OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 2 May 2001 [1]

Introduction

1. By virtue of the Agreement on Agriculture concluded during the Uruguay Round of multilateral trade negotiations, the Community may require additional import duties to be paid on certain products, in relation to which it has ceased to impose any restrictions (other than customs duties) and, in particular, any quantitative restrictions.

Those additional duties are payable if the price of the imported goods is lower than a particular threshold or trigger price.

At issue in the present case is the validity of the procedural requirements laid down by the Commission for the purpose of determining, each time those products are imported, whether it is appropriate to impose additional duties, that is to say, whether the price of a particular consignment is to be regarded as lower than the trigger price. In addition, a series of questions concerning interpretation arise, which are of less importance and relate to the actual circumstances of the case in the main proceedings.

Background

2. The facts giving rise to the case before the national court may be summarised, for the purposes of my argument, in the following way.

3. Towards the end of 1995, the Netherlands company Kloosterboer Rotterdam BV ('Kloosterboer'), a customs agent, imported — on behalf of certain clients — a number of consignments of frozen chicken breasts from Brazil. Initially, the customs authorities took the view that no additional duty was payable, since the price actually paid for the goods (*cif import price*), [2] as it appeared on the invoice, was higher than the threshold price below

1 — Original language: Spanish.

2 — That term includes the value of the goods, the cost of insurance and transport (Cost Insurance Freight). Regulation No 493/1999 (cited in footnote 18 below) includes in cif import prices: (a) the fob price in the country of origin (Free on Board, namely including only the value of the goods) and (b) transport and insurance costs to the point of introduction into the customs territory of the Community.

which the commercial safeguard mechanism applied (*trigger price*) and which, at the material time, amounted to NLG 714 per 100 kg net.

4. However, on 18 April and 9 August 1996, the inspector from the Tax Office for the Rotterdam customs district required Kloosterboer to pay the additional duties on the imported goods. The inspector took the view that the amounts charged were appropriate because it had mistakenly not been taken into account at the material time that Kloosterboer had failed to make a specific request, as required by Article 3(1) of Regulation (EC) No 1484/95, [3] for any additional duty to be established on the basis of the cif import price. In accordance with Article 3(3) of the regulation, the inspector calculated the additional duty payable on the basis of the average price ascertained on the world market (*representative price*) for that type of product, which at that time amounted to NLG 466.14 per 100 kg.

5. Since the goods had already been released, it was not possible to make a request having retroactive effect, with the result that the debt had to be deemed to have been incurred after clearance, whilst Kloosterboer was not able to raise any objection on the ground that the customs authorities had made a mistake, since, as a professional customs agent, it should reasonably have recognised that a mistake had been made.

6. Kloosterboer challenged the demand for payment disputing, first, the validity of the obligation in Article 3(1) of Regulation No 1484/95 to request that the cif price apply, and invoking, as a subsidiary plea, a legitimate expectation based on information provided by the customs authorities, with the result that a request to that effect might be allowed after clearance.

Relevant Community legislation

The obligation to request application of the cif import price

7. Article 3(1) of Regulation No 1484/95 provided that 'at the request of the importer the additional duty may be established on the basis of the cif import price of the consignment in question, if this price is higher than the applicable representative price'. Furthermore, the request for the cif import price to apply had to be accompanied by certain documents (the purchasing contract, the insurance contract, the transport contract, the bill of lading, the invoice,

3 — Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC (OJ 1995 L 145, p. 47) (unamended version).

the certificate of origin), for the purpose of showing that the price declared was accurate (Article 3(2)). At the same time, security had to be lodged equal to the amount of additional duty which would have been paid if the additional duty had been calculated on the basis of the representative price applicable to the product. The importer would recover the security if he showed that he had sold the consignment on conditions that proved that the prices declared were accurate.

In the absence of a request in those terms, the import price to be taken into consideration for imposing an additional duty was the representative price (Article 3(3)).

8. Regulation No 1484/95 was adopted by the Commission for the purpose of implementing Council Regulation (EEC) No 2777/75,[4] as it stood following the entry into force of Regulation No 3290/94.[5]

However, Article 5(3) of that basic regulation merely provides that the prices to be taken into consideration for imposing an additional import duty 'shall be determined on the basis of the cif import prices of the consignment in question'. The same provision also enables the cif prices declared to be checked against the representative prices for the product in question.

