

Case T-317/02

**Fédération des industries condimentaires de France (FICF)
and Others**

v

Commission of the European Communities

(Common commercial policy — World Trade Organisation (WTO) — Regulation (EC) No 3286/94 — Obstacles to trade — Prepared mustard — Termination of the examination procedure in relation to obstacles to trade — Community interest)

Judgment of the Court of First Instance (First Chamber, Extended Composition), 14 December 2004 II - 4333

Summary of the Judgment

1. *Common commercial policy — Defence against obstacles to trade — Complaint by an association of undertakings under international trade rules — Commission decision to terminate the examination procedure — Judicial review*
(Council Regulation No 3286/94, Art. 4)

2. *Common commercial policy — Defence against obstacles to trade — Exercise of a right of action by the Community — Conditions — Cumulative conditions*
(Council Regulation No 3286/94, Arts 2(1) and (4), and 4(2))
3. *Common commercial policy — Defence against obstacles to trade — Exercise of a right of action by the Community — Conditions — Obstacle to trade — Scope*
(Council Regulation No 3286/94, Art. 4)
4. *Common commercial policy — Defence against obstacles to trade — Exercise of a right of action by the Community — Conditions — Adverse trade effects — Scope*
(Council Regulation No 3286/94, Art. 4)
5. *Common commercial policy — Defence against obstacles to trade — Exercise of a right of action by the Community — Conditions — Community interest — Discretion of the Commission — Assessment of complex economic situations — Judicial review — Limits*
(Council Regulation No 3286/94)
6. *Common commercial policy — Defence against obstacles to trade — Exercise of a right of action by the Community — Conditions — Community interest — Discretion of the Commission — Assessment undertaken when the examination procedure is initiated — No impact on the assessment undertaken on termination of the procedure*
(Council Regulation No 3286/94)
7. *Common commercial policy — Defence against obstacles to trade — Exercise of a right of action by the Community — Conditions — Need for adverse trade effects concerning the complainant notwithstanding the existence of a general interest on the Community's part — Discretion of the Commission*
(Council Regulation No 3286/94, Art. 11(1))
8. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision terminating an examination procedure in relation to obstacles to trade*
(Art. 253 EC; Council Regulation No 3286/94, Art. 11(1))

9. *Common commercial policy — Defence against obstacles to trade — Examination procedure — Duty of the institutions to provide information — Scope*
(Council Regulation No 3286/94, Art. 8(4))
10. *Common commercial policy — Defence against obstacles to trade — Examination procedure — Period for submitting the report in cases of 'straightforward or normal' examination — Extension in cases of 'complex' examination — Purely indicative period — Exceeded — Whether permissible — Condition — Reasonable time*
(Council Regulation No 3286/94, Art. 8(8))
11. *Common commercial policy — Defence against obstacles to trade — Examination procedure — Period for taking a decision terminating the procedure after the opinion of the Advisory Committee was obtained — Discretion of the Commission — Limit — Reasonable time*
(Council Regulation No 3286/94, Art. 11(1))

1. Article 4 of Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (WTO) is intended to permit, in particular, any association acting in the name of one or more Community undertakings to rely on the right to avail itself of international trade rules laid down in a multilateral or plurilateral trade agreement in the complaint which it lodges with the Commission, subject to the conditions laid down in the regulation, and to avail itself of the procedural safeguards laid down in the regulation. Seen together, those safeguards show that a complainant under Article 4 of the regulation has the right to submit for review by the Court any decision of the Commission terminating an examination procedure initiated as a result of his complaint.

(see para. 41)
2. Under Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, exercise of a right of action by the Community under international trade rules against an obstacle to trade adopted or maintained by a third country and having an effect on the market of

that country requires as a minimum that three cumulative conditions be satisfied, namely the existence of an obstacle to trade, as defined in the regulation, the presence of adverse trade effects which result from that obstacle and the need to take action in the interests of the Community. Where, upon the conclusion of an examination procedure initiated under Regulation No 3286/94, the Commission finds that one of those conditions is not satisfied, the Community institutions are entitled to form the view that such an action should not be proceeded with.

different interpretation would mean that any trade practice adopted or maintained by a third country could be considered to be an obstacle to trade, even where no right of action existed under those rules.

(see paras 49, 53)

(see para. 48)

4. The definition of 'adverse trade effects' set out in Article 2(4) of Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules shows that it sought to retain a causal link between the actual ('causes') or potential ('threatens to cause') adverse trade effects and the obstacle to trade, as identified in the particular circumstances of each case, within the meaning of Regulation No 3286/94.

3. The two elements of the definition of an obstacle to trade within the meaning of Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, that is to say 'any trade practice adopted or maintained by a third country' and 'right of action' cannot be artificially separated. For there to be an obstacle to trade which may be relied upon for the purposes of the application of the regulation, there must be a right of action under international trade rules. A

That interpretation is supported by the seventh recital in the preamble to the regulation, which states that the mechanism established by the regulation aims to allow Community institutions to react to obstacles to trade adopted or maintained by third countries 'which cause' adverse trade effects, and by Article 4(2) of the regulation, relating to the content of a complaint, which states that the latter must contain

sufficient evidence of the existence of the obstacles to trade 'resulting therefrom'. In addition, for the purposes of Regulation No 3286/94 the adverse trade consequences must also have a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein.

been accurately stated and that there has not been a manifest error of assessment of those facts or a misuse of powers. The scope of judicial review also includes verifying the absence of errors of law.

