OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 29 March 1990 *

My Lords,

1. This Opinion relates to three cases in which a Dutch court, the College van Beroep voor het Bedrijfsleven, has requested a preliminary ruling on the validity and interpretation of certain provisions of the Community legislation governing entitlement to export refunds for pigmeat.

2. The plaintiffs in the main proceedings are undertakings that exported various consignments of pigmeat to non-member countries in the period between February 1983 and March 1986. They claim that, under the applicable Community legislation, they are entitled to export refunds in respect of those consignments. The defendant, the Produktschap voor Vee en Vlees, refuses to grant refunds on the ground that the meat in question did not satisfy a condition that was introduced into the legislation as from 1 February 1983, regarding the proportion of muscle tissue to bone.

The relevant legislation

3. Clarity, simplicity and elegance! Thus it was that Somerset Maugham defined the essential ingredients of good style. Sadly, none of those qualities is much in evidence in the legislation that we are now called upon to consider. And while elegance may be more than we are entitled to expect from the legislative draftsman and simplicity may be an unattainable ideal in a field so complex as the common organization of the market in pigmeat, yet none the less a little clarity would be greatly appreciated, because it would facilitate the work of the Court and promote legal certainty.

4. Article 15 of Council Regulation (EEC) No 2759/75 on the common organization of the market in pigmeat (Official Journal 1975 L 282, p. 1) provides that:

'(1) To the extent necessary to enable the products [covered by the common organization] to be exported on the basis of quotations or prices for those products on the world market, the difference between those quotations or prices and prices within the Community may be covered by an export refund.

(2) The refund shall be the same for the whole Community. It may be varied according to use or destination.

The refund shall be granted on application by the party concerned.

...'

* Original language: English.

5. Article 17(1) of the same regulation provides that:

'The general rules for the interpretation of the Common Customs Tariff and the special rules for its application shall apply to the tariff classification of products covered by this regulation; the tariff nomenclature resulting from the application of this regulation shall form part of the Common Customs Tariff.'

6. The definition of a number of products covered by the common organization of the market was amended by Article 2 of Commission Regulation (EEC) No 3602/82 fixing coefficients for calculating levies on pigmeat products other than pig carcasses, amending the Annex to Council Regulation (EEC) No 950/68 on the Common Customs Tariff and repealing Regulation (EEC) No 747/79 (Official Journal 1982 L 376, p. 23). In particular, Article 2(2) of Regulation No 3602/82 provided that:

'The parts of the cuts defined in paragraphs 1(a), (b), (c) and (d) fall within the same subheadings only if they contain the muscle tissue and the bones in natural proportion to the entire cuts.'

For the purposes of the present cases it may be noted that the cuts referred to included 'fore-ends' and 'shoulders' (tariff subheading 02.01 A III (a) 3) and 'loins' (tariff subheading 02.01 A III (a) 4).

7. In accordance with Article 17(1) of Regulation No 2759/75, the aforesaid amendments made it necessary to amend the nomenclature of the Common Customs Tariff. That was effected by Article 3 of Regulation No 3602/82, which added the following text as Additional Note 2 to Chapter 2 of the Common Customs Tariff:

'2. A. The following expressions shall have the meanings hereunder assigned to them:

(a) . . .

(b) . . .

(c) "Fore-ends", for the purposes of subheadings 02.01 A III (a) 3 . . . the anterior (cranial) part of the half-carcass without the head, including bones, with or without foot, shank, rind or subcutaneous fat.

The fore-end is separated from the rest of the half-carcass so that it includes, at most, the fifth dorsal vertebra.

The upper (dorsal) part of the fore-end, whether or not containing the blade-bone and attached muscles (neck-end in fresh or collar in salted condition), is considered a cut of the loin, when it is separated from the lower (ventral) part of the fore -end, at most by a cut just below the vertebral column;

(d) "Shoulders", for the purposes of subheadings 02.01 A III (a) 3 . . . the lower part of the fore-end whether or

not containing the blade-bone and attached muscles, including bones, with or without foot, shank, rind or subcutaneous fat.

