Case-note to Case T-317/02, Fédération des industries condimentaires de France (FICF) and others v. Commission

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Case T-317/02, *Fédération des industries condimentaires de France (FICF) and others* v. *Commission*, judgment of 14 December 2004 by the First Chamber (extended composition) of the Court of First Instance, not yet reported

1. The Trade Barrier Regulation and the *Prepared Mustard Case*

On 14 December 2004 in the so-called *Prepared Mustard case* the Court of First Instance rendered the first – and so far only – judgment[1] on the correct interpretation and application of the Trade Barrier Regulation, normally referred to as the TBR.[2]

The TBR is one of the European Union's common commercial policy instruments – but one that has so far attracted surprisingly little attention. In brief, where Community industries or enterprises (or Member States) find that they are suffering as a result of obstacles to trade set up by a third country, the Regulation allows them to request the Commission to open an examination procedure. If it is apparent to the Commission that there is sufficient evidence to justify initiating such procedure, and doing so is in the interest of the Community, the Commission must examine the case in order to establish whether the third country pursues a trade practice which is either prohibited under international trade law or the effects of which international trade law allows the Community to eliminate. The examination procedure may last up to five months (extendable up to seven months), following which the Commission must present a report on whether it recommends the adoption of commercial policy measures – and if so, which measures.

The TBR operates in a politically very sensitive area and the Regulation itself leaves open a number of important legal questions. Only a limited

1. At present no other cases on the interpretation of the TBR are pending before the Community judicature in Luxembourg. The judgment was not appealed to the Court of Justice.

2. Council Regulation(EC) 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 Organization (WTO), O.J. 1994, L 349/71 as amended by Council Regulation (EC) 356/95, O.J. 1995, 41/3. Hereafter referred to as "the Regulation" or simply as "the TBR". On the TBR's history, see Garcia Molyneux, *Domestic Structures and International Trade – The Unfair Trade Instruments of the United States and European Union* (Hart Publishing, Oxford, 2001), pp. 234–243 and Bronckers and McNelis, "The EU Trade Barrier Regulation Comes of Age", (2001) JWT, 427–482 at 428–430. For a recent systematic study, see MacLean, *The EU Trade Barrier Regulation – Tackling unfair foreign trade practices* (Sweet & Maxwell, London, 2006).

number of proceedings have been started under the TBR[3] and until the *Prepared Mustard case* no case had been tried before the Community judiciary in Luxembourg. The importance of the *Prepared Mustard case* therefore lies in particular in the fact that it is the first to shed legal light on the TBR.

2. Facts of the case

During the 1980s and first half of the 1990s the Council adopted several directives against the use of hormones in animal feedstuffs. This led the United States to bring dispute settlement proceedings before the tribunals of the WTO, challenging the compatibility of the Community provisions with the WTO rules. In 1997 the Community provisions were declared to be contrary to these rules and in early 1998 this decision was upheld on appeal by the WTO's appellate body.

The Community did not amend its legislation as required by the WTO, and the United States therefore sought authorization from the WTO's Dispute Settlement Body to suspend certain tariff concessions to the extent of 202 million US$ per year. In practice, suspending a tariff concession means imposing tariffs on imported goods. When applying for this authorization, the United States produced a list of products for which the tariff concessions should be suspended (this list included prepared mustard). In July 1999, the WTO authorized the United States to suspend the tariff concessions to the extent of 116.8 million US$ per year and to impose additional customs duties of 100 percent on a number of products from the European Community, including prepared mustard. The United States decided not to apply the suspension to products from the United Kingdom, however. The retaliation was, in other words, selective in nature (so-called selective sanctioning).

In June 2001 the Fédération des industries condimentaires de France (FICF) – an organization that comprises the principal French producers of prepared mustard – lodged a complaint with the European Commission under the TBR. The complaint stated in particular that the selective application of the US retaliatory measures was contrary to WTO rules. It also stated that the obstacles to trade created by the United States caused adverse trade effects within the meaning of the TBR in relation to exports of prepared mustard by members of FICF and that it was in the interests of the Community to initiate a complaint procedure under the TBR in relation to the measures

3. For an in-depth examination of the use of the TBR over the first decade after its entering into force, see Crowell & Moring, *Interim Evaluation of the European Union's Trade Barrier Regulation (TBR) – Final Report*, prepared for the European Commission, June 2005.

taken by the United States. Following receipt of this complaint, the Commission called for producers of other products that appeared to be affected in a similar way to prepared mustard to come forward. Several trade organizations made themselves known to the Commission.

