

JUDGMENT OF THE COURT
OF 22 NOVEMBER 1978¹

Lothar Mattheus
v Doego Fruchtimport und Tiefkühlkost eG
(preliminary ruling requested
by the Amtsgericht Essen)

Case 93/78

1. *References for a preliminary ruling — Respective powers of the Court and of the national courts — Division by the Treaty — Mandatory nature*
(EEC Treaty, Article 177)
 2. *EEC — Admission of new Member States — Conditions for admission — Definition by the authorities referred to in the Treaty*
(EEC Treaty, Article 237)
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1. The division of powers between the Court of Justice and the courts of the Member States provided for in Article 177 of the EEC Treaty is mandatory; it cannot be altered, nor can the exercise of those powers be impeded, in particular by agreements between private persons tending to compel the courts of the Member States to request a preliminary ruling, by depriving them of the independent exercise of the discretion which they are given by the second paragraph of Article 177.
 2. Article 237 of the EEC Treaty lays down a precise procedure encompassed within well-defined limits for the admission of new Member States, during which the conditions of accession are to be drawn up by the authorities indicated in the article itself; thus the legal conditions for such accession remain to be defined within the context of that procedure without its being possible to determine the context judicially in advance.

In Case 93/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Amtsgericht Essen for a preliminary ruling in the action pending before that court between

LOTHAR MATTHEUS, merchant, Windeck/Opperzau,

¹ — Language of the Case: German.

and

DOEGO FRUCHTIMPORT UND TIEFKÜHLKOST eG, Dortmund,

on the interpretation of Article 237 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: H. Mayras

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedures

On 1 August 1977 the parties in the main action entered into an agreement under which Mr Mattheus undertook to set up a system of market surveys in respect of certain products in Spain and Portugal. This system was to be operational at the latest from the date of the decision on the accession of those States to the European Communities.

Doego undertook in consideration thereof to pay half-yearly a lump sum, the amount whereof was to be agreed subsequently.

The clauses at the end of the contract are worded as follows:

"This agreement is definitively concluded for a period of five years. If the said accession should in fact or in law prove to be impracticable, the Principal [Doego] shall have the right to terminate this agreement. The decisive factor in determining whether the said accession is practicable in law shall be a decision of the Court of Justice of the European Communities. In the event of a justified termination of this agreement the Agent shall lose his right to repayment of his expenses.

The courts in Essen shall have jurisdiction in matters arising out of this agreement."

By a letter of 29 January 1978 Mattheus called upon Doego to reimburse him for his expenses amounting to DM 527 85 but the latter terminated the agreement pursuant to the above-mentioned paragraph. Mattheus therefore sued Doego in the Amtsgericht (Local Court) Essen on 21 February 1978.

That court thereupon made the following order:

“Amtsgericht Essen

Order

In the Case of

Lothar Mattheus, merchant, HH,
Halbacher Straße, 5227 Windeck/
Opperzau,

plaintiff,

v

Doego Fruchtimport und Tiefkühlkost
(Fruit importation and frozen food) eG.
(eingetragene Genossenschaft —
registered co-operative), represented by
its Board of Directors, being represented
in turn by the Managing Director, K.
Winkler, having a diploma in business
studies, 84 Feldstraße, 46 Dortmund 1,

defendant

- (1) Upon the application of the parties the following questions are to be referred pursuant to the second paragraph of Article 177 of the EEC Treaty to the Court of Justice of the European Communities for a preliminary ruling:
 - (a) Is Article 237 of the EEC Treaty, either standing alone or in conjunction with other provisions of the EEC Treaty, to be interpreted as meaning that it contains substantive legal limits on the accession of third countries to the European Communities over and above the formal conditions laid down in Article 237?
 - (b) What are those limits?
 - (c) Is therefore the accession of Spain, Portugal and Greece to the European Communities for reasons based on Community law not possible in the foreseeable future?
- (2) The proceedings are stayed pending the ruling of the Court of Justice of the European Communities.

Essen, 23 March 1978

Schaper, Judge of the Amtsgericht”

The order making the reference was entered on the Court Register on 14 April 1978.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted to the Court by Lothar Mattheus, the plaintiff in the main action, by Doego, the defendant in the main action, represented by Gert Meier and by the Commission of the European Communities, represented by Claus-Dieter Ehlermann, Director General of the Legal Department of the Commission, acting as Agent, assisted by Peter Karpenstein, Legal Adviser to the Commission.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. It requested the Commission to give its views on the question whether clauses such as those found in the penultimate paragraph of the contract at issue are compatible with Community public policy.

