JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

22 September 2005 *

In Case T-101/03,

Suproco NV, established in Curaçao (Netherlands Antilles), represented by M. Slotboom and N.J. Helder, lawyers,

applicant,

supported by

Kingdom of the Netherlands, represented by H. Sevenster, acting as Agent,

intervener,

v

Commission of the European Communities, represented by T. van Rijn and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Dutch.

supported by

Council of the European Union, represented initially by G. Houttuin and M. Bishop, and subsequently by G. Houttuin and D. Canga Fano, acting as Agents,

and by

Kingdom of Spain, represented by N. Díaz Abad, lawyer, with an address for service in Luxembourg,

interveners,

APPLICATION for the annulment of Commission Decision 2003/34/EC of 10 January 2003 refusing to grant a derogation from Council Decision 2001/822/EC, as regards the rules of origin for sugar from the Netherlands Antilles (OJ 2003 L 11, p. 50),

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

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 25 November 2004,

gives the following

Judgment

Background to the dispute

1 Suproco NV, a company established in Curaçao (Netherlands Antilles), is an undertaking which processes unrefined cane-sugar into granulated cane-sugar and sugar lumps.

2 Since 1995, the date of its establishment, Suproco has been processing cane-sugar originating mainly from African countries, the Caribbean and the Pacific (ACP) and, subsidiarily, from the European Community. Since the finished products benefited from the so-called 'cumulation of origin' regime, the finished products were considered as originating from overseas countries and territories (OCTs) and could therefore be exported to the Community free of customs duty.

3 In the light of the difficulties associated with the supply of raw materials and the establishment by the Community of safeguard measures, in particular for sugar cumulating ACP/OCT origin, Suproco began to market sugar on the basis of the so-called '30/70' regime, which was initially provided for in Annex 2 to Annex II to Council 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). That regime makes it possible to obtain an OCT origin for sugar on the condition that the value of the cane-sugar or sugar beet and of the chemically pure sucrose that are used, regardless of their origin, does not exceed 30% of the product's ex-works price. Under that regime, the applicant coloured and flavoured sugar originating from Colombia by using treacle.

4 However, Article 5(1)(g) of Annex III to Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (OJ 2001 L 314, p. 1) ('the OCT decision') specified that 'operations to colour sugar or form sugar lumps' are operations considered as insufficient working or processing to confer the status of originating products.

5 In those circumstances, the Kingdom of the Netherlands applied to the Commission, on 20 February 2002, for a derogation on the basis of Article 37 of Annex III to the OCT decision. More precisely, it requested a derogation for an annual quantity of 3 000 tonnes in favour of Suproco as part of the annual quota of 28 000 tonnes of sugar benefiting from the ACP/OCT/EC cumulation of origin, laid down in Article 6(4) of Annex III to the OCT decision.

6 By letter of 13 May 2002, replying to questions put by the Commission and following the first discussions within the Community Customs Code Committee, the Kingdom of the Netherlands stated that it was withdrawing its request until further notice in order to carry out further examination of the possibility to supply ACP sugar to the applicant.

7 On 4 October 2002, after a further examination had been carried out, the Kingdom of the Netherlands sent a letter to the Commission in order to 'reactivate' its request for a derogation.

8 On 10 January 2003, the Commission adopted Decision 2003/34/EC refusing to grant a derogation from Council Decision 2001/822/EC, as regards the rules of origin for sugar from the Netherlands Antilles (OJ 2003 L 11, p. 50; 'the contested decision').

Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the Court of First Instance on 14 March 2003 the applicant brought the present action.

10 By order of the President of the Third Chamber of the Court of First Instance of 18 September 2003, the Council and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by the defendant, and the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the applicant. The Kingdom of the Netherlands applied, under Article 116 (2) of the Rules of Procedure of the Court of First Instance, for certain confidential information contained in its reply to be omitted from the documents sent to the interveners. It produced a non-confidential version of its reply and only that non-confidential version was sent to the interveners. The interveners did not raise any objection to this and they lodged their statement within the time-limit set for doing so.

11 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. In the context of measures of organisation of procedure, Suproco, the Commission and the Kingdom of the Netherlands were requested to produce certain documents.

