OPINION OF ADVOCATE GENERAL TESAURO

delivered on 7 December 1995 *

1. The questions referred by the High Court of Justice, Queen's Bench Division, concern the interpretation of the *Lomas* judgment, [1] in which the Court ruled that the detailed rules in force for calculating clawback were invalid. They also relate to the validity and interpretation of the new system for calculating clawback established by the Commission in Regulation (EEC) No 1922/92 of 13 July 1992 [2] in order to comply with that judgment.

Accordingly, the questions once more raise for the Court's consideration the detailed rules for calculating clawback. Clawback is a sum which *exporters* of sheep and goats from the United Kingdom are required by Community rules to pay to the United Kingdom authorities at the time of export by way of reimbursement of premiums previously paid to *producers* when the animals were slaughtered.

2. Until 1992 the clawback system was based on Council Regulation No 1837/80 establishing the common organization of the market in sheepmeat and goatmeat, [3] later replaced by Council Regulation No 3013/89, [4] and also on Commission Regulation No 1633/84 laying down a number of detailed rules for its application. [5]

Regulation No 1837/80 had authorized the United Kingdom to pay a 'variable slaughter premium' to sheepmeat and goatmeat producers in respect of animals going to slaughter. That premium was payable when the prices recorded on the representative market of the United Kingdom were below a 'guide level' corresponding to 85% of the basic price. [6]

3. When products for which the premium had been paid were exported (which could happen within 21 days of their first being

* Original language: Italian.

1 — Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781.

2 — Commission Regulation (EEC) No 1922/92 of 13 July 1992 laying down detailed rules for applying the variable slaughter premium for sheep and repealing Regulation (EEC) No 2661/80 and determining the conditions for the reimbursement of the clawback following the judgment of the Court of Justice in Joined Cases C-38/90 and C-151/90 (OJ 1992 L 195, p. 10).

3 — Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the market in sheepmeat and goatmeat (OJ 1980 L 183, p. 1).

4 — Council Regulation (EEC) No 3013/89 of 25 September 1989 on the common organization of the market in sheepmeat and goatmeat (OJ 1989 L 289, p. 1), most recently amended by Council Regulation (EEC) No 1741/91 of 13 June 1991 (OJ 1991 L 163, p. 41).

5 — Commission Regulation (EEC) No 1633/84 of 8 June 1984 laying down detailed rules for applying the variable slaughter premium for sheep and repealing Regulation (EEC) No 2661/80 (OJ 1984 L 154, p. 27).

6 — And so long as aid measures had not been applied by the intervention agencies.

put on the market), the exporters had to repay the competent national authority a sum equivalent to the premium. The aim was to counteract, at the time when the products were placed on the market, the effects of a premium for which there was no longer any justification. In particular, Article 9(3) of Regulation No 1837/80 gave the Commission the task of taking the necessary measures to ensure that 'an amount equivalent to the premium actually granted' is charged on products when they leave the United Kingdom. [7]

Regulation No 1633/84, adopted by the Commission pursuant to that provision, laid down the criteria for calculating the slaughter premium and clawback. The former was fixed at the rate in force in the week in which the products were first placed on the market or on the day of slaughter, whereas the latter was calculated on the basis of the rate applicable in the week in which the products were exported. [8]

4. As I mentioned above, in the *Lomas* judgment the Court declared Article 4(1) and (2) of Regulation No 1633/84 invalid. Following settled case-law, it first of all confirmed that it was permissible to charge the clawback where products for which a premium had previously been paid were exported. [9]

The Court stated that the detailed rules laid down for the calculation of the clawback must be such that it neutralizes the effect of the premium at the time when the products which benefited from the premium leave the region concerned in order to avoid an unjustified advantage or disadvantage for the producers, and declared the detailed rules for calculation described above invalid inasmuch as they did not ensure that the two amounts were exactly the same. [10]

5. The Court noted however that upholding claims concerning the charging of clawback for periods prior to the date of the judgment would lead to a risk of significant financial consequences and serious organizational difficulties for the United Kingdom. For that reason and also in the interests of legal certainty it considered that the effects of the declaration of invalidity should be limited in time. Consequently, it decided that such invalidity could be relied on retroactively

7 — Article 9(3) of Regulation No 1837/80, as amended by Regulation No 871/84 (OJ 1984 L 90, p. 35). The new basic regulation No 3013/89, cited above, contains an all but identical provision; Article 24(5) provides that if the slaughter premium is paid and the products are subsequently exported, 'the Commission shall adopt the necessary measures to ensure the levying on all the products (...) leaving Great Britain of an amount equivalent to that of the premium actually paid'.

