# OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 5 APRIL 1979 [1]

*Mr President,*
*Members of the Court,*

The Galster undertaking exported to Spain on 12 July 1973 some unboned (bone-in) hams and loins of pork and claimed that it was entitled to the export refund since this pigmeat, in so far as it was slightly dried ham, came within tariff subheading 02.06 B I (b) 3 (aa) and, in so far as it was loin which had also been slightly dried, came within tariff subheading 02.06 B I (b) 5 (aa).

However, after the competent customs office had examined the goods, it found that the meat had been frozen and was to be classified under tariff heading 02.01. It therefore refused to grant the export refund pursuant to Commission Regulation (EEC) No 1553/73 which was then applicable.

The plaintiff in the main action lodged an objection with the Hauptzollamt [Principal Customs Office] Hamburg-Jonas; the objection was rejected and Galster commenced proceedings against this decision before the Finanzgericht [Finance Court] Hamburg, which in turn rejected its claim on the ground that in the Common Customs Tariff in its present form the distinction between fresh meat, which like frozen meat comes within tariff heading 02.01 and meat preserved by being slightly dried has not been defined. Additional Note No 3 to Chapter 2 of the tariff only gives the criteria for distinguishing between meat which has been thoroughly dried and meat which has been slightly dried.

In any case, according to the Finanzgericht, slight drying, which is not such as to enable meat thus treated to be preserved, cannot be taken into account as against subsequent freezing, which is the only lasting preservation technique relevant for the classification of the goods for tariff purposes. This solution necessarily follows from the Explanatory Notes to the Common Customs Tariff relating to subheading 02.06 B I (b) 3 by virtue of which meat which has been partially dehydrated but the actual preservation of which is ensured by freezing falls within heading 02.01.

Galster has appealed on a point of law against the judgment of the Finanzgericht to the Bundesfinanzhof which has stayed proceedings and refers two questions to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

1. Does the term "frozen" in tariff heading 02.01 cover not only meat which has been frozen when fresh but also meat which has first been "slightly dried" within the meaning of tariff subheadings 02.06 B I (b) 3 (aa) and B I (b) 5 (aa) and only then frozen?

   If the answer to this question is in the negative:

2. How is the term "fresh" in tariff heading 02.01 to be distinguished from the term "slightly dried" in tariff subheadings 02.06 B I (b) 3 (aa) and B I (b) 5 (aa)?

I shall reverse the order in which I answer the two questions raised by the Bundesfinanzhof since it is clearly logical to do so. In fact the question whether a particular type of meat is to remain classified as slightly dried meat under

1 — Translated from the French.

heading 02.06 or must be assigned to heading 02.01 because it was subsequently frozen plainly does not arise if it has in fact never been a slightly dried meat within the meaning of heading 02.06.

How then is term "fresh" in tariff heading 02.01 to be defined as compared with the expression "slightly dried" in tarif subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa)?

In other words what is the criterion for distinguishing between fresh and slightly dried meat?

The actual answer to this question with reference to meat in dispute is of course within the exclusive jurisdiction of the national court which is alone entitled to assess the facts.

The Court of Justice can only interpret the relevant rules of Community law.

They are:

— The Explanatory Notes to the Common Customs Tariff, Chapter 2, subheading 02.06 B I (b):

Paragraph 2:

The terms "Slightly dried" and "slightly smoked" are defined in Additional Note 3 to this chapter.

Paragraph 3:

Meat which has been partially dehydrated but the actual preservation of which is ensured by freezing or deep freezing falls in heading 02.01,

and, in accordance with the above,

— Additional Note No 3 to Chapter 2 of the Common Customs Tariff:

"For the purposes of subheadings 02.06 B I (b) ..., products whose water/protein ratio in the meat (nitrogen content multiplied by 6.25) is more than 2.8 shall be considered as slightly dried and slightly smoked."

Thus the definition contained in Additional Note 3 only defines the expression "slightly dried" in relation to (thoroughly) dried meat.

The plaintiff in the main action, with reference to the definition of slightly dried meat as opposed to fresh meat, points out, in reliance on an expert report, that in the pork-butcher's trade even pigmeat, whose water/protein ratio is less than 3.3, is regarded as slightly dried. Since I have no reason to challenge this figure, which has not been disputed, I am of the opinion that I may accept it as correct. Similarly I take it for granted that meat having a water/protein ratio of less than 3.3 is partially dehydrated within the meaning of the Explanatory Note.

But for meat having these attributes to be able to remain within heading 02.06 it would have to satisfy the additional requirement that its actual preservation has not been achieved by freezing (or deep freezing) but by being slightly dried. There accordingly remains the obstacle of the Explanatory Note 3 on subheading 02.06 B I (b).

It appears that slight drying within the meaning which Galster itself has given to it (water/protein ratio less than 3.3) does not on its own achieve their actual preservation. Even though this assertion might already be inferred without difficulty from the Commission's written observations, and even Galster's, it was made

explicitly during the oral procedure by the representative of the Commission who was not challenged on this point. Slightly drying therefore cannot by itself cause meat to be classified under heading 02.06 having regard to the requirement of actual preservation.