The Commission thereupon initiated an examination and in March 2002 – almost eight months after initiating the procedure – it sent to the TBR Advisory Committee[4] a report in which it proposed that the procedure be terminated. The TBR Advisory Committee approved the proposal to terminate the procedure and the Commission thereupon sent a copy of the report to FICF and informed them that a decision to terminate the procedure would be published shortly in the Official Journal.

Unsurprisingly, the FICF and the other complainants were not happy about this outcome. In letters to the Commission, the FICF and two of the other trade organizations argued amongst other things that the Commission had not completed and presented its report within the time limit laid down in the Regulation,[5] The Commission replied that it had complied with the time limits laid down in the Regulation and that the advisers to the trade organizations had been kept regularly informed of the evolution of the case and that they were aware of the outcome of the examination procedure well before the date on which the official report of the examination procedure was communicated. The Commission added that the decision to terminate the procedure would be adopted shortly.

On 9 July 2002 the Commission adopted the decision formally to terminate the examination procedure. In support of this, the Commission in recital 6 of the decision explains that:

> "The examination procedure led to the conclusion that the alleged adverse trade effects do not appear to stem from the obstacle to trade claimed in the complaint, i.e. the [US] practice of applying withdrawal of concessions selectively against some but not all the Member States (selective sanctioning). In fact, the examination did not provide any evidence of the fact that making the suspension of concessions also applicable to the United Kingdom would result in greater export opportunities for the complainant for prepared mustard to the [US] market. Therefore, no adverse trade effect, as defined in the Regulation, can be attributed to the obstacle to trade claimed by the complaint, other than the trade effects resulting from the suspension of concessions which are authorized and lawfully applied by the United States of America under the WTO Agreement.

4. The Advisory Committee that has been set up in accordance with Art. 7 of the TBR.

5. Art. 8(8) of the Regulation provides that the report shall be presented to the TBR Advisory Committee within 5 months of the announcement of initiation of the procedure. The period may, however, be extended to 7 months if the complexity of the examination so requires.

> Therefore, in accordance with Article 11 [of Regulation No 3286/94], the examination procedure has demonstrated that the interests of the Community do not require that a specific action be taken against the alleged obstacle to trade under the Regulation."

On 16 October 2002 the FICF together with three other French organizations representing producers of agricultural products[6] lodged an application for annulment against the decision before the Court of First Instance. The case was referred to a chamber sitting in extended composition.

3. The judgment by the Court of First Instance

As a preliminary point, the Court of First Instance observed that, under the TBR, Community action is possible only where at least three cumulative conditions are satisfied namely:

(i) the existence of an obstacle to trade as defined in the Regulation, which
(ii) causes adverse trade effects and
(iii) makes it in the interest of the Community to act.

The Court then went on to analyse all of the complainants' claims.

First, the complainants argued that the US retaliatory measures as a whole should be regarded as an "obstacle to trade". The Court disagreed. It held that for there to be an "obstacle to trade" which may be relied on under the Regulation, there must be a right of action under international trade rules. The US measures had been approved by the WTO Dispute Settlement Body, and they therefore were not illegal *as such*, only their selective nature was potentially contrary to WTO rules.[7]

Second, the complainants argued that the Commission had committed a manifest error in the assessment of the economic data which led it to conclude that the selective application of the US measures did not cause adverse trade effects for the French complainants. The Court observed that the complainants did not contest the accuracy of the data as such, nor the methodology applied to analyse them. It being so, the Court found that there was no manifest error of appreciation: given that UK exporters had not increased their sales significantly during the period when they were exempt from the

6. The Confédération générale des producteurs de lait de brebis et des industriels de Roquefort, the Comité national interprofessionnel des palmipèdes à foie gras and the Comité économique agricole regional "fruits et légumes de la region Bretagne".

7. The CFI also dismissed an argument that the Commission had misconstrued the scope of the complaint itself by focusing only on the selective nature of the US measures.

retaliatory US measures, the Commission was justified in concluding that French exports would not have benefited had the UK exporters also been covered by the US measures.