9. The current wording of Article 5 of Regulation No 2777/75 must be seen in the context of the adaptation of Community legislation to conform with the provisions of the Agreement on Agriculture concluded during the Uruguay Round of multilateral trade negotiations ('the Agreement on Agriculture'), which was adopted by the Community under Article 228 of the EC Treaty (now, after amendment, Article 300 EC).

10. Among the special safeguard provisions, Article 5(1)(b) of the Agreement on Agriculture provides that any Member of the World Trade Organisation ('WTO') may impose additional duties on the importation of certain products if the price at which imports of that product may enter its customs territory, 'as determined on the basis of the cif import price of the shipment concerned, expressed in terms of its domestic currency', falls below the trigger price.[6]

4 — Council Regulation (EEC) No 2777/75 of 29 October 1975 on the common organisation of the market in poultrymeat (OJ 1975 L 282, p. 77).

5 — Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105).

6 — Equal to the average 1986 to 1988 reference price for the product calculated either as the average cif unit value of the product concerned or in terms of the quality of the product and its stage of processing.

Can an initial failure to submit a request be rectified?

11. The legislation which applies in relation to the amendment of customs declarations is found in the Community Customs Code. [7] According to subparagraph (c) of the second paragraph of Article 65, no amendment is permitted where authorisation is requested after the customs authorities have allowed the goods to be released.

12. Article 220 of the Code stipulates that a customs debt may be entered in the accounts subsequently, within two days of the date on which the customs authorities become aware that, at the relevant time, the debt was not entered in the accounts or was so entered at a lower level than the amount legally owed. Subsequent entry in the accounts is not to occur when the amount of duty legally owed has not been paid 'as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter, for his part, having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration' (Article 220(2)(b)).

7 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), subsequently amended on several occasions.

The questions referred for a preliminary ruling

13. Kloosterboer brought successive administrative and judicial appeals against the inspector's demands for payment.

14. In the course of the legal proceedings, the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

'1. Is Regulation (EC) No 1484/95 valid, in so far as it makes Article 5(3) of Regulation (EEC) No 2777/75 — which provides that the additional import duty referred to in Article 5 of the Agreement on Agriculture is determined on the basis of the cif import price of the consignment in question — applicable in such a way that such determination can be made only if the importer so requests and in all other cases the import price of the consignment in question to be taken into consideration for the additional import

duty is the representative price referred to in Article 2(1) of Regulation (EC) No 1484/95?

2. If the first question is answered in the affirmative:

Is it in accordance with Community law, and in particular with the principle of the protection of legitimate expectations, if, where no request has been made under Article 3(1) of Regulation (EC) No 1484/95, the customs debt is calculated pursuant to Article 3(3) thereof, where:

— the cif price of the consignment in question indicated on the declaration is higher than the trigger price;

— the declarant was informed by the customs authorities that such a request did not have to be made in that case;

— the declarant acted in good faith in relying on that customs information; and

— the declarant otherwise complied with all conditions of the applicable provisions relating to customs declarations?

3. If the second question is answered in the affirmative:

Does that affirmative answer still apply if, in addition to the circumstances mentioned in the second question, the declarant in question has taken cognisance of the "Verification Notices" issued in connection with earlier declarations which he made, as reproduced in paragraph 2.2, second indent, of this decision?

4. If the second and third questions are answered in the affirmative:

Do the provisions of Regulation (EC) No 1484/95, in conjunction with Article 65 of Regulation (EEC) No 2913/92, mean that if no request was initially made under Article 3(1) of Regulation (EC) No 1484/95 because of reliance on the information given by

the customs authorities, such a request, designed to prevent application of Article 3(3) of Regulation (EC) No 1484/95, may not be accepted after the goods have been released?

5. If the fourth question is answered in the affirmative:

Is it in accordance with Community law, in particular Article 220(2)(b) of Regulation (EEC) No 2913/92 and the principle of the protection of legitimate expectations, for subsequent entry to be made in the accounts under Article 220(1) of that regulation in the circumstances described in the second question?

6. If the fifth question is answered in the negative:

Must the fifth question also be answered in the negative if the circumstances outlined in the third question obtain?'

Analysis of the questions

15. The first three questions concern various aspects of the validity of Article 3(1) of Regulation No 1484/95 as it originally stood: the first, from the point of view of the basic regulation; the second and third, from the point of view of the principle of legitimate expectations and in the light of the circumstances of the case.

16. The national court's doubts, expressed in its first question, are wholly justified. In my opinion, the obligation to make a specific request for the cif price to apply at the time when the additional import duty is established is invalid on two grounds.

