JUDGMENT OF THE COURT (Fourth Chamber)
5 June 1985 *

In Case 116/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'appel [Court of Appeal], Brussels, for a preliminary ruling in the criminal proceedings pending before that court against

Henri Roelstraete

on the interpretation of Regulation No 121/67/EEC of the Council of 13 June 1967 on the common organization of the market in pigmeat (Official Journal, English Special Edition 1967, p. 46) and of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187),

THE COURT (Fourth Chamber)

composed of: Lord Mackenzie Stuart, President, G. Bosco, President of Chamber, P. Pescatore, T. Koopmans and K. Bahlmann, Judges,

Advocate General: C. O. Lenz
Registrar: P. Heim

after considering the observations submitted on behalf of:

— H. Roelstraete, the accused in the main proceedings, represented in the written procedure by J. M. van Hille, of the Ghent Bar, and in the oral procedure by Mr Cornut, avocat,

— the Belgian Government, in the person of the Minister for Economic Affairs, represented by R. Andersen, of the Brussels Bar,

— the Commission of the European Communities, represented by D. Sorasio, a member of its Legal Department, acting as Agent,

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 12 February 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By a judgment of 21 March 1984 which was received at the Court on 30 April 1984 the Cour d'appel [Court of Appeal], Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question as to the interpretation of Regulation No 121/67 of the Council of 13 June 1967 on the common organization of the market in pigmeat (Official Journal, English Special Edition 1967, p. 46) and of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187).

2 The question was raised in the course of criminal proceedings brought against Mr Roelstraete, a retail butcher who is accused of having sold pigmeat, beef and veal at prices which infringed the Ministerial Decree of 27 March 1975 (*Moniteur Belge* of 29 March 1975). Articles 1 and 2 of that decree provide that consumer prices, inclusive of value-added tax, of beef, veal and pigmeat charged by retail butchers may not exceed an amount representing the average weighted purchase price plus a maximum gross profit margin of 22 francs per kilo and value-added tax. That gross profit margin was increased to 31 francs by virtue of the Ministerial Decree of 5 January 1980, which applies in this case.

3 Mr Roelstraete was convicted at first instance by the Tribunal correctionnel [Criminal Court], Nivelles. He appealed to the Cour d'appel, Brussels, claiming, *inter alia*, that the above-mentioned Belgian provisions were incompatible with Regulations Nos 121/67 and 805/68 and could not therefore be applied to him.

4 The Cour d'appel, Brussels, took the view that it was necessary to ask the Court for a ruling on the following question:

'In the retail marketing of pigmeat and beef and veal, is a standard assessment by the national legislature of marketing and import costs compatible with Community Regulations Nos 121/67 of 13 June 1967 and 805/68 of 27 June 1968 where those costs incorporate the maximum profit margin, that is to say the retailer's net profit?'

5 In order to reply to that question it must be recalled that the problem of the compatibility with the Community rules of a system of price control such as that laid down in the Ministerial Decree of 27 March 1975 has already been considered on two occasions by the Court (judgments of 29 June 1978, Case 154/77 *Dechmann* [1978] ECR 1573, and of 17 January 1980, Joined Cases 95 and 96/79 *Kefer and Delmelle* [1980] ECR 103).

6 In the last of those judgments the Court ruled that Regulation No 121/67 and Regulation No 805/68 do not prohibit the unilateral fixing by a Member State of a maximum gross profit margin for the retail sale of pigmeat or beef and veal which is calculated essentially on the basis of the purchase prices charged at the previous marketing stages and which varies according to those prices, provided that the marketing and import costs actually borne by the retailer at the supply stage and at the stage of sale to consumers are added to the purchase prices used in the calculation of the profit margin, and that the margin is fixed at a level which does not impede intra-Community trade.

7 The doubts expressed by the Cour d'appel in its judgment in this case arise from its interpretation of the Belgian legislation. In its view that legislation does not satisfy the conditions laid down in the judgment of the Court of 17 January 1980 inasmuch as it does not provide that there should be added to the purchase prices used in the calculation of the retail prices, in the first place, the import and marketing costs actually borne by the retailer at the supply stage and at the stage of sale to the consumer and, secondly, a margin representing the retailer's net profit, but establishes a fixed maximum gross profit margin which is to be added to the purchase prices and which incorporates both marketing and import costs and the retailer's profit.

8 In its observations the Belgian Government maintains that the Cour d'appel has supplied the Court with an inaccurate description of the Belgian legislation.

According to the Belgian Government, contrary to what is stated in the Cour d'appel's judgment, the maximum gross profit margin does not include any import costs which the retailer may incur. Such costs are to be added to the wholesale prices and, therefore, have no effect on the retailer's profit.

9 According to the Belgian Government, that interpretation is confirmed by the contents of Instruction No 223 of 21 December 1979 of the Inspection générale économique [General Economic Inspectorate] in which it is stated, for the benefit of officials responsible for applying the Belgian price legislation, that import costs are to be added in certain cases to the wholesale prices.