12 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 25 November 2004. The Commission was requested to reply, in writing, to an additional question, which it did within the time-limit set for doing so. Suproco submitted its observations on the Commission's reply and produced a non-confidential version of its submissions. The submissions which Suproco sent to the interveners were restricted to that non-confidential version. The interveners did not raise any objection to this. The oral procedure was closed on 25 January 2005.

13 Suproco claims that the Court should:

— declare its action well founded;

— annul the contested decision;

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order Suproco to pay the costs.

15 The Council contends that the Court should grant the form of order sought by the Commission.

16 The Kingdom of Spain contends that the Court should:

— declare inadmissible the plea of illegality raised in respect of Article 5(1)(g) of Annex III to the OCT decision and, in the alternative, reject it;

— dismiss the action brought against the contested decision;

— order Suproco to pay the costs.

17 The Kingdom of the Netherlands submits that the Court should annul the contested decision.

Legal context

18 Suproco puts forward three pleas in law in support of its action. The first and principal plea is a plea of illegality raised in respect of Article 5(1)(g) of Annex III to the OCT decision. The second plea, submitted in the alternative, alleges lack of competence of the Commission. The third plea, submitted in the further alternative,

alleges infringement of Article 37 of Annex III to the OCT decision and an erroneous assessment of the facts.

19 It should be noted, at the outset, that the contested decision is a decision within the meaning of the fourth subparagraph of Article 249 EC and it must therefore, pursuant to Article 253 EC, state the reasons on which it is based. The insufficiency or lack of reasoning constitutes an infringement of an essential procedural requirement and is a matter of public policy which the Community judicature must raise of its own motion (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67; Joined Cases Case T-12/99 and T-63/99 *UK Coal* v *Commission* [2001] ECR II-2153, paragraph 199).

20 According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Commission* v *Sytraval and Brink's France*, cited above at paragraph 19, paragraph 63; and Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87, and Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66).

21 In the present case, it should be pointed out, first, that the request for a derogation made by the Kingdom of the Netherlands under Article 37 of Annex III to the OCT

decision was based on a certain number of facts and economic information which were sent to the Commission. In particular, the Kingdom of the Netherlands completed the form in Appendix 7 to Annex III to the OCT decision and referred to in Article 37(2) of Annex III to the OCT decision. That form, as completed by the Netherlands authorities, contained information on production costs and the value added in the context of the use of a raw material originating from Colombia. It should be pointed out that, in the contested decision, the Commission did not claim that the information sent by the Kingdom of the Netherlands was inadequate. It therefore considered that it was in possession of all the items required by Article 37 (2) of Annex III to the OCT decision.

22 Second, the Kingdom of the Netherlands, as applicant for the derogation, and Suproco, as beneficiary of the derogation had it been granted, had an interest in receiving explanations from the Commission.

23 Third, the request for a derogation submitted by the Kingdom of the Netherlands is rejected by the contested decision on the basis of Article 37 of Annex III to the OCT decision, and in particular paragraphs 4 and 7, which are cited in the first and eighth recitals respectively in the preamble to the contested decision.

24 According to Article 37(4) of Annex III to the OCT decision, an examination is to be made to ascertain whether the rules relating to cumulation of origin do not provide a solution to the problem. That means that, if the rules relating to cumulation of origin provide a solution to the problem, the Commission is entitled to reject the request for a derogation.

25 Article 37(7) of Annex III to the OCT decision provides that '[w]ithout prejudice to paragraphs 1 to 6, the derogation shall be granted where the value added to the non-originating products used in the OCT concerned is at least 45% of the value of the finished product, provided that the derogation is not such as to cause serious injury to an economic sector of the Community or of one or more Member States.' The use of the words 'without prejudice' means that the rule laid down in paragraph 7 exists alongside paragraphs 1 to 6 of Article 37 of Annex III to the OCT decision. In particular, even in the situation envisaged by Article 37(7) of Annex III to the OCT decision, the Commission is required, pursuant to Article 37(4) of that annex, to examine whether the rules relating to cumulation of origin provide a solution to the problem. If that is the case, as pointed out above, the Commission is entitled to reject the request for a derogation. In any event, whether or not the Commission decides to apply Article 37(7) of Annex III to the OCT decision, the reasons for its decision must be given in a sufficiently clear manner.

26 In the light of the above, it is necessary to consider whether the statement of reasons, in the present case, meets the requirements of Article 253 EC.

27 The contested decision is made up of nine recitals with an operative part containing two articles and finding that the request for a derogation should be rejected.