II — Summary of the written observations submitted to the Court

A — Observations of the plaintiff in the main action

As far as concerns the first question it is immaterial according to Mattheus whether Article 237 imposes substantive legal limits, as well as formal conditions, on the accession of non-member States.

Even if this question were to be answered in the affirmative the paramount political interests of the Community make it necessary to admit Greece, Spain and Portugal as new members.

The development of the Community of European States, which is politically desirable, cannot be impeded by formal provisions of Community law.

As far as concerns the third question Mattheus submits that the accession of non-member States to the European Community will be possible in the foreseeable future if only because the Member States have remained in control of the treaties.

B — Observations of the defendant in the main action

According to Doego it would be appropriate to answer the first question in the affirmative without making any reservation. The second paragraph of Article 237 of the EEC Treaty clearly indicates that unless special conditions of admission are fulfilled the accession of non-member States to the Community is not permissible under Community law. Special importance must accordingly be attached to the need to lay down conditions for admission.

This view has for a long time been in keeping with the legal doctrines advocated both by the Council and by the Commission of the European Communities. Doego refers to the Copenhagen Declaration of the Heads of State and Heads of Government of 14 and 15 December 1973 on the European identity, to the Declaration of the Council of Europe of 8 April 1978 on democracy at Copenhagen, to the reply of the Council of the European Communities to Written Question No 930/77 by Mr Holst (Official Journal of 14 March 1978, C 64, p. 20) and also to the Opinions of the Commission delivered to the Council on 29 September 1967 and 1 October 1969 (Opinion of the Commission of 29 September 1967, (COM (67) 750) and Opinion of 1 October 1969, Annex to The Bulletin of the European Communities, Nos 9/69 and 10/69), to the Commission's "General consider-

ations on the problems of enlargement" of 24 April 1978 and finally to its analysis of the same date entitled "The transitional period and the institutional implications of enlargement".

As far as concerns the second question Doego submits that according to the theoretical view on accession, expounded in the above-mentioned documents, non-member States which apply for accession must fulfil *inter alia* the following conditions:

- They must have a "liberal" constitution and an adequate degree of political stability.
- Their level of economic development must be on average comparable with that of the Community.
- They must accept the "acquis Communautaire" (Community legislation and decisions already adopted), including the Community's political objectives.
- They must satisfy the economic conditions and those relating to persons, possess the necessary financial resources and the instruments to enable them to fulfil effectively the requirements of Community law.

The defendant suggests that the second question should be answered as follows:

"Article 237 of the EEC Treaty in conjunction with the principles of the Treaty prohibits the accession of non-member States to the European Communities, if and to the extent to which the level of integration which has been reached would thereby be jeopardized and such progress with regard to integration as is provided for in the Treaty or in decisions derived therefrom would be retarded. Under Community law the Community institutions and the Member States are under a duty to authorize the accession of another Member State to the European Economic Community only if and to the extent to which the conditions

of admission are an *effective* guarantee that such accession does not seriously imperil either the level of integration of the Community or certain objectives in the field of integration or the Community's capacity to act."

According to Doego the third question is inadmissible under Article 177 of the EEC Treaty as it does not relate to the interpretation of the Treaty. It is true that the contract entered into by the parties includes an arbitration clause appointing the Court of Justice of the European Communities as arbitrator. It is apparent however from Articles 181 and 182 of the EEC Treaty that private persons cannot confer jurisdiction upon the Court of Justice of the European Communities by means of an arbitration clause.

C — Observation of the Commission of the European Communities

The Commission doubts whether the reference for a preliminary ruling is admissible. A perusal of the agreement giving rise to this reference gives the impression that it was concluded for the sole purpose of obtaining from the Court a ruling as to the existence of substantive conditions for accession to the Community. It considers that it is strange, to say the least, for businessmen to stipulate in a written contract that the repayment of expenses incurred in performance of an undertaking should depend solely upon the question whether there are *legal* obstacles to the accession of new European States to the European Economic Community, and for them to provide in doing so that that question should be determined by the Court of Justice of the European Communities.