(see para. 94)

(see para. 65)

5. Where proceedings are brought before the Community judicature for the annulment of a Commission decision terminating, on the ground of the absence of a Community interest, an examination procedure relating to obstacles to trade interest initiated under Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, judicial review of the appraisal of complex economic situations, which the question whether the interests of the Community require that action be taken involves, must be limited to verifying that the relevant procedural rules have been complied with, that the facts on which the choice is based have
6. The assessment of the interests of the Community undertaken when the examination procedure laid down under Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules is initiated, is, by definition, of a preparatory nature. It cannot therefore be compared with the assessment which must be undertaken subsequently, that is to say on termination of the examination procedure, when deciding whether action is necessary in the interests of the Community.

A different interpretation would mean that, when the Commission decides to initiate an examination procedure, it is automatically obliged, when the decision as to whether the Community should act is taken, to assume that such action is necessary, provided that the other legal conditions for the application of Regulation No 3286/94, namely the existence of an obstacle to trade and the existence

of adverse trade effects arising from it, are satisfied, thereby depriving the Commission of its power of discretion.

(see paras 97-98)

7. The Commission does not fail to have regard to Article 11(1) of Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules by requiring that any action by the Community be linked to the facts and legal bases underlying the examination procedure and, though faced with a general and long-term interest in acting in the future against potential breaches which might result from the practice of 'selective sanctions' adopted by a non-member State, by deciding to terminate the examination procedure.

(see para. 120)

8. It is clear from Article 11(1) of Regulation No 3286/94 laying down Commu-

nity procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules that the statement of reasons in a decision terminating an examination procedure under the regulation may be restricted to a note of the principal findings set out in the examination report, referring to that report, and that it is not necessary, given the circumstances in which that decision is taken, that it record the whole of the factual and legal background to that report.

(see para. 132)

9. Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules provides the complainants and the exporters and importers concerned, as well as the representatives of the country or countries concerned, with a right to information, subject to the conditions laid down in Article 8(4)(a) and (b), which must reflect, inter alia, the obligation of the Community institutions to respect commercial confidentiality. Those persons may ask to be kept

informed of the principal facts and considerations resulting from the examination procedure.

However, there is no provision of Regulation No 3286/94 requiring the Commission to send the examination report in draft to the persons referred to in Article 8(4) of the regulation before its submission to the Advisory Committee so as to enable those persons to inform the Commission of any observations they might have to make, nor to inform those persons on its own initiative of the principal facts and considerations resulting from the examination procedure.

On the contrary, under Article 8(4)(a) and (b) of Regulation No 3286/94 the persons referred to in that provision are required to make an application for information to the Commission. The fact that the right to be informed of the principal facts and considerations resulting from the examination procedure is subject to the — sole — condition that the applicants submit their request to the Commission does not, on its own, prejudice the defence of their interests, particularly as that request is not required to comply with any particular formalities.

(see paras 173, 175-176, 178)

10. Whist failure to comply with a mandatory time-limit will result in the nullity of every act adopted after the expiry of the time-limit, failure to comply with a time-limit that is purely indicative does not, as a matter of principle, mean that an act adopted after its expiry falls to be annulled.

The period of five months laid down for the presentation of the report of the examination laid down by Article 8(8) of Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules is indicative.

The period of seven months referred to in that article merely represents, in the case of a 'complex' examination, the extension of the initial period of five months laid down for an examination which is 'straightforward or normal'. It follows that, inasmuch as the period for sending the examination report is purely indicative in the case of an examination which is 'straightforward or normal', the position should not differ in the case of an examination which is 'complex', since all that is involved is an extension of the initial period.

However, the Commission ought not to delay the submission of the examination report beyond a period which is reasonable, as that might delay the adoption of the decision to terminate the examination procedure.

which such a decision needs to be adopted, having regard to all the circumstances of each case, in particular any steps which the Commission envisages may be taken against the authorities of the non-Member State in question before an examination procedure is terminated.

(see paras 187-190)

11. The silence of Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules on the question whether a decision to terminate an examination procedure must ensue following the consultation with the committee referred to in Article 7 of the regulation can be interpreted as reflecting the desire of the Community legislature to provide the Commission with a certain discretion as regards the date on

Nevertheless, the recognition of such a discretion does not mean that the Commission may delay the adoption of a decision taken under Article 11(1) of Regulation No 3286/94 beyond a reasonable time, which falls to be assessed with regard to the particular circumstances of each case. Such a limit aims to ensure compliance with the duty of diligence and the principle of sound administration which are binding on the Commission.

(see paras 198-199)