28 The first recital in the preamble to the contested decision specifies the legal context of the request for a derogation made by the Kingdom of the Netherlands and refers, in particular, to Article 37(1) and (4) of Annex III to the OCT decision.

29 The second recital recalls the subject-matter of the request for a derogation initially submitted by the Kingdom of the Netherlands on 20 February 2002.

30 The third recital points out that the Kingdom of the Netherlands withdrew that request on 13 May 2002.

31 The fourth recital states that 'sugar producers in five different ACP States ... refused, in May and June 2002, to supply the producer with the sugar required, while one sugar producer in Guyana was willing to supply the quantity and quality requested but offered a price (USD 450/tonne fob Georgetown) that was much higher than the price of the Colombian sugar (USD 275/tonne franco warehouse of the purchaser)'. That information was sent to the Commission by the Kingdom of the Netherlands on 4 October 2002.

32 The fifth recital states that the Kingdom of the Netherlands indicates that the labour and overheads in the Antilles represents an amount of EUR 1 095 570 for 3 000 tonnes of finished products, which themselves have a value of EUR 3 241 200. That information derives from the sheet attached to the request for a derogation.

33 The sixth recital explains that the examination of the information supplied shows that the value added of the transaction exceeds 45% of the ex-works price, both in cases of supply of Colombian and that of Guyanese sugar. The assertion as regards the value added of Guyanese sugar is the result of a calculation made by the Commission on the basis of information provided by the Kingdom of the Netherlands.

34 The seventh recital recalls that Suproco obtained, under the annual quota of 28 000 tonnes for 2002, an import licence for a quantity of 6 222 tonnes. That information was sent to the Commission by the Kingdom of the Netherlands in its letter of 4 October 2002.

35 It follows from the above that, while the first recital in the preamble to the contested decision refers to certain provisions of Annex III to the OCT decision and the second recital refers to the subject-matter of the request for a derogation, the third to seventh recitals merely reproduce the facts put forward by the Kingdom of the Netherlands (the third to fifth and the seventh recital(s)) or determined on the basis of information provided by it (sixth recital). The ninth recital states that the measures provided for in the contested decision are in accordance with the opinion of the Customs Code Committee.

36 The Commission's legal reasoning for rejecting the request for a derogation submitted by the Kingdom of the Netherlands is given in the eighth recital to the contested decision.

37 The eighth recital states that, '[i]n the light of all these elements, the requested derogation is not justified with regard to Article 37(1) of Annex III. The information provided indicates that the rules relating to cumulation of origin can provide a solution to the problem. In particular no information has been supplied to the effect that the transaction using Guyana sugar would be so uneconomical as to cause the producer to cease its activities. Moreover, given that the value added represented by the transaction in the case of supply of both Colombian and Guyana sugar exceeds 45% of the ex-works price of the finished product, Article 37(7) does not apply.'

38 The second sentence of that recital refers to the implementation of Article 37(4) of Annex III to the OCT decision since it states that the rules relating to cumulation of origin can solve the problem. However, the categorical and succinct assertion in that sentence is not supported by any precise reasoning.

39 In particular, the assertion in the second sentence of the eighth recital is not adequately established by the third sentence of that recital.

40 The words used in that third sentence indicate that a calculation of profitability in the event that Guyanese sugar were to be used was probably made by the Commission. Such a calculation was, moreover, necessary in order to assess whether the rules relating to cumulation of origin could provide a solution to the problem encountered by Suproco. However, neither the method used by the Commission to make such a calculation nor even the simple result of that calculation appear in the contested decision. Nor is it apparent from the documents in the file that that method or that result was known by the Kingdom of the Netherlands and, in particular, by Suproco during the administrative procedure. Assuming even that the calculation at issue may be deduced from various factors contained in the other recitals in the preamble to the contested decision, such a calculation would be uncertain in the light of the required currency conversion. The prices of Guyanese sugar, stated in the fourth recital in the preamble to the contested decision, are given in US dollars (USD) whereas the figures referred to in the fifth recital in the preamble to the contested decision are in euros. However, neither the contested decision nor the documents in the file concerning the administrative procedure indicate the exchange rate used by the Commission.

41 Moreover, the third sentence of the eighth recital does not explain in what respect an undertaking which pursues an 'uneconomical' activity (or 'anti-economical', according to other language versions of the contested decision) might decide, in spite of everything, to continue with its production.