There are accordingly grounds for asking whether the parties to the main action are really concerned with the repayment of the expenses in question, or whether their aim is simply to obtain a clarification *in abstracto* of a legal question which appears to them to be of

interest. On the latter assumption this is probably not the kind of action which is a prerequisite for the application of Article 177 of the EEC Treaty.

The third question which is concerned neither with an interpretation of Community law nor with the validity of a measure adopted by the institutions of the Community is manifestly inadmissible.

The Commission is of the opinion that the first question must be answered in the affirmative.

In order to be able to start accession negotiations the applicant State must fulfil in the legal field two basic conditions: on the one hand it must be a European State and on the other hand, its form of constitution must be that of a pluralistic democracy whose structure guarantees representation of the various political opinions and also the procedures necessary for the protection of human rights. In this connexion the Commission refers to the opinion which it delivered at the time of the first enlargement of the Community and to the declaration on democracy adopted by the Council of Europe on 4 and 5 April 1978 at Copenhagen (both of which have been mentioned above).

The first enlargement of the Community was based on the principle that applicant States must accept the totality of the "*acquis Communautaire*". However, there is no doubt that the increase in the number of Member States also presents problems of a qualitative nature. On this point the Commission refers to its analysis on the institutional implications of enlargement of 24 April 1978, COM (78) 190 Final. The concept of "adjustments" used in the second paragraph of Article 237 of the EEC Treaty must be interpreted as meaning that, in so far as is necessary for the accession of a European State to be effected, the concept also permits amendments to the Treaty which go further than the purely mechanical

adjustment carried out at the time of the first enlargement.

As far as the question raised by the Court is concerned the Commission takes the view that by the clause at issue the parties referred to the procedure mentioned in Article 177 of the Treaty, which is governed only by the conditions specified in that article.

Even if it were assumed that the clause at issue is intended to bind the national court, there cannot possibly be said to be a breach of Community provisions relating to public policy. There is no doubt that contracting parties are, in the main, forbidden to dictate to courts in a clause governed by private law, the action they must take in procedural matters.

On the other hand it is impossible to prevent the contracting parties from expressing their wishes as to the procedure to be adopted. The Commission takes the view that the *Amtsgericht Essen* appears to have interpreted the penultimate paragraph of the agreement of 1 August 1977 as only being a suggestion. It might already have come to its decision on the basis of the right of termination mentioned in the penultimate paragraph (second sentence).

To sum up the Commission submits that:

- The third question should be rejected as inadmissible;
- Should the Court hold that the other part of the reference for a preliminary ruling is admissible the answers to the first and second questions should be as follows:

- (1) Article 237 of the EEC Treaty must be interpreted as meaning that, in addition to the requirements which it lays down for the application and agreement, it permits the accession of a State to the European Economic Community only if:

- that State is a European State; and

- its constitution guarantees, on the one hand, the existence and continuance of a pluralistic democracy and, on the other hand, effective protection of human rights.

- (2) In addition to the requirements mentioned in paragraph (1) above the substantive conditions which a State must fulfil in order to become a member of the European Economic Community must be the subject of the agreement between the Member States and the applicant States provided for in the second paragraph of Article 237. In accordance with that provision the only restrictions to which the States taking part in the negotiations on the terms of the accession agreement are subject are the following:

- (a) The derogations from the EEC Treaty and from the secondary legislation under the Treaty which they contemplate may only be transitional, that is to say of limited duration;
- (b) They may make adjustments to the EEC Treaty only in so far as that proves to be necessary by reason of the accession;
- (c) When making adjustments to the EEC Treaty and to the secondary legislation they may not depart from the principles governing the European Economic Community.

III — Oral procedure

At the hearing on 3 October 1978 the defendant in the main action and the Commission of the European Communities presented their oral observations.

On 17 October 1978 the Court received a letter from the Amtsgericht Essen which stated that "the court interpreted the third sentence of the last paragraph of the agreement between the parties of 1 August 1977 as a mere suggestion on their part and that it did not consider that it was bound by it but referred the

case to the Court of Justice on the basis of appropriate argumentation and of an independent analysis of the requirements of Article 177 of the EEC Treaty".

The Advocate General delivered his opinion at the hearing on 26 October 1978.