The blade-bone and attached muscles imported separately shall remain classified in this subheading as a part of the shoulder;

(e) "Loins", for the purposes of subheading 02.01 A III (a) 4 . . . the upper part of the half-carcass, extending from the first cervical vertebra to the caudal vertebrae, including bones, with or without the tenderloin, blade-bone, subcutaneous fat or rind.

The loin is separated from the lower part of the half-carcass by a cut just below the vertebral column;

. . .

B. The parts of the cuts defined under 2. A(b), (c), (d) and (e) fall within the same subheadings only if they contain muscle tissue and bones in natural proportion to the entire cuts.'

Regulation No 3602/82 came into force on 1 February 1983.

8. The list of products on which export refunds are granted was amended by Commission Regulation (EEC) No 263/83 of 28 January 1983 fixing the export refunds on pigmeat (Official Journal 1983 L 30, p. 72). That regulation also came into force on 1 February 1983. The products on which refunds are granted are set out in the annex to the regulation. It includes the following:

'02.01 Meat and edible offals of the animals falling within Headings 01.01 to 01.04 inclusive, fresh, chilled or frozen:

A. Meat:

III. of swine:

(a) of domestic swine:

1. whole carcasses or half-carcasses

2. legs and parts thereof

3. fore-ends or shoulders; parts thereof

4. loins and parts thereof

5. bellies and parts thereof

6. other:

ex (aa) boned or boneless:

. . .'

The facts

9. In Case C-354/88 the plaintiff in the main proceedings is Vleeswarenbedrijf Roermond BV (hereafter 'Roermond'). Between 24 March and 13 December 1983 it exported 14 consignments of pigmeat from the Netherlands to the Dutch Antilles. On the relevant forms it described the meat as falling under tariff subheading 02.01 A III (a) 4 (loins and parts thereof).

10. In Case C-355/88 the plaintiff in the main proceedings is Sleegers Vleeswarenfabriek BV (hereafter 'Sleegers'). Between 17 December 1984 and 18 November 1985 it exported 17 consignments of pigmeat from the Netherlands to Zaïre. On the relevant forms it described the meat as 'parts of pork shoulder, with bone, frozen' and stated that the applicable tariff subheading was 02.01 A III (a) 3.

11. In Case C-356/88 the plaintiff in the main proceedings is Kühne en Heitz BV. Between the beginning of February 1983 and the end of March 1986 it exported approximately 158 consignments of pigmeat from the Netherlands to various destinations outside the Community. On the relevant forms it described the meat as falling under tariff subheading 02.01 A III (a) 4.

12. In all three cases the defendant decided that some or all of the consignments of pigmeat had been incorrectly classified under tariff subheadings 02.01 A III (a) 3 and 02.01 A III (a) 4. Instead they should have been classified under tariff subheading 02.01 A III (a) 6 (bb), which constitutes a residual category for pigmeat not falling under another, more specific subheading. The defendant arrived at that view on the ground that the pigmeat in question, which was exported not in the form of whole cuts but in the form of parts of cuts, did not satisfy the condition laid down by Additional Note 2 B to Chapter 2 of the Common Customs Tariff. It will be recalled that that provision, which was introduced by Article 3 of Regulation No 3602/82, states that the parts of certain cuts (including fore-ends, shoulders and loins) fall within the same subheading as the whole cut 'only if they contain muscle tissue and bones in natural proportion to the entire cuts'. The relevance of the tariff classification of the meat in question lies in the fact that the entitlement to export refunds depends thereon. Regulation No 263/83 provides for the granting of refunds on meat falling within subheadings 02.01 A III (a) 3 and 02.01 A III (a) 4. However, no provision is made for the granting of refunds on meat falling within subheading 02.01 A III (a) 6(bb).