Third, the Court held that once the Commission had found that the US measures did not cause adverse trade effects, the TBR did not oblige the Commission to carry out a legal assessment to establish whether those measures constituted a violation of international trade rules.[8]

Fourth, on the complex issue of "Community interest", the complainants argued that Community action may be in the systemic interest of the Community even where such action would not benefit the complainant directly. In this respect the complainants referred to the Commission's decision to open the procedure in which it was stated that the US selective retaliation could "severely affect the cohesion and solidarity of the [Community]".[9] Having recalled that the TBR does not define "Community interest",[10] the Court made two general findings that: (1) since Community interest involves a balancing of the different interests of the various affected parties and an assessment of complex economic issues, judicial review is limited to checking respect for procedural requirements, the correctness of the facts relied on, absence of errors of law,[11] and absence of manifest errors of appreciation; and that (2) the assessment of Community interest in the decision to open the examination is of a preparatory nature and cannot deprive the Commission of its power of discretion when deciding whether action is necessary in the interest of the Community.

More specifically, the Court found that the TBR can be invoked by a complainant to make the Community take action only if the complainant himself has suffered adverse trade effects. Even if the complainant has suffered such effects, this is not sufficient to require the Community to act under the Regulation, since the Commission has a wide discretion when assessing the com-

8. See on this point Art. 10(5) of the TBR. In this context, the CFI acknowledged that the French version of Art. 10(5) of the Regulation contained a grammatical error, see para 79 of the judgment.

9. Cf. para 96. The complainants also argued that the Commission had failed to examine the interests of the co-complainants separately from that of the FICF. The products of the co-complainants were not produced in the UK, however, and so the exclusion of the UK from the US measures could by definition not have benefited UK producers. The fact that the Commission's decision did not mention separately the interests of the co-complainants was, in these circumstances, not sufficient to entail a violation of the requirement that the procedure shall be terminated only after it has been established that the interests of the Community do not require any action, cf. paras. 102–109.

10. Para 89.

11. On this point, the CFI, by way of analogy, made reference to Case T-132/01, *Euroalliages*, [2003] ECR II-2359, para 49 (concerning anti-dumping measures).

mercial interests of the Community, seen as a whole.[12] On this basis, the Court of First Instance upheld the Commission's decision to close the examination on the grounds that action was not in the Community interest. It may be added that although the Court did not explicitly rule on whether WTO action for purely systemic reasons may be in the Community interest, it noted *without disapproval* that the Commission's decision did not exclude that possibility.[13]

Fifth, the complainants argued that the decision should be annulled since the Commission (1) by almost one month had exceeded the maximum seven-month-time-limit[14] for completing the examination and transmitting an examination report to the TBR Advisory Committee and (2) had taken almost three months to close the examination after consultation with the TBR Advisory Committee. This, the complainants argued, was contrary to the duty to exercise due diligence and the principle of sound administration.

The Court dismissed both of these claims. First, it held that the Regulation's time-limits for completing the examination are not mandatory and cannot therefore entail the illegality of a decision under the Regulation. However, the Commission should not delay the submission of the examination report to the TBR Advisory Committee beyond a "period which is reasonable". Second, the Court found that the absence of any specific time-limits in the Regulation for deciding on the appropriate follow-up to an examination after consultation of the TBR Advisory Committee could be interpreted as reflecting the desire of the Community legislature to provide the Commission with "a certain discretion". It added, however, that the recognition of such a discretion does not mean that the Commission may delay the adoption of a decision beyond "a reasonable time". Given the obligation on the Commission to undertake internal consultation with its various services and the duty to allow sufficient time for the decision to be translated into all the official languages of the Community, a period of two months and 24 days was not unreasonable.

Sixth, the complainants claimed that although they were in regular contact with the Commission throughout the examination procedure, the Commission should, in accordance with the general principle of the right to a fair

12. Para 122.

13. Para 119.

14. Laid down in Art. 8(8) of the TBR. MacLean, *supra* note 2 at p. 54, observes that "[t]he European Commission regularly exceeds the permitted normal period [of five months], and even the extended period [of seven months] although it cannot be the case that all TBR investigations are exceptional". See likewise Sundberg and Vermulst, "The EC Trade Barriers Regulation – An Obstacle to Trade?", (2001) JWT, 989–1013 at 991.

hearing, have offered them an opportunity to comment on its findings *before* finalizing the examination report.

