded;

— order the applicant to pay the costs.

34 The Council and the Kingdom of Spain contend that the Court should:

— dismiss the application for annulment as unfounded;

— order the applicant to pay the costs.

35 The United Kingdom of Great Britain and Northern Ireland contends that the Court should:

— dismiss the action as unfounded;

36 Pursuant to Article 177 of the EC Treaty (now Article 234 EC), the President of the Arrondissementsrechtbank te 's-Gravenhage (District Court, The Hague, Netherlands) asked the Court of Justice to give a ruling on the validity of decision 97/803 (Case C-17/98).

37 By order of 11 February 1999 the Court of First Instance stayed proceedings in Case T-44/98 until the decision bringing Case C-17/98 to an end.

38 In its judgment of 8 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-675 the Court of Justice held that examination of the questions submitted disclosed no factor of such a kind as to affect the validity of Decision 97/803.

39 By letter of 29 February 2000 the parties were requested to submit their observations on pursuing the proceedings in this case.

40 In its letter of 31 March 2000 the applicant maintained that the assessment made by the Court of Justice in its judgment in *Emesa Sugar*, cited above in paragraph 38, of the validity of decision 97/803 was based on errors of fact. In addition, it claims that that judgment was given in breach of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because, during the proceedings before the Court of Justice, the applicant was not able to put forward observations on the Advocate General's Opinion. In any event, the proceedings before the Court of Justice concerned only decision 97/803 and not Regulation No 2553/97. The applicant asked the Court of First Instance to continue the written procedure in this case and to request the parties to submit observations on the basis of the *Emesa Sugar* judgment, cited above.

41 In their letters of 24 and 29 March respectively, the Commission and the Council argued that the plea of illegality challenging decision 97/803 had become nugatory because in the *Emesa Sugar* judgment, cited above in paragraph 38, the Court had upheld the validity of that decision. The proceedings had therefore to continue in order for the Court of First Instance to rule on the validity of Regulation No 2553/97.

42 By letter of 24 May 2000 the applicant was requested to submit a further statement on the basis of the *Emesa Sugar* judgment, cited above in paragraph 38. On 9 October 2000 the applicant lodged that statement, on which the Commission and the Council submitted observations in statements of 21 February 2001.

43 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. By way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, some questions were addressed in writing to the parties who replied within the period prescribed.

44 The oral arguments of the parties were heard and their answers were given to the questions asked by the Court of First Instance at the hearing on 15 May 2001.

Law

45 The applicant maintains that there is no legal basis for the contested decision because it is based on two unlawful acts of the Community, namely decision 97/803 and Regulation No 2553/97, which it challenges with pleas of unlawfulness.

Alleged unlawfulness of decision 97/803

46 The applicant puts forward five pleas in law in support of its plea of unlawfulness. The first alleges failure to maintain the 'locking mechanism' by means of which the advantages conferred on the OCTs as their association with the Community proceeds in stages can no longer be challenged by the Community. The second alleges breach of the principle of proportionality. The third alleges infringement of Article 240 of the OCT Decision and the fourth breach of the principle of legal certainty. Finally, the fifth plea in law alleges infringement of Article 190 of the EC Treaty (now Article 253 EC).

47 It must be stated that the applicant's first, second and fourth pleas repeat the arguments which it put forward in Case T-43/98 *Emesa Sugar* v *Council*. Those pleas must be rejected for the same reasons as those set out in the judgment of the Court of First Instance given today in that case.

48 However, the pleas in law alleging infringement of Article 240 of the OCT Decision and infringement of Article 190 of the Treaty must be considered.