Decision

- 1 By order of 23 March 1978, received at the Court on 14 April 1978, the Amtsgericht Essen referred to the Court of Justice for a preliminary ruling in pursuance of Article 177 of the Treaty three questions on the interpretation of Article 237 of the Treaty which are designed to find out whether the accession of Spain, Portugal and Greece to the European Communities for reasons based on Community law is not possible in the foreseeable future.
- 2 These questions arise out of an agreement under the terms of which the contracting party Mattheus undertook to produce for the Doego undertaking market studies in respect of certain agricultural products for Spain and Portugal.

The clauses at the end of that agreement were worded as follows:

"This agreement is definitively concluded for a period of five years. If the said accession should in fact or in law prove to be impracticable, the Principal [Doego] shall have the right to terminate this agreement. The decisive factor in determining whether the said accession is practicable in law shall be a decision of the Court of Justice of the European Communities. In the event of a justified termination of this agreement the Agent shall lose his right to repayment of his expenses.

The courts in Essen shall have jurisdiction in matters arising out of this agreement."

- 3 When Doego terminated the agreement in reliance on the provision for termination in the above-mentioned clause Mattheus sued Doego in the Amtsgericht for repayment of his expenses.

That court thereupon referred the following questions to the Court of Justice:

- “(a) Is Article 237 of the EEC Treaty, either standing alone or in conjunction with other provisions of the EEC Treaty, to be interpreted as meaning that it contains substantive legal limits on the accession of third countries to the European Communities over and above the formal conditions laid down in Article 237?
- (b) What are those limits?
- (c) Is therefore the accession of Spain, Portugal and Greece to the European Communities for reasons based on Community *law* not possible in the foreseeable future?”

Procedure

- 4 In the words of the first paragraph of Article 177 of the Treaty: “The Court of Justice shall have jurisdiction to give preliminary rulings concerning ...
(a) the interpretation of the Treaty; ...”

According to the second paragraph of that article: “Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon”.

- 6 The division of powers thus effected is mandatory; it cannot be altered, nor can the exercise of those powers be impeded, in particular by agreements between private persons tending to compel the courts of the Member States to request a preliminary ruling by depriving them of the independent exercise of the discretion which they are given by the second paragraph of Article 177.
- 6 The facts in these proceedings raise the question whether a clause such as the one contained in the contract between the parties to the main action, which has given rise to this reference for a preliminary ruling and which makes the legality of the termination of the contract dependent upon a ruling of the Court of Justice is not void as being incompatible with the above-mentioned provisions.

However, no such question has been raised by the national court and in view of what follows it is unnecessary for the court to give a ruling of its own motion on this matter.

The questions referred to the Court

- 7 As provided for in the first paragraph of Article 237 of the EEC Treaty: "Any European State may apply to become a member of the Community. It shall address its application to the Council, which shall act unanimously, after obtaining the opinion of the Commission".

The second paragraph of the article reads: "The conditions of admission and the adjustments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements".

These provisions lay down a precise procedure encompassed within well-defined limits for the admission of new Member States, during which the conditions of accession are to be drawn up by the authorities indicated in the article itself.

Thus the legal conditions for such accession remain to be defined in the context of that procedure without its being possible to determine the content judicially in advance.

Therefore the Court of Justice cannot in proceedings pursuant to Article 177 give a ruling on the form or subject-matter of the conditions which might be adopted.

It must accordingly declare that it has no jurisdiction to answer the questions referred to it by the Amtsgericht.

Costs

- 9 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Amtsgericht Essen by an order of 23 March 1978, hereby rules:

The Court of Justice has no jurisdiction to give a ruling on the questions referred to it by the national court.

Kurtscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore
Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 22 November 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS
DELIVERED ON 26 OCTOBER 1978 ¹

*Mr President
Members of the Court,*

This request for a preliminary ruling in which no Member State and no institution *other than* the Commission has shown any interest will not take up very much of the Court's time.

By an agreement dated 1 August 1977 the plaintiff in the main action undertook to prepare, for a financial consideration, on behalf of a fruit importer, the defendant in the main action, a series of market surveys of various agricultural products in *Spain*

and *Portugal*. These surveys were to be ready at the date of accession of those States and, as everyone knows, such accession has not yet taken place.

The *penultimate* paragraph of that agreement provided that it should be for a period of five years and that, if the accession of those countries should in fact or in law prove to be impracticable, the defendant should have the right to terminate the agreement without having to indemnify the plaintiff. It was a term of the contract that "The decisive factor in determining whether the said

¹ — Translated from the French.