8 — Articles 3 and 4(1) of Regulation No 1633/84.

9 — See, to that effect, the judgments in Case 106/81 *Kind* v *EEC* [1982] ECR 2885 and Case 61/85 *United Kingdom* v *Commission* [1988] ECR 431.

10 — *Lomas* (cited at footnote 1), paragraph 22 and operative part, in which the Court stated that by adopting the disputed rules for calculation, the Commission had exceeded the powers conferred on it by Article 9(3) of Regulation No 1837/80.

only by those traders who had already initiated proceedings or made an equivalent complaint before the date of the judgment. [11]

6. The legislative framework described above has since undergone substantial changes. First of all, as from the 1992 marketing year, the United Kingdom has been authorized to discontinue granting the slaughter premium. [12]

Secondly, to comply with the *Lomas* judgment, the Commission has adopted the abovementioned Regulation No 1922/92 establishing the new clawback calculation system at issue in this case. As provided in Article 3, the regulation is to apply to all situations where, on 10 March 1992, the clawback had not yet been paid (covered by Article 1) [13] or proceedings had been initiated in order to obtain reimbursement of the sums unduly paid by way of clawback (covered by Article 2).

7. For the purposes of Article 1 of Regulation No 1922/92 amending Article 4 of Regulation No 1633/84, operators who still have to pay sums by way of clawback are in essence offered two options. Either they may choose to pay an amount exactly equal to the premium granted to the producers ('the first option'), at the same time providing 'proof satisfactory to the competent authorities of the amount of premium actually granted', or they may choose to pay an amount 'fixed equal to the average amount of the premium for the week of departure of the products and the three previous weeks' ('the second option').

8. Article 2 of Regulation No 1922/92 lays down the detailed rules for calculating the amounts which operators entitled to rely on the *Lomas* judgment may claim by way of reimbursement of the clawback unduly paid. They too have the right to choose between two different methods of calculation, essentially the same as the first and second options under Article 1.

11 — The action arose from two sets of criminal proceedings brought against sheepmeat exporters who had been prosecuted for making false statements to the competent United Kingdom authorities inter alia in order to calculate their reference clawback. The Court declared that the finding that the calculation rules, which formed the 'legal basis' of the offence, were invalid did not exempt the United Kingdom from the obligation to institute criminal proceedings against traders who had contravened them.

12 — Commission Regulation (EEC) No 3246/91 of 7 November 1991 authorizing the United Kingdom to discontinue granting the variable slaughter premium for sheep in Great Britain and derogating from Regulation (EEC) No 1633/84 laying down detailed rules for applying the variable slaughter premium for sheep (OJ 1991 L 307, p. 16).

13 — As I have just said, the slaughter premium was discontinued as from the 1992 marketing year. It is however clear from the documents in the case that in the period 1991-1992 the the United Kingdom authorities, pending the Court's judgment in *Lomas*, had suspended collection of the clawback on exports of products for which a premium had previously been paid; it was therefore necessary, following the judgment, for the Commission to adopt detailed rules for calculating the clawback to be applied in order to regulate the operations which were still suspended.

Article 2 provides that operators are entitled to reimbursement ('within the time-limits and according to the procedure laid down in the relevant national law') of the difference between the clawback they paid and the amount of the premium actually granted for the same products. However, at the request of the operators, 'reimbursement can be made of the difference between the clawback actually paid and the average amount of the premiums fixed for the week of departure of the products and the three previous weeks'.