10 In that respect it must be noted that, in submitting its question to the Court for a preliminary ruling, the Cour d'appel relies on a different interpretation of the Belgian legislation to that advanced by the Belgian Government and that it is the interpretation adopted by the Cour d'appel which must be followed by the Court in the context of these proceedings. Moreover, it is clear from the actual wording of the instruction cited that only in certain cases may the import costs incurred by the retailer be added to the purchase prices with the result that those costs are not incorporated in the maximum gross profit margin.

11 It is therefore necessary, in accordance with the Cour d'appel's request, to consider whether the fixing by the legislation of a Member State of a maximum gross profit margin for the retail sale of beef, veal and pigmeat, which is added to the wholesale price and is intended to cover the costs of importation, supply and retail marketing incurred by the retailer, and his net profit, is compatible with the Community rules and in particular with Regulations Nos 121/67 and 805/68.

12 According to Mr Roelstraete, the accused in the main proceedings, the fixing of such a maximum gross profit margin conflicts with the requirements imposed by those regulations because there is always a risk for the retailer that his net profit margin may be reduced to nil or may even become negative as a result of the marketing and import costs which he has actually incurred. That state of affairs is, in Mr Roelstraete's view, not in conformity with the decisions of the Court, according to which the retailer is entitled to obtain a fair remuneration for his activity.

13 The Belgian Government maintains that the compatibility with the Community rules of a system such as that in force in Belgium depends upon the level at which the maximum gross profit margin is fixed. It considers that the level chosen by the Belgian legislature is capable of guaranteeing retailers a fair profit, as is demonstrated, moreover, by the fact that the margin is fixed after a body which represents all the interested parties, the Commission for the Control of Prices has been consulted. The Belgian Government also states that the number of infringements of the contested legislation is small, that the gross profit margin is frequently reviewed and that no complaint has been lodged against the Belgian Government by the other Member States in connection with the contested legislation.

14 According to the Commission, a maximum gross profit margin such as that provided for in the Belgian legislation must in no circumstances incorporate the import costs actually borne by the retailer. The incorporation of those costs in a fixed amount constitutes, in the Commission's view, a measure having an effect equivalent to a quantitative restriction because it reduces the net profit of retailers who have chosen to import their products from other Member States and therefore has the effect of discouraging imports.

15 The Commission considers that there is a risk that the incorporation in the gross profit margin of the other supply costs incurred by the retailer may have an effect on the mechanism of price formation governed by the common organizations of the market, even if that risk is solely potential and only the national courts are in a position to determine whether it is a real one in relation to specific cases.

16 As regards costs related to the stage of sale to the consumer, the Commission sees no objection to their being incorporated in a maximum gross profit margin, provided always that such a measure does not have the effect of preventing retailers from obtaining a fair profit.

17 In order to reply to the question submitted by the Cour d'appel, it must be borne in mind that, in its judgment of 17 January 1980, the Court stated that in principle the fixing of a maximum gross profit margin for retailers to charge when selling to the ultimate consumer was not apt to jeopardize the aims or functioning of the common organization of the markets in beef, veal and pigmeat, so long as that profit margin was calculated essentially on the prices charged at the production and wholesale stages, so as not to affect the functioning of the price system on which the common organizations of the markets concerned were based.

18 In the same judgment, the Court stated that 'this is not however the case where the purchase prices taken into consideration do not take into account marketing and importation costs which the retailer has in fact borne both at the supply stage and at that of sale to consumers or where the gross profit margin itself is fixed at a level which, taking into account the detailed rules for the calculation of purchase prices, is not capable of ensuring that the retailer obtains fair remuneration for his activity'.

19 In order to determine whether a system which, like the system referred to by the Cour d'appel, fixes a maximum gross profit margin covering at the same time the costs of importation, supply and retail marketing, is in conformity with the principles laid down by the Court in that judgment, it is necessary to consider in the first place the effect of incorporating import costs in that maximum gross profit margin.

20 In that respect it is necessary to refer to the judgment of 29 November 1978 (Case 83/78 *Pigs Marketing Board* [1978] ECR 2347), in which the Court stated that the provisions of the Treaty relating to the abolition of tariff and commercial barriers to intra-Community trade and in particular Articles 30 and 34 on the abolition of quantitative restrictions and of all measures having equivalent effect on imports and exports were to be regarded as an integral part of the common organization of the market in pigmeat, as was clear from Article 19 of Regulation No 121/67. The same principle applies equally to the common organization of the market in beef and veal, governed by Regulation No 805/68, Article 22 of which provides that any quantitative restriction or measure having equivalent effect is prohibited in the internal trade of the Community.

21 A system of price control such as that described by the Cour d'appel may constitute a measure having an effect equivalent to a quantitative restriction on imports if the maximum gross profit margin imposed for the retail sale of beef, veal and pigmeat is fixed so as to incorporate import costs which the retailer may have incurred. Such a gross profit margin is fixed at a single amount which is applicable both where the retailer obtains his supplies from the national market and where he decides to import his products by buying them directly on the markets of other Member States. It follows that the net profit of a retailer who has imported his products from other Member States is reduced by an amount

corresponding to the import costs and is, therefore, lower than the profit which a retailer can make by buying his products on the national market.