13. Accordingly, the defendant decided that export refunds were not payable in respect of pigmeat that did not satisfy the aforesaid condition regarding the proportion of muscle tissue to bone. It notified the three undertakings of its decision not to pay refunds in respect of a number of the consignments and to require the repayment of amounts that had already been paid. In Case C-354/88 it also demanded the repayment of monetary compensatory amounts. The three undertakings appealed against those decisions to the College van Beroep voor het Bedrijfsleven.

14. The national court commissioned an expert report on a number of issues raised by the requirement regarding the natural proportion of muscle tissue to bone. The report stated that there was no normal method for cutting the parts in dispute which was uniform throughout the Community, that the natural proportion of muscle tissue to bone could not be expressed as a generally valid percentage in view of the many sources of variation, and that it was also impossible to state what tolerance must be allowed for in that regard.

15. The expert report led the national court to doubt the validity of the aforesaid requirement, on the ground that it did not provide a uniform criterion valid throughout the Community. It referred the following questions to the Court of Justice:

'(1) Is the first subparagraph of Article 2(2) of Regulation (EEC) No 3602/82 valid?

(2) If so, what criteria should be used to determine the natural proportion of muscle tissue and bone in the entire cuts, referred to in the provision cited in Question 1?'

Preliminary remarks

16. Although the questions submitted by the national court refer expressly to Article 2(2) of Regulation No 3602/82, it would have been more accurate to refer to Article 3 of that regulation, which introduced Additional Note 2 into Chapter 2 of the Common Customs Tariff. It is part B of that Additional Note, in conjunction with the annex to Regulation No 263/83, that has the effect of denying refunds to exporters of parts of fore-ends, shoulders and loins unless they contain muscle tissue and bone in natural proportion to the whole cuts.

17. The national court raises first the question of validity and then the question of interpretation. However, it would, I think, be preferable to invert the order of the questions because, where a difficulty of interpretation arises, it may be necessary to interpret the provision before its validity can be appraised. I propose therefore to deal with Question 2 first.

The question of interpretation

18. Sleegers and Kühne en Heitz (who, unlike Roermond, submitted written observations and were represented at the hearing) both state that the pigmeat exported by them took the form of riblets, which are a part of the shoulder. They both maintain that they did not remove the muscle tissue from the riblets once they had separated them from the whole cut. They point out that the proportion of muscle tissue to bone in the riblets can never be the same as in the whole cut for the obvious reason that the ribs are a particularly bony part of the whole cut. One does not need to be a master butcher to realize that there is some

truth in that assertion: the riblets will always contain a higher proportion of bone than the whole shoulder. Sleegers and Kühne en Heitz maintain that, since they merely separated the riblets from the rest of the shoulder and did not remove any of the muscle tissue from them, the requirement regarding the natural proportions of muscle tissue and bone must be deemed to have been satisfied. In other words, what matters — according to them — is that the proportion of muscle tissue to bone in the part of the whole cut should be natural for that part of the cut, rather than that it should correspond to the proportion occurring naturally in the whole cut.

19. The opposite view is advanced by the Commission, which maintains that the requirement is satisfied only when the proportion of muscle tissue to bone in the part correspond to the proportion existing in the whole cut. The Commission recognizes that the proportions can vary because the composition of the whole cut can vary. Additional Note 2 A (d) to Chapter 2 of the Common Customs Tariff provides, for example, that the shoulder is 'the lower part of the fore-end whether or not containing the blade-bone and attached muscles, including bones, with or without foot, shank, rind or subcutaneous fat'. The Commission therefore accepts that the 'natural proportions' cannot be expressed as a single percentage for each cut; instead upper and lower limits must be established for each cut and the requirement would be satisfied if the proportions occurring in the parts fell within those limits.

20. Thus the Court is faced with two radically different views as to the correct interpretation of the provisions in question. Neither of those views is obviously wrong and neither is obviously right. In favour of the Commission's view it may be said that it is more easily reconcilable with the wording of the provisions. On the other hand, the interpretation canvassed by the plaintiffs in the main proceedings cannot be said to do violence to that wording, and it is in many ways more logical, at least as regards the practical consequences.