Under Article 2(2), operators were required before 30 November 1992 to give the competent national authorities a specification of: the date at which their claim commenced; the amount of the clawback paid until 10 March 1992; the amount of the premium actually granted (except for operators who had chosen the second option); and also 'proof satisfactory to the competent United Kingdom authorities as far as the above elements are concerned'.

9. The plaintiffs in the main proceedings are companies which export sheepmeat and goatmeat. They brought an action in the national court for reimbursement of the clawback paid from 1980 until the date of issue of the writ itself (6 March 1992). Subsequently, as stated at the hearing, they reduced the claim to the difference (unquantified) between the amount of the clawback unduly paid and the amount that they would have had to pay in that period if the Community rules had been properly applied. [14]

In the course of the main proceedings, following the entry into force of Commission Regulation No 1922/92, the plaintiffs challenged the detailed rules for calculation laid down therein, claiming that both the options offered to operators by Articles 1 and 2 are inconsistent with the basic regulation. The first option is unworkable in practice, since the United Kingdom authorities demand documentary proof of the amount of the premium which exporters have no means at all of supplying, since they do not receive the premium, while the second is unlawful because — as stated in the *Lomas* judgment — it does not ensure that the amount of the premium received by the producer is exactly equal to the clawback which the exporter is required to pay.

10. For those reasons the High Court stayed proceedings and referred six questions to the Court of Justice for a preliminary ruling.

14 — It must be pointed out that pending the outcome of the claim before the national court, the plaintiffs have been obliged by orders, which they unsuccessfully opposed, to pay further sums by way of clawback, calculated this time on the basis of the new Community system; since, as we shall shortly see, the plaintiffs are challenging the validity of that system they have also claimed reimbursement of the difference between the amount paid and the amount owed by way of such payment.

In its first and fourth questions, it asks the Court to rule on the validity of Articles 1 and 2 of Regulation No 1922/92, that is to say on the new system for calculating the clawback, and also of the rules for calculating the amounts to be repaid to those operators entitled (pursuant to the *Lomas* judgment) to claim reimbursement.

If the answer to the first and fourth questions is no, the national court asks the Court to clarify the nature of the proof that operators may be required to present to the competent national authorities for the purposes of calculating the clawback or the amounts to be reimbursed (second and fifth questions).

The third question seeks to ascertain whether operators are permitted, pursuant to the *Lomas* judgment, to claim reimbursement even of the sums they paid by way of clawback in the period prior to the initiation of proceedings or the making of an equivalent complaint.

Lastly, the sixth question concerns the existence and scope of the provisions of Community and national law which the national court must or may take into account in determining the amount to be reimbursed, in particular as regards the burden of proof, unjust enrichment and the limitation periods relevant to the action.

11. This case raises the same questions, therefore, as those on which the Court ruled in *Lomas*.

In my Opinion in that case, starting from the conviction that the objectives pursued by the rules contained in the basic regulation could be attained only if the amount of the premium were exactly equal to that of the clawback, I proposed that the Court should declare the rules for calculating the clawback then in force unlawful. As mentioned, the Court confirmed that approach and, without calling in question the enabling provisions of the basic regulation, declared Article 4(1) and (2) of Regulation No 1633/84 invalid.

12. I would note, however, that these proceedings, unlike the *Lomas* case, are taking place at a time when the grant of the premium and, in consequence, the collection of the clawback, have been discontinued. The Court is accordingly called on to give an interpretation of a system which, although in force, is intended to govern earlier situations, whether concerning the calculation of amounts still owed for operations suspended since the *Lomas* judgment or the calculation of sums unduly paid.

These proceedings concern the detailed rules for calculating an amount (the clawback) payable by the exporter to offset another amount (the premium) *paid previously* to the

farmer; the point is to determine how much the exporters should have had (or have) to pay by way of clawback for the operations which are still suspended, or how much they should be reimbursed because payments were made on the basis of calculations declared invalid.

