

JUDGMENT OF THE COURT

26 March 1987 \*

In Case 45/86

**Commission of the European Communities**, represented by Peter Gilsdorf, Legal Adviser, acting as Agent, 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,

applicant,

v

**Council of the European Communities**, represented by Jean-Louis Dewost, Director-General of its Legal Department, assisted by John Carbery, an adviser in the Council's Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Department of the European Investment Bank, 100 boulevard Konrad-Adenauer,

defendant,

APPLICATION for a declaration that Council Regulation (EEC) No 3599/85 of 17 December 1985 applying generalized tariff preferences for 1986 in respect of certain industrial products originating in developing countries and Council Regulation (EEC) No 3600/85 of 17 December 1985 applying generalized tariff preferences for 1986 to textile products originating in developing countries are void,

THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot, C. Kakouris, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, U. Everling, K. Bahlmann, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: C. O. Lenz  
Registrar: D. Louberman, Administrator

\* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 2 December 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 January 1987,

gives the following

### Judgment

- 1 By application lodged at the Court Registry on 17 February 1986 the Commission brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Council Regulation (EEC) No 3599/85 of 17 December 1985 applying generalized tariff preferences for 1986 in respect of certain industrial products originating in developing countries and Council Regulation (EEC) No 3600/85 of 17 December 1985 applying generalized tariff preferences for 1986 to textile products originating in developing countries (Official Journal 1985, L 352, pp. 1 and 107, respectively) are void.
- 2 Reference is made to the Report for the Hearing for the facts 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.
- 3 With regard to the doubts expressed by the Council concerning the Commission's interest in bringing proceedings and hence the admissibility of the action, it need merely be pointed out that Article 173 of the Treaty draws a clear distinction between the right of action available to the Community institutions and the Member States on the one hand and that available to natural or legal persons on the other. The first paragraph of Article 173 gives the Commission and any Member State the right to bring an action for annulment in order to challenge the legality of any Council regulation without making the exercise of that right conditional on proof of an interest in bringing proceedings. Consequently, the application is admissible.
- 4 The Commission raises two submissions in support of its action, which in its view merge into a single complaint: the absence of a precise legal basis, which is in itself

contrary to Article 190 of the EEC Treaty, and in this case at the same time constitutes an infringement of the Treaty because it resulted in recourse being had to a procedure entailing a unanimous vote rather than the procedure applicable under Article 113 of the Treaty, which in the Commission's view is the only correct legal basis.

- 5 Article 190 of the Treaty provides that: 'Regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based'. According to the case-law of the Court (in particular the judgment of 7 July 1981 in Case 158/80 *REWE-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1981] ECR 1805), in order to satisfy that requirement to state reasons, Community measures must include a statement of the facts and law which led the institution in question to adopt them, so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the Treaty.
- 6 It is therefore necessary to consider whether the contested regulations satisfy those requirements.
- 7 In that connection the Council contends that, although the indication of the legal basis is not precise, the recitals in the preambles to the regulations, taken as a whole, provide sufficient alternative information as to the aims pursued by the Council, that is to say both commercial aims and aims of development-aid policy.
- 8 However, those indications are not sufficient to identify the legal basis by virtue of which the Council acted. Although the recitals in the preambles to the regulations do refer to improving access for developing countries to the markets of the preference-giving countries, they merely state that adaptations to the Community system of generalized preferences have proved to be necessary in the light of experience in the first 15 years. Moreover, according to information given the Court by the Council itself, the wording 'Having regard to the Treaty' was adopted as a result of differences of opinion about the choice of the appropriate legal basis. Consequently, the wording chosen was designed precisely to leave the legal basis of the regulations in question vague.
- 9 Admittedly, failure to refer to a precise provision of the Treaty need not necessarily constitute an infringement of essential procedural requirements when the

legal basis for the measure may be determined from other parts of the measure. However, such explicit reference is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis.