The plea alleging infringement of Article 240 of the OCT Decision

49 The applicant observes that decision 97/803 was adopted on 24 November 1997. It submits that the Council was no longer entitled to rely on the power conferred on it by Article 240(3) of the OCT Decision in order to review that decision in November 1997. That article did not permit the Council to review the decision after 1 March 1995. The applicant maintains that the reasons why the OCT Decision was valid for a period of ten years, rather than the five years of previous OCT decisions, were, first, the considerable progress achieved by the OCT Decision in pursuing the objectives set out in Articles 131 and 132 of the Treaty and, second, that the aim was to ensure that the rules of law applicable to investors would remain so for a period long enough to allow them to develop commercial or industrial activities. Before its period of validity came to an end, the OCT Decision could be reviewed only at the times which had been expressly provided for.

50 The Court of First Instance finds that that line of argument has previously been rejected by the Court of Justice in its judgment in *Emesa Sugar*, cited above in

paragraph 38. The Court of Justice held that '[a]lthough Article 240(3) of the OCT Decision provides that, before the end of the first five years, the Council is to establish, where necessary, any amendments to be made to the provisions governing the association between the OCTs and the Community, that cannot, as the Advocate General observes in point 43 of his Opinion, deprive the Council of its competence, conferred directly by the Treaty, to amend the acts which it has adopted under Article 136 thereof in order to attain all the objectives set out in Article 132 of the Treaty' (paragraph 33 of that judgment).

51 Since the applicant's further observations of 9 October 2000 did not contain any mention of that paragraph in the judgment in *Emesa Sugar*, cited above in paragraph 38, that plea in law must be rejected.

The plea alleging infringement of Article 190 of the Treaty

52 The applicant claims that the summary of reasons given for Decision 97/803 amending the commercial rules regulating trade between the OCTs and the Community is beyond understanding, inadequate and plainly wrong. In its submission, therefore, Decision 97/803 does not satisfy the requirements of Article 190 of the Treaty.

53 The Court observes that the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the Community authority adopting the contested measure, so as to inform the persons concerned of the reasons given for the measure adopted and thus enable them to defend their rights and the Community judicature to exercise its power of review (Case T-87/98 *International Potash Company* v *Council* [2000] ECR II-3179, paragraph 65).

54 The statement of reasons given for Decision 97/803 does satisfy those requirements. The reasons justifying the limitation of ACP/OCT cumulation of origin in respect of sugar were clearly set out in the seventh recital in the preamble to Decision 97/803.

55 It follows that the plea in law alleging infringement of Article 190 of the Treaty is not well founded either.

56 It follows from all the foregoing that the plea that Decision 97/803 is unlawful must be rejected.

Alleged unlawfulness of Regulation No 2553/97

57 In its application, Emesa Sugar put forward five pleas in law in support of its plea of unlawfulness. The first plea alleged that Regulation No 2553/97 was unlawful because it gave effect to Decision 97/803, itself unlawful. In the second plea, it argued that, given the relations between the Community and the OCTs, it was unlawful to require import licences. The third plea alleges that the conditions imposed by Regulation No 2553/97 were disproportionate. The fourth claims that the third paragraph of Article 8 of Regulation No 2553/97 was unlawful. Finally, in its fifth plea the applicant maintained that the restrictions on imports imposed by Regulation No 2553/97 infringed certain provisions of the agreements concluded within the framework of the World Trade Organisation.

58 At the hearing the applicant withdrew all except the first of those pleas in law.

59 Since, so far as the first plea is concerned, the applicant refers solely to the arguments considered above in paragraphs 46 to 56, the plea that Regulation No 2553/97 is unlawful cannot be accepted either.

60 Since the two pleas of illegality have been declared to be unfounded, this action must be dismissed.

Costs

61 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including the costs incurred in connection with the proceedings for interim relief, as applied for by the Commission.

62 In accordance with Article 87(4) of those Rules, the Council, the French Republic, the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, which have intervened in support of the forms of order sought by the Commission, are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear, in addition to its own costs, the costs incurred by the Commission, including those incurred in connection with the proceedings for interim relief;**

3. **Orders the interveners to bear their own costs.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 6 December 2001.

H. Jung M. Jaeger

Registrar President