42 It follows from those factors that it is not possible to determine with sufficient clarity the reasoning which led the Commission to conclude that the rules relating to cumulation of origin could solve the problem and that using Guyanese sugar would not cause the producer to cease its activities. In those circumstances, the reasoning in the contested decision in that respect does not allow the Court of First Instance to exercise its power of review.

43 Neither does that reasoning allow the Kingdom of the Netherlands and Suproco to ascertain the reasons for the measure adopted and to defend their rights before the Court of First Instance. In that regard, it should be noted that Suproco raises, in its application, a plea alleging infringement of Article 37(3)(b) of Annex III to the OCT decision. That plea is supported by the Kingdom of the Netherlands in its statement in intervention. In particular, Suproco submits that the Commission infringed that provision in so far as it held that ceasing to operate was an essential condition for granting a derogation. However, in reading the contested decision, it is difficult to determine whether Article 37(3)(b) of Annex III to the OCT decision was applied by the Commission or not, in particular in the light of the assertion in the eighth recital in the preamble to the contested decision, according to which using Guyanese sugar would not cause the producer to cease its activities.

44 Moreover, the reasoning contained in the last sentence of the eighth recital in the preamble to the contested decision, concerning Article 37(7) of Annex III to the OCT decision, fails to satisfy the requirements of Article 253 EC.

45 It is not necessary to rule on the possible application in this case of Article 37(7) of Annex III to the OCT decision, as it is sufficient to point out that the method of

calculation used by the Commission in relation to the value added of Guyanese sugar is not identifiable in the contested decision and that the Commission gave different results of that calculation in its written pleadings (point 35 of its defence), at the hearing (in response to a question put by the Court of First Instance) and after the hearing (within the context of its written reply of 6 December 2004 to a question put by the Court of First Instance).

46 In that regard, it is apparent from the explanations given by the Commission that, for the calculation, as a percentage, of the value added (understood as being the ex-works price of the products less the customs value of the materials imported from third countries into the Community, ACP States or OCTs) to imported sugar in the value of the finished product, the applicable exchange rate was the one in force on 4 October 2002, namely USD 1 to EUR 1.0111. However, the Commission concedes, in its written reply, that it used a different exchange rate, namely USD 1 to EUR 1, to calculate the customs value of the imported sugar. In addition, that exchange rate was used in the calculation made in respect of an amount (EUR 3 241 200) resulting from a conversion carried out according to a third exchange rate (USD 1 to EUR 1.1505, in force on 20 February 2002). In addition, that amount of EUR 3 241 200, which is claimed in the contested decision, without further explanation, to represent the value of the finished products, does not correspond to the ex-works price of the products, but to that price plus the delivery costs to the buyers.

47 Moreover, it can be seen from its written pleadings that the Commission considers that an amount of USD 37.2 per tonne for transport costs of imported sugar is justifiable for the calculation of the value added to Guyanese sugar and that the amount of USD 85 per tonne, as proposed by the Kingdom of the Netherlands in its letter of 4 October 2002, is excessive. However, that amount of USD 37.2 per tonne does not feature in the contested decision. Neither is it evident from the documents in the file concerning the administrative procedure that that amount was known by the Kingdom of the Netherlands and, in particular, by Suproco.

48 In those circumstances, the reasoning in the last sentence of the eighth recital in the preamble to the contested decision does not enable the Kingdom of the Netherlands and Suproco to defend their rights before the Court of First Instance or that court to exercise its power of review.

49 For all of those reasons, it must be held that the contested decision does not satisfy the requirements of Article 253 EC and that it must therefore be annulled, on that basis, without there being any need to examine the substantive pleas put forward by Suproco in support of its action.

Costs

50 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by Suproco.

51 Under Article 87(4) of the Rules of Procedure, Member States and institutions which intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls Commission Decision 2003/34/EC of 10 January 2003 refusing to grant a derogation from Council Decision 2001/822/EC, as regards the rules of origin for sugar from the Netherlands Antilles;**

2. **Orders the Commission to bear its own costs and those of Suproco;**

3. **Orders the Council, the Kingdom of Spain and the Kingdom of the Netherlands to bear their own costs.**

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 22 September 2005.

H. Jung

Registrar

M. Vilaras

President