The Court of First Instance rejected this claim: neither Article 8 of the Regulation nor the general principle of right to a fair hearing oblige the Commission on its own initiative to send the examination report in draft to the complainants and other persons concerned. On the contrary, if these persons want to obtain this information, Article 8(4)(a) and (b) impose an obligation to submit a request to the Commission. The Court observed that the complainants did not claim to have sent the Commission such request.

Since the Court of First Instance also rejected the complainants' other pleas, the action was dismissed in its entirety. The complainants did not appeal to the Court of Justice.

4. Comments

The ruling in the *Prepared Mustard case* does not fall in the category of groundbreaking judgments, but still it is important since it is the first to cast light upon a field which has so far been surrounded by considerable uncertainty.

4.1. *Margin of manoeuvre on questions of substance*

The Court of First Instance allows the Commission a very large margin of manoeuvre on important questions of substance. This is first of all so on the key notion of "Community interest", where the Court observed that the question whether the Community interests "require that action be taken involves appraisal of complex economic situations and judicial review of such an appraisal must be limited to verifying that the relevant procedural rules have been complied with, that the facts on which the choice is based have been accurately stated and that there has been a manifest error of assessment of those facts or a misuse of powers".[15] The Court's restraint in its judicial review *vis-à-vis* Community interest follows the traditional formula in trade policy proceedings.[16] In the *Fediol case*[17] the Commission argued that the assessment of "Community interest" under the New Commercial Policy Instrument cannot be reviewed by the European Court of Justice *at all*. The

15. Para 94.
16. Cf. Bronckers and McNelis, *supra* note 2 at 450.
17. Case 70/87, [1989] ECR 1781

judgment in the *Prepared Mustard case* implicitly rejects that view, but accepts that the *extent* of judicial scrutiny is strictly limited.

The Court also allowed the Commission considerable leeway with respect to establishing whether the measures complained of produce "adverse trade effects". On this point the Court argued that the fact that the British producers of prepared mustard had not significantly increased their market shares while the French producers were barred from the American market, in itself showed that the French producers were not adversely affected by the selectivity of the measure. This line of argument appears rather simplistic, however,[18] and one wonders whether the Court would feel compelled to reach the opposite conclusion if the British producers had significantly increased their market share.[19]

In this respect it is important to note that the Court of First Instance accepts that where the Commission finds that there are no adverse trade effects, it may dismiss a complaint against foreign trade measures without conducting a time-consuming legal assessment of whether such measures violate international trade law. This finding appears very reasonable for two reasons. Firstly, counter-measures may only be introduced if the Commission has established that the measures complained of produce adverse trade effects in the Community. Hence, if no adverse trade effects are felt in the Community, it is difficult to justify why the Commission should carry on further examinations. Secondly, examining – not to mention establishing – that some foreign measures violate international trade law is politically very sensitive.[20]

On one point it is somewhat unclear how much leeway the Court allows the Commission. The complainants argued that the Commission had produced an incorrect analysis of the adverse trade effects. The Court dismissed

18. If, for example, British, French and American producers of prepared mustard had been fighting about the American market for this product – and the French and American producers were winning market shares at the cost of the British producers, the barring of the French producers from the market could mean that American producers took over the market of the French producers, while the competitive pressure on the British producers would ease so that their decline in market share would cease for some time.

19. Obviously the American sanctions were detrimental to the French producers of prepared mustard. The sanctions as such were legal under WTO law, whereas the legality of the selective application of the sanctions was disputed. For this reason the French producers had to show that the adverse trade effects flowed from the selectivity. It appears very difficult to argue that the selective sanctioning in itself has caused adverse trade effects to the French producers. Indeed, one is tempted to argue that the fact that the British producers were still able to sell into the US was likely to benefit the French producers as this meant less competition for customers outside the US.