22 Such a system clearly has the effect of discouraging imports from other Member States and encouraging retailers to obtain their supplies on the national market. It is therefore contrary to Article 30 of the Treaty and Articles 19 of Regulation No 121/67 and 22 of Regulation No 805/68.

23 As regards the other costs covered by the maximum gross profit margin, it is necessary to distinguish between the costs borne by the retailer at the supply stage and the costs relating to the stage of sale to the consumer.

24 As far as costs coming within the first category are concerned, there is, as the Commission has correctly pointed out, a risk, or at least a potential risk, that their incorporation in the maximum gross profit margin may have an effect on the mechanisms of price formation governed by Regulations Nos 121/67 and 805/68. The costs relating to the supply stage may vary according to, *inter alia*, the distance between the centres of supply and the place where each retailer carries on his business. Consequently, in certain places the incorporation of those costs in the maximum gross profit margin may result in a retail prices freeze for certain retailers and therefore affect the distribution network of beef, veal and pigmeat in the regions which are furthest away from the centres of supply, and that may in turn have an effect on the mechanism for fixing prices provided for under the common organizations of the markets in question and on trade within the Community.

25 Since that effect is, as has been stated, solely potential, it is for the national courts to determine whether it occurs in specific cases which are brought before them.

26 On the other hand, the fact that the marketing costs borne by the retailers at the stage of sale to the consumers are incorporated in the maximum gross profit margin and therefore are subject to a standard assessment and not based on the costs actually borne by each retailer does not mean, in itself, that there is a risk that the mechanism for fixing prices as provided for in the common organizations of the market in beef, veal and pigmeat or trade within the Community may be

affected, provided that that standard assessment is not arbitrary and, in any event, allows retailers to obtain fair remuneration for their activity.

27 It is also for the national courts to determine to what extent the system provided for by the national legislation, which it is their task to apply, complies with the conditions set out above.

28 The Cour d'appel points out, in its judgment, that the costs of sale to the consumer vary from one business to another and that consequently, the maximum gross profit margin may, for certain retailers, be sufficient to cover their marketing costs and to guarantee them a fair remuneration, whilst for other retailers who incur greater costs that same margin may not be sufficient.

29 In that respect it must nevertheless be noted that, as the Commission has correctly maintained, Community law does not prohibit the exclusion of a few retail butchers from the market as a result of the imposition of a maximum gross profit margin which is insufficient to cover their retail sale costs when those costs are particularly high. It has not been shown that the possible disappearance of a small number of retailers would affect either the functioning of the price rules or intra-Community trade. If, on the other hand, the number of retailers put into difficulty by the effect of the maximum gross profit margin were considerable, that might indicate that the level at which the margin was fixed was insufficient to guarantee retailers a fair remuneration for their activity and, accordingly, incompatible with the requirements of Community law.

30 For those reasons, in reply to the question submitted by the Cour d'appel, Brussels, it must be stated as follows:

(1) Legislation of a Member State which is intended to control retail prices of beef, veal and pigmeat and which prohibits retailers from selling their products to consumers at a price exceeding the wholesale price plus a maximum gross profit margin covering *inter alia* any import costs which may be borne by the retailers constitutes a quantitative restriction contrary to Article 30 of the EEC

Treaty and to Articles 19 of Regulation No 121/67 and 22 of Regulation No 805/68;

(2) Such legislation is also incompatible with Regulations Nos 121/67 and 805/68 where the maximum gross profit margin incorporates the supply costs borne by retailers and, as a result, in certain regions the distribution network for beef, veal and pigmeat is affected.

(3) Community law does not prohibit the fixing of a gross profit margin which incorporates, in addition to the retailer's net profit, only the marketing costs borne by retailers at the stage of sale to consumers, provided that that margin is not fixed at an arbitrary level and allows retailers to obtain fair remuneration for their activity.

Costs

31 The costs incurred by the Belgian Government and the Commission which have submitted observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question submitted to it by the Cour d'appel, Brussels, by judgment of 21 March 1984 hereby rules:

(1) Legislation of a Member State which is intended to control retail prices of beef, veal and pigmeat and which prohibits retailers from selling their products to consumers at a price exceeding the wholesale price plus a maximum gross profit margin covering *inter alia* any import costs which may be borne by the retailers

constitutes a measure having an effect equivalent to a quantitative restriction contrary to Article 30 of the EEC Treaty and to Articles 19 of Regulation No 121/67 and 22 of Regulation No 805/68.

(2) Such legislation is also incompatible with Regulations Nos 121/67 and 805/68 where the maximum gross profit margin incorporates the supply costs borne by retailers and, as a result, in certain regions the distribution network for beef, veal and pigmeat is affected.

(3) Community law does not prohibit the fixing of a gross profit margin which incorporates, in addition to the retailer's net profit, only the marketing costs borne by retailers at the stage of sale to consumers, provided that that margin is not fixed at an arbitrary level and allows the retailers to obtain fair remuneration for their activity.

Mackenzie Stuart Bosco

Pescatore Koopmans Bahlmann

Delivered in open court in Luxembourg on 5 June 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President