17. First, it is invalid because there is no adequate foundation for it in the basic legislation, namely Regulation No 2777/75, as amended.

18. Second, it is invalid because it is also contrary to the provisions of Article 5(1) of the Agreement on Agriculture.

19. The second to sixth questions also raise, as a subsidiary matter, issues of validity and interpretation linked to the particular circumstances of the present case. The strength of the arguments showing that the principal provision at issue is invalid is such that, to my mind, analysis of those questions is unnecessary.

The validity of Article 3(1) and (3) of Regulation No 1484/95 in the light of the basic regulation

20. Article 5(3) of Council Regulation No 2777/75, as amended by Regulation No 3290/94, reads as follows:

'The import prices to be taken into consideration for imposing an additional import duty shall be determined on the basis of the cif import prices of the consignment in question.

Cif import prices shall be checked to that end against the representative prices for the product on the world market or on the Community import market for that product.'

21. So the provision is very straightforward: the relevant price for the purpose of ascertaining whether additional duties are payable is the price which is declared as having actually been paid for the imported goods and not a hypothetical or statistically-calculated price, such as the average price of the product in a certain market over a given period of time.

However, doubtless to prevent fraud, the Council allowed the prices declared to be compared with market prices.

In brief, the basic regulation rests on the assumption that the amount of additional duty is to be established on the basis of the cif price of the imported goods, although it does not preclude, in particular cases, checking of the price against market prices.

22. Article 5(4) of Regulation No 2777/75, as amended, makes the Commission responsible for adopting the appropriate implementing rules.

23. However, paragraphs (1) and (3) of Article 3 of Regulation No 1484/95, as they originally stood, take the opposite approach: '[a]t the request of the importer the additional duty may be established on the basis of the cif import price of the consignment' when that price is higher than the representative price and certain documentary proof is provided. In any other case, the representative price is to be taken into consideration.

Despite first appearances, the effect of the mechanism in Regulation No 1484/95 is to elevate the reference to the representative price to a rule which applies *unless* a specific request is made for the cif import price to apply, a case which thereby becomes the exception.

24. In that regard, the preamble to Regulation No 1484/95 speaks for itself. There it is unequivocally stated that 'the import prices to be taken into consideration for imposing an additional import duty should be checked *against the representative prices* on the world market or on the Community import market for the products in question' (second recital) and that 'the importer *may choose* that the additional duty is calculated on *a basis which is different from the representative price*' (third recital). [8]

25. The fact that the clear meaning of the basic regulation has been distorted by the implementing legislation is sufficient, in itself, to render the latter invalid.

26. The Commission's argument concerning the discretion it enjoys in the exercise of its legislative powers is irrelevant. The Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, but they must never be contrary to such legislation. [9]

The validity of Article 3(1) and (3) of Regulation No 1484/95 in the light of Article 5(1) of the Agreement on Agriculture

27. The fact that the provision at issue is void becomes even more apparent, were that possible, in the light of the interna-

8 — Emphasis added.

9 — See, *inter alia*, Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 36, to which the Commission refers in its observations.

tional obligations entered into by the Community in the context of the Uruguay Round of multilateral trade negotiations, in particular the Agreement on Agriculture annexed to the WTO Agreement.

28. The Court of Justice has stated that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. [10]

29. However, that ceases to be the case where 'the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements'. In such cases, it is for the Court to review the legality of the Community measure in question in the light of the WTO rules. [11]

30. The same is true of the Community legislation in the present case. The third recital in the preamble to Council Regulation No 3290/94, which adjusted the common organisation of the market in the poultrymeat sector — set up by Regulation No 2777/75 — on the conclusion of the Uruguay Round makes clear that 'in order to maintain a minimum level of protection against the adverse effects on the market as a result of tarification, the Agreement [on Agriculture] permits the application of additional customs duties *under precisely defined conditions* but only to products subject to tarification; whereas *the corresponding provisions should accordingly be inserted into the basic regulations concerned*'. [12]

31. More specifically, Article 5(4) of Regulation No 2777/75, as amended by Regulation No 3290/94, enables and requires the Commission to adopt detailed implementing rules and specifies in that regard that '[s]uch detailed rules shall specify in particular: (a) the products to which additional import duties shall be applied under the terms of Article 5 of the Agreement on Agriculture; (b) the other *criteria necessary to ensure application of [the special safeguard mechanism] in accordance with Article 5 of that Agreement [on Agriculture]*'. [13]

32. Thus, the Community measure refers specifically to actual provisions of the WTO. Further, the Council was anxious

10 — Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47.