20. MacLean, *supra* note 2, at p. 156 notes that "[t]he initiation of international trade dispute resolution proceedings is generally seen as an unfriendly act by foreign governments".

this argument, holding that "the conclusion reached by the Commission is not manifestly erroneous".[21] That the Court restricted itself to examining whether the Commission had committed a manifest error of appreciation, presumably, was due to the fact that the complainants' claim was limited to "manifest error" and so the Court did not need to resolve whether its review goes any further. In other words, the judgment cannot necessarily be taken to mean that the Court will only intervene if the Commission has committed a manifest error – although such approach appears to be in line with prior case law.[22]

4.2. *Consequences of exceeding the time-limit*

The Court of First Instance holds that the Commission's breach of the time-limit for carrying out TBR examinations does not necessarily have any legal consequences. In other words, the Commission is granted some flexibility to exceed the Regulation's time-limits for carrying out examinations as long as this does not go beyond a period which is reasonable. There are, however, limits to this flexibility. Thus the judgment seems to imply that decisions on the appropriate follow-up to completed TBR examination reports cannot be postponed for longer than it takes to complete internal Commission decision-making procedures, since this could amount to "unreasonable delay". Along the same line of reasoning, it seems likely that the Court would also consider (reasonably active) negotiations with a third country on a possible solution sufficient to make any resulting delay "reasonable".

The Court did not clarify what legal consequences could ensue in case of an unreasonable delay, but it explicitly refers to its own earlier judgment in *NTN Corporation and Kyoko Seiko*[23] in which a Commission regulation imposing antidumping duties was annulled due to an unreasonably long delay. There do not appear to be any strong reasons why the Court of First Instance should choose a different solution for decisions under the TBR.

4.3. *The right to invoke the TBR and the right to be heard*

The Court of First Instance found that the TBR can be invoked by a complainant to make the Community take action, only if that complainant has himself suffered adverse trade effects.[24] This does not necessarily mean that

21. Para 71.
22. See e.g. Case C-174/87, *Ricoh* v. *Council*, [1992] ECR I-1335, para 68.
23. Joined Cases T-163 & 165/94, [1995] ECR II-1381, see in particular paras. 119–125.
24. Para 122.

the Commission is precluded from pursuing a complaint under the TBR if the complainant has not suffered such effects, but it means that the complainant cannot *require* the Commission to initiate an examination. The Court also confirmed that the Commission is not obliged formally to consult the complainants on the draft examination report.[25] Moreover, if the Commission concludes that the examination should be closed, the decision to this effect may limit itself to recalling the principal findings set out in the TBR examination report.[26]

5. Concluding remarks

The most apparent conclusion that may be drawn from the ruling in the *Prepared Mustard case* is the confirmation of the Commission's practice under the TBR. This means that the Commission is allowed considerable leeway when it comes to the interpretation and application of the substantive issues of the Regulation; i.e. establishing whether the measures complained of constitute an obstacle to trade that produce adverse trade effects in the Community and the definition of Community interest. Taking into account the considerable political sensitivity surrounding the cases that are likely to arise under the TBR, this approach seems well justified, albeit the reasoning on adverse trade effects is rather weak. An explanation why the Commission (and the Court of First Instance) decided to focus on the adverse trade effect rather than on the legality of the American measures could possibly be that selective sanctioning was actually considered to be lawful under WTO law, but that the Commission wanted to avoid openly endorsing the American retaliation measures. This could explain why the Commission reverted to the much weaker argument that there were no trade effects.

On the important issue of standard of review of adverse trade effects, the judgment in the *Prepared Mustard case* is quite closely bound to the facts, which limits its value as a precedent somewhat. Perhaps this is due to the fact that even if the complainants had won the case, it was difficult to see that the procedure would lead anywhere.

As to the procedural aspects of the case, the Court equally appears to allow the Commission considerable leeway. This is particularly so with respect to the Commission's exceeding the time-limits laid down in the TBR. The Court accepts a delay as long as it is "reasonable". If the Court had annulled the decision, the Commission would basically have been forced to issue a

25. Paras. 175–177.
26. Para 132.

new one. It seems very unlikely, however, that a new decision would be different from the one annulled and it is equally difficult to see how the annulment would benefit the complainants.[27] To put this differently, even if the Commission had exceeded the time-limit unreasonably, it would not seem to make real sense to annul the decision.

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27. In contrast, if a regulation imposing anti-dumping duties is annulled, it is likely to mean that the duties are postponed for some time.

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