In these circumstances we come in the end to the same conclusion as the Commission whilst at the same time understanding the conclusion which Galster has reached.

In the Commission's view the classification of slightly dried meat under subheading 02.06 B I (b) presupposes that such meat has undergone, as well as slight drying, one of the other preservation processes (for example salting) mentioned in this tariff heading. This requirement appears to be adding to the wording of the tariff.

It is however quite clear that, in so far as slight drying cannot by itself actually preserve the meat, one of the other preservation processes will in practice have to be used for tariff classification to be effected appropriately. If the product is salted, smoked or in brine it will be classified under heading 02.06. On the other hand if the product is preserved by freezing or deep freezing it will have to be classified under heading 02.01.

The reasoning of the Commission is therefore easy to understand.

But the conclusion which Galster has reached is also comprehensible. In actual fact if, in the case of a product which according to its water/protein ratio is slightly dried, the normal and potential keeping quality achieved by slight drying is insufficient for it to be classifiable as a slightly dried product under heading 02.06, it may be asked what is the use of mentioning the words "slightly dried" in this heading.

No doubt the difficulty has arisen because no official text interpreting the Common Customs Tariff has defined slightly dried meat as opposed to fresh meat, and, assuming that the definition is applied on the basis of an expert report, because the third paragraph of the Explanatory Note adds a requirement (actual preservation) to the second paragraph as far as concerns slightly dried meat which is frozen or deep frozen.

In fact having regard to the arrangement of the texts it is apparent that, since the actual preservation of meat by slight drying cannot be guaranteed, this preservation process ought not to have been placed on the same footing, in tariff matters, as salting, preserving in brine or smoking.

In the absence of any amendment of the Common Customs Tariff and/or the explanatory works thereon dealing with this point how must we decide?

For meat to be regarded as slightly dried is it sufficient for its water/protein ratio to be less than 3.3, a condition extrapolated from Additional Note 3? Or must it be the drying, a condition prescribed by the Explanatory Note, which ensures the actual preservation of the meat?

It appears to me that the most restrictive solution must be chosen without any

hesitation. For example, if meat, although it is slightly dried from the standpoint of its water/protein ratio, cannot travel for several days without deteriorating, unlike other meat (salted or in brine, thoroughly dried or smoked) which may be classified under heading 02.06, it cannot be placed on the same footing as the latter. Such meat cannot be classified under tariff heading 02.06. It should therefore be considered to be fresh meat within the meaning of heading 02.01.

But, in the case of slightly dried meat within the meaning I have just referred to, which can therefore legitimately be classified under tariff heading 02.06, does a subsequent freezing of it mean that it is then to be classified under tariff heading 02.01?

It seems to me that the answer to this question must be in the negative.

Moreover both Galster and the Commission agree on this point.

In the first place, as the court making the reference has stressed in the statement of the reasons on which its order is based, this follows from the actual wording of tariff headings 02.01 and 02.06.

In fact tariff heading 02.01 covers only fresh meat and meat exposed when fresh to a very low temperature with a view to improving its keeping quality *without its natural conditions being adversely affected.*

On the other hand tariff heading 02.06 relating to meat which is salted or in brine, dried or smoked, covers meat the keeping quality whereof has been improved *by a change in its natural condition.* The meat not only has a keeping quality dependent on the maintenance of an external process — freezing — but *an independent keeping quality.*

Next, as far as concerns the practical consequences of my interpretation, I share the view of the plaintiff in the main action that freezing meat cannot result in its classification for tariff purposes being altered, because, if that were the case, its thawing ought to lead in turn to another alteration, and that must obviously be avoided.

Finally if, as the Bundesfinanzhof, supported by Galster, suggests, only meat frozen when fresh receives a classification under tariff heading 02.01 then the only classification to be considered is heading 02.06.

But even if it were assumed that goods classifiable under tariff heading 02.06 may, because they have been frozen, be classified at the same time under tariff heading 02.01 — and I shall not propose that that should be done since I am receptive to the arguments put forward by the Bundesfinanzhof and Galster — in the end they would also be classified under heading 02.06. General rule 3 (c) for the Interpretation of the Nomenclature of the Common Customs Tariff in fact provides that where goods, as in this case, cannot be classified by reference to the preceding rules they shall be classified under the last numbered heading of those which may validly be taken into consideration

Finally I propose that the Court should rule:

1. In answer to the first question: that slightly dried meat within the meaning of subheadings 02.06 B I (b) 3 (aa) and 02.06 B I (b) 5 (aa) is simply meat which has been partially dehydrated but the preservation of which is ensured by one of the preservation processes coming under heading 02.06 (salting, preserving in brine, smoking). Slightly dried meat does not cease to be fresh meat within the meaning of tariff heading 02.01 until this additional method of preservation has been effected.

2. In answer to the second question: that, provided that the meat comes within the above-mentioned definition, it cannot, in consequence of freezing, be assigned to tariff heading 02.01 and removed from tariff heading 02.06, because the word "frozen" in tariff heading 02.01 covers only meat which has been frozen when fresh.