- 10 In answer to a question put by the Court the Council has stated that when it adopted the contested regulations it intended to base them on both Articles 113 and 235 of the EEC Treaty. It has explained that it departed from the Commission's proposal to base the regulations on Article 113 alone because it was convinced that the contested regulations had not only commercial-policy aims, but also major development-policy aims. The implementation of development policy goes beyond the scope of Article 113 of the Treaty and necessitates recourse to Article 235.
- 11 It must be observed that in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.
- 12 In this case, the argument with regard to the correct legal basis was not a purely formal one, since Articles 113 and 235 of the EEC Treaty entail different rules regarding the manner in which the Council may arrive at its decision. The choice of the legal basis could thus affect the determination of the content of the contested regulations.
- 13 It follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question.
- 14 It must therefore be considered whether in this case the Council had the power to adopt the contested regulations pursuant to Article 113 of the Treaty alone, as the Commission maintains.

- 15 It is common ground that the tariff preferences granted by the regulations at issue are 'changes in tariff rates' within the meaning of Article 113. However, the Council contends that the aims pursued by the regulations with regard to development-aid policy go beyond the scope of the common commercial policy.
- 16 It must be pointed out in the first place that, as the Court has already stated, the concept of commercial policy has the same content whether it is applied in the context of the international action of a State or in that of the Community (Opinion of Case 1/75 of 11 November 1975 [1975] ECR 1355).
- 17 The link between trade and development has become progressively stronger in modern international relations. It has been recognized in the context of the United Nations, notably by the United Nations Conference on Trade and Development (Unctad), and in the context of the GATT, in particular through the incorporation in the GATT of Part IV, entitled 'Trade and Development'.
- 18 It was against that background that the model was evolved on which the Community system of generalized preferences, partially implemented by the regulations at issue, was based. That system reflects a new concept of international trade relations in which development aims play a major role.
- 19 In defining the characteristics and the instruments of the common commercial policy in Article 110 *et seq.*, the Treaty took possible changes into account. Accordingly, Article 110 lists among the objectives of commercial policy the aim of contributing 'to the harmonious development of world trade', which presupposes that commercial policy will be adjusted in order to take account of any changes of outlook in international relations. Likewise, Articles 113 to 116 provide not only for measures to be adopted by the institutions and for the conclusion of agreements with non-member countries but also for common action 'within the framework of international organizations of an economic character', an expression which is sufficiently broad to encompass the international organizations which might deal with commercial problems from the point of view of a development policy.

- 20 The Court has already acknowledged that the existence of a link with development problems does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the Treaty. It considered that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade. A 'commercial policy' understood in that sense would be destined to become nugatory in the course of time (Opinion 1/78 of 4 October 1979 [1979] ECR 2871).
- 21 It follows that the contested regulations are measures falling within the sphere of the common commercial policy and that since the Council had the power to adopt them pursuant to Article 113 of the Treaty, it was not justified in taking as its basis Article 235.
- 22 It is clear from the foregoing that the contested regulations do not satisfy the requirements laid down in Article 190 of the Treaty with regard to the statement of reasons and that, moreover, they were not adopted on the correct legal basis. Consequently, they must be declared void.
- 23 However, in view of the circumstances of the case and of the requirements of legal certainty, the effects of the annulled regulations must be declared to be definitive pursuant to the second paragraph of Article 174 of the EEC Treaty.

### Costs

- 24 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Council has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Declares void Council Regulation No 3599/85 of 17 December 1985 applying generalized tariff preferences for 1986 in respect of certain industrial products originating in developing countries and Council Regulation No 3600/85 of 17 December 1985 applying generalized tariff preferences for 1986 to textile products originating in developing countries (Official Journal 1985, L 352, pages 1 and 107 respectively);
- (2) Declares that the effects of the annulled regulations are to be regarded as definitive;
- (3) Orders the Council to pay the costs.

Mackenzie Stuart	Galmot	Kakouris	O'Higgins	Schockweiler	
Bosco	Koopmans	Everling	Bahlmann	Joliet	Rodríguez Iglesias

Delivered in open court in Luxembourg on 26 March 1987.

P. Heim  
Registrar

A. J. Mackenzie Stuart  
President