21. Faced with such ambiguity, the Court's normal approach would be to seek to interpret the provisions in the light of their purpose. In the present case that is unusually difficult because we do not know what purpose the Commission had in mind when it decided to amend the relevant legislation with effect from February 1983. Ordinarily, one would look to the preamble to a legislative measure in the hope of finding some guidance as to the legislature's purpose. Such a step would not be very fruitful in the present case because the preambles to the regulations in issue say very little about the purpose pursued by the legislature. The preamble to Regulation No 263/83 simply states, in the second recital, that Regulation No 3602/82 has 'defined other products of the pigmeat sector [i.e. products other than pig carcasses] and amended the wording of the subheadings concerned' and that 'the list of pigmeat products for which the export refund is granted should be adapted accordingly'. Regulation No 3602/82, which was of course primarily concerned with import levies rather than export refunds, states in the fourth recital that 'more detailed descriptions of the other main products in the pigmeat sector [i.e. products other than pig carcasses]

should . . . be introduced in order to ensure the proper application of the levies on the products concerned'.

22. Those statements do not indicate why the Commission felt it necessary to introduce a new requirement, as from February 1983, concerning the proportion of muscle tissue to bone. Why then did the Commission decide to amend the relevant legislation? At first sight, one might think that the reason was to combat some sort of fraud or malpractice whereby the exporter removes the muscle tissue from the cut and claims an export refund on what would in effect be a worthless consignment of bones. If such was the legislature's purpose, it might justify a strict interpretation of the regulations in issue, in accordance with a principle well established in the case-law of the Court: see, for example, Joined Cases 146/81, 192/81 and 193/81 *BayWa* v *BALM* [1982] ECR 1503, at p. 1529, paragraph 10, and Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, at p. 279, paragraph 9. However, even if such a principle of interpretation were applied, there would be no reason to exclude from the benefit of export refunds riblets or any other part of a cut presented in a standard form, customary to the trade, with the usual amount of muscle tissue attached to it. Nor would it be logical to exclude from the benefit of refunds a part of a cut that has a particularly high proportion of muscle tissue. However, that would be the inevitable consequence of the interpretation advocated by the Commission. It is not just particularly bony parts that are excluded; particularly meaty parts suffer the same fate.

23. The Commission does not in fact contend that the purpose of the new requirement introduced in 1983 was to combat some sort of fraud or indeed to prevent refunds from being paid on consignments of pigmeat that are of particularly low value. The Commission's Agent informed the Court at the hearing that the legislation was amended in order to achieve a 'customs-technical clarification of the nomenclature'. The need was felt for a further refinement of the tariff subheadings for pigmeat. The amendment was effected primarily in relation to the system of import levies, but it was realized that it would have repercussions on the system of export refunds. In particular, it was realized that riblets would no longer qualify for refunds. According to the Commission's Agent, a conscious decision was taken to the effect that it was no longer necessary to grant refunds on riblets because they were selling well enough on export markets without the benefit of refunds. That clearly excludes any suggestion that the reason for not granting refunds on riblets is that they are of low value on account of their high proportion of bone.

24. I do not find the Commission's explanations very convincing. It is not clear from the relevant regulations that the Commission really directed its mind to the question whether riblets should qualify for export refunds. If it did address such a question and came to the conclusion that riblets, or indeed any other part of a pig's carcass, should no longer qualify for refunds, it could (and should) have made express provision to that effect in clear

language. The benefits of so doing, in terms of legal certainty, would have been considerable. Both the traders concerned and the national authorities that have to implement the legislation would have known what their rights and obligations were.

25. The Commission did not, however, do that. Instead, it seems almost to have legislated by accident. It decided, for 'customs-technical' reasons, that the Common Customs Tariff needed to be refined. Having tinkered with a few subheadings, primarily in relation to the system of import levies, it seems to have decided that the repercussions of that refinement on the system of export refunds should be allowed to take effect without really considering what the practical consequences would be.