11 — Ibid., paragraph 49. Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31, are to the same effect, although in relation to the 1947 GATT.

12 — Emphasis added.

13 — The formula uniformly applied to various arrangements for the common organisation of markets. Emphasis added.

to point out one of the main characteristics of the special safeguards in the Agreement on Agriculture, namely the *precisely* defined conditions under which they operate. That precision requires in turn — in a legal context arising from '[entry] into reciprocal and mutually advantageous arrangements' [14] — such specificity, in turn, that its terms be strictly adhered to.

33. Therefore, under Article 5(1)(b) of the Agreement on Agriculture, additional duties exceeding the customs duty may be imposed for certain products — including those at issue in the main proceedings [15] — 'if the price at which imports of that product may enter the customs territory of the Member [of the WTO] granting the concession, as determined on the basis of the cif import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned'.

34. Article 5(1) of the Agreement on Agriculture makes the cif import price of each individual shipment the only criterion for determining any additional duties.

35. That was also confirmed by the WTO Appellate Body in its report of 13 July 1998 — *European Communities — Measures Affecting the Importation of Certain Poultry Products*, the subject-matter of which included the requirements applicable to imports of frozen poultrymeat from Brazil.

36. The legal question raised before the Appellate Body was whether, for the purposes of establishing the additional duty, it was permissible for a member of the WTO to offer the importer a choice between the use of the cif price of the shipment and another method of calculation which departs from that principle, which might be based on the representative price provided for in Regulation No 1484/95. [16]

37. The Appellate Body concluded that the use of a basis other than the cif price of the shipment concerned for the calculation of any additional duty was inconsistent with the obligations under Article 5 of the Agreement on Agriculture, [17] founding its conclusion on both the ordinary meaning of the words and their context. As regards the latter, it pointed out that, since the provision made by Article 5 of the Agreement on Agriculture involves a special safeguard mechanism that operates auto-

14 — Preamble to the Agreement establishing the WTO.

15 — Annex I to Regulation No 1484/95 includes products in CN category 0207 4110 (boneless cuts of fowl of the species *Gallus domesticus*, frozen) originating in Brazil.

16 — Paragraph 159 of the Report. The Report analyses Article 5(5) of the Agreement on Agriculture but its conclusions may equally well apply to Article 5(1) (as paragraph 166 of the Report acknowledges).

17 — Paragraphs 170 and 171 of the Report.

matically, that is to say it is not conditional upon a test of injury, 'it should not be invoked except in accordance with, and within the confines of, the strict requirements of Article 5'. [18]

38. I fully concur with the arguments of the WTO Appellate Body and I recommend that paragraphs (1) and (3) of Article 3 of Regulation No 1484/95 in the version applicable to the present case should be declared void, inasmuch as they make the representative price the general basis for establishing additional duty, requiring the trader concerned to make a specific request for the cif price to apply.

39. Before the Court, the Commission defended the legality of the obligation to make a specific request, pointing out that the need to combat fraud justifies both making application of the declared cif price conditional upon the lodging of certain documents as evidence of its accuracy and requiring the provision of security.

40. Although the Commission has a legitimate interest in combating fraud, it ought to have attempted at least to show that requiring a prior request was the only way — or even the most effective one — of achieving that end.

41. However, as a result of the report of the WTO Appellate Body mentioned above, the Commission adopted Regulation (EC) No 493/1999 [19] amending Regulation No 1484/95. The current wording of Article 3(1) of Regulation No 1484/95 provides that 'additional duty shall be established on the basis of the cif import price of the consignment concerned'. If the price declared is higher than the representative price, the importer remains obliged to submit documents in support and to provide security. Therefore, it is no longer necessary to make the prior request at issue in the main proceedings, whilst the anti-fraud measures found in the earlier legislation have not been abandoned.

42. Consequently, the Commission's arguments are unfounded and it is not necessary to ascertain whether they would have been sufficient to remedy the two grounds of invalidity which I have pointed out above.

18 — Paragraph 167 of the Report.

19 — Commission Regulation of 5 March 1999 amending Regulation No 1484/95 (OJ 1999 L 59, p. 15).

Conclusion

43. For all the foregoing reasons, I propose that the Court of Justice should give the following answer to the questions referred by the College van Beroep voor het bedrijfsleven:

Paragraphs (1) and (3) of Article 3 of Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC, as in force at the material time, are invalid, inasmuch as they require the importer to make a specific request for the amount of any special duty to be established on the basis of the cif import price.