26. The result of this curious legislative technique is an ambiguous rule which we cannot interpret in the light of its purpose because we do not know what purpose the legislature was pursuing. In the circumstances all that we can do is to attempt to interpret the legislation in a manner that accords with common sense and logic and thus ensure that, in its practical application, the results of the legislation are not perverse or irrational.

27. I am not convinced that the interpretation proposed by the Commission satisfies that test. If applied in practice, it would have a number of consequences that can only be described as illogical. I have already alluded to one of them when I pointed out that the interpretation advocated by the Commission would exclude from the benefit of the refund not only parts with too high a bone content but also parts with too high a percentage of muscle tissue.

28. In fact, if the interpretation advocated by the Commission were adopted, there would be only four ways in which pigmeat exported in the form of parts of fore-end, shoulder or loin could qualify for refunds:

(i) the whole cut could be divided into parts, every one of which would be exported in a single consignment; in such a case it is mathematically certain that the proportion of muscle tissue to bone in the consignment of parts would correspond to the natural proportions of the whole cut. I am assuming here that what counts are the proportions found in the whole consignment, not those found in each piece of pigmeat;

(ii) the part in question, for example the riblets, although normally containing a lower percentage of muscle tissue than the whole cut, could be separated from the whole cut in such a way as to ensure that enough muscle tissue is attached to it to bring the proportion of muscle tissue to bone into line with those occurring in the whole cut. Conversely, in the case of a part that would normally have too low a percentage of bone, some of the muscle tissue normally attached to it could be removed;

(iii) because the permissible methods of presenting the whole cut vary considerably, the gap between the

upper and lower limits referred to by the Commission might be so wide that a part of the cut that would not normally contain the appropriate proportions of muscle to bone might none the less come within those limits;

(iv) it is of course conceivable that the part in question might, purely by chance, contain muscle and bone in the same proportions as the whole cut.

29. None of that strikes me as very logical. In particular, I cannot see why the legislature would wish to lay down a rule the effect of which would be to disqualify from the benefit of refunds riblets cut normally, but to grant refunds on riblets cut with an abnormally large chunk of muscle tissue attached to them. The proportions of muscle tissue and bone in such a cut may well correspond to those of the whole cut but they could hardly be described as 'natural proportions'. Nor does it seem entirely logical that the permissible range between the upper and lower limits should vary considerably as a result of the different compositions in which the whole cuts may be presented in accordance with Article 2(1) of Regulation No 3602/82. It seems somewhat arbitrary that a part of a whole cut should have a better chance of qualifying for a refund simply because the whole cut is itself defined more loosely.

30. But the greatest objection to the Commission's interpretation is that it creates an intolerable degree of uncertainty for the traders who have to attempt to comply with the requirement in question. It is not of course impossible to determine whether a particular piece of pigmeat has muscle tissue and bone in the same proportions as the whole cut from which it is taken. But it is extremely difficult, as is evidenced by the fact that the national court in the present proceedings had to have recourse to an expert report, the conclusions of which merely highlight the difficulty. The need for certainty in the drafting of legislation has been recognized in a number of the Court's decisions. It held, for example, in Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24, that:

'... Community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them'.

31. The purpose of the system of export refunds is to enable pigmeat to be exported from the Community to non-member countries, where prices are generally lower (see the eighth recital in the preamble to Regulation No 2759/75). That purpose can only be accomplished if exporters are able to determine, with a reasonable degree of certainty, at the time when they negotiate contracts with purchasers from non-member countries, whether the meat in question will qualify for export refunds. The vicissitudes

of international trade are great enough without exporters being subjected to the uncertainty caused by having to comply with requirements as vague and imprecise as the requirement at issue in the present cases would be if it were interpreted in the manner proposed by the Commission. The relevant legislation must be construed in such a way that the criteria laid down by it are clear enough to enable an intelligent exporter, exercising due diligence and relying on his professional knowledge, to determine whether he will be entitled to export refunds. That test would not be satisfied if the legislation in issue were interpreted in the manner proposed by the Commission.

32. By comparison, the interpretation suggested by the plaintiffs in the main proceedings is clear, logical, easy to apply in practice and free of the arbitrariness that seems to characterize the Commission's interpretation. Moreover, it would not, so far as I can see, open the door to fraud. The Commission has not, in any event, suggested that such would be the case. I therefore conclude that the requirement regarding the proportion of muscle tissue to bone should be regarded as being satisfied where the whole cut is divided into parts in a manner habitual to the trade and the muscle tissue attached to those parts is not removed.

The question of validity

33. If the provisions in question are interpreted in the manner that I have proposed, their validity cannot really be in doubt. One of the advantages of that interpretation is that it cures the defects that could otherwise be said to vitiate the provisions — namely, uncertainty, arbitrariness and illogicality. Since, therefore, most of the grounds on which the validity of the provisions could be challenged cease to apply if the interpretation that I have proposed is adopted, I shall deal relatively briefly with the question of validity.

34. One of the criticisms levelled against the requirement in question is that it is contrary to the principle of equality of treatment and the principle of the uniform application of Community law. It is argued that the proportions of muscle tissue to bone vary considerably as a result of a number of factors, including differences in the composition of the whole cut, differences in the method of dividing up the whole cut into parts and differences due to the age, breed, sex and diet of the animal in question.

35. I cannot see that that particular criticism is justified, even if the interpretation proposed by the Commission is adopted. It may well be the case that a six-month old boar fed on skimmed-milk powder in a Jutland piggery differs considerably from a three-year old sow raised on a diet of acorns on the plains of La Mancha. But that is of no consequence. Pieces of pigmeat that come from the first type of animal will satisfy the 'natural proportions' criterion if they contain muscle tissue and bone in the natural proportions occurring in a typical representative of that type of animal. No one would suggest that they should be compared with the second

type of animal. Like must be compared with like. If that fundamental rule is applied there will, in my view, be no question of any inequality or lack of uniformity in the application of Community law. There is therefore no need to have recourse to the judgment in Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107, from which it might perhaps be inferred that, where total uniformity is not attainable on account of differences in national practices, the ensuing discrepancies must be accepted.

36. Kühne en Heitz maintains further that, if the provisions in question were interpreted in the manner suggested by the Commission, they would be invalid because they would breach the principles of legal certainty and proportionality.

37. There is much to be said for that point of view. As regards legal certainty, I have already pointed out that if the Commission's interpretation were accepted it would be impossible for the traders in question to determine, with sufficient certainty, whether they would be able to obtain refunds.

38. As regards proportionality, it is in fact virtually impossible to determine whether the requirement introduced as from 1 February 1983 is proportionate to the aim pursued, because the regulations do not tell us what that aim was. Indeed, it is questionable whether the regulations even complied with the terms of Article 190 of the Treaty, in so far as they failed to state the reasons for which the 'natural proportions' rule was introduced.

39. I conclude therefore that if the provisions in question were interpreted in the manner suggested by the Commission, there would be grave doubts about their validity. That is a further reason for construing them in the manner that I have proposed, in accordance with the maxim *ut magis res valeat quam pereat*: compare, for example, Joined Cases 201/85 and 202/85 *Klensch* v *Secrétaire d'État* [1986] ECR 3477, at p. 3510, paragraph 21.

40. I propose that the questions referred by the College van Beroep voor het Bedrijfsleven should be answered as follows:

'(1) Additional Note No 2 B to Chapter 2 of the Common Customs Tariff, introduced by Article 3 of Regulation (EEC) No 3602/82, must be interpreted as meaning that the requirement laid down therein is satisfied where the whole cut is divided into parts in a manner habitual to the trade and the muscle tissue attached to those parts is not removed.

(2) Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of the aforesaid provision as so interpreted.'