13. Another component must be added to my basic position: neither in its original nor its amended version does the Community system impose any obligation on the producer receiving the premium or on the authority paying it to retain any evidence relating to that amount. However odd this may seem, the result is that proof of the exact sum *may legitimately no longer exist* at the time the clawback is paid.

Starting from those facts, it seems clear to me that unless the Court intends to change its case-law on clawback, by calling into question the validity of the system as a whole, or that of the enabling provisions of the basic regulation (a choice which would not in the circumstances lead to any different result), the answer to be given to the national court in relation to Questions 1, 2, 4 and 5 must inevitably depend on requirements of actual practicality.

14. Accordingly, I must alter the guidance given in my earlier Opinion, which must now also take account of the feasibility of the proposed solutions for the regulation of past events: *no one shall be required to do the impossible.*

From this point of view, I consider that even if the twofold option offered to operators by the new system does not entirely fulfil the aim of the basic regulation, it does reflect it sufficiently; in particular, it manages at least to satisfy the need essentially to neutralize the effects of a premium which has already been paid and which ceases to have any economic justification when the product leaves the reference territory.

15. When an exporter is in a position to supply the relevant proof, he may pay (for operations still in suspense) a clawback exactly equal to the amount of the premium, or else (where reimbursement is claimed) obtain payment of the exact difference between the two amounts.

Where he is not in a position to supply proof, he may none the less have applied a calculation of the reference clawback which comes reasonably close to the amount of the premium, since it is based on the average of the rates fixed for the four weeks which, by definition, include either the date when the product was first placed on the market or the date of its export.

16. It is moreover significant that while the plaintiffs challenge the lawfulness of the new calculation method, they have not themselves been able to suggest any practically feasible alternative in order to determine the exact amount of the premium received by producers in respect of the products for which the plaintiffs are, or were, obliged to pay a clawback. As regards premiums granted in the past, and in the absence of proof, such a calculation is simply impossible.

17. The plaintiffs in the main proceedings have objected that the first option is in fact impracticable since it places on them the burden of proving something excessively difficult and is for that reason unlawful in accordance with the case-law of the Community judicature; [15] furthermore, they concluded that, having regard to the invalidity of the rules for calculating the clawback paid by them, the burden of proving the amount of the premium should rather fall on the authority which granted it.

Irrespective of the merits of those arguments, I shall merely point out the risk that in the light of the foregoing considerations all discussion concerning the burden of proof which, in most cases, concerns documentation which may legitimately no longer exist may in the circumstances be pointless. [16]

18. In my view, the case-law quoted by the plaintiffs in which the Court has drawn the limits imposed by Community law on the application of national provisions concerning burden of proof [17] cannot apply in the specific case of the amount of the premium because of the special nature of the system at issue.

First of all, Regulation No 1922/92 itself lays down specific rules for proof relating to the premium, expressly stating that exporters intending to rely on the calculation rules under the first option are required to provide proof 'satisfactory' to the competent United Kingdom authorities.

19. Secondly, the opportunity for the operator to indicate precisely the amount of the premium and thus to have applied a clawback exactly equal to it must in any event be seen as just one of the two alternatives offered to the operator, who may use it if he

15 — Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595.

16 — Since the system is no longer in force, the observations suggesting methods of proof for the future are equally useless.

17 — For all, see Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633.

is in a position to provide the necessary proof. Where that is not possible, the operator will in any case pay a reasonable clawback or else may, as appropriate, be able to obtain reimbursement of the undue payment, on the basis of the calculation rules provided for in the second option.

In the first instance, it is clear that it will be necessary for the competent United Kingdom authorities to recognize, in an intelligent spirit of collaboration, the due probative value of each document the producers are able to produce to make it possible to determine the exact amount of the premium paid.

20. To sum up, in answer to the first and fourth questions, I consider that the new system is not invalidated, since it permits the clawback to be quantified, even when it is impossible to establish the exact amount of the premium granted, at an amount reasonably close to the supposed amount of the premium and which must therefore be considered capable of fulfilling its intended purpose; in answer to the second and fifth questions, I consider that in accordance with the rules in question it is for the national authorities to assess any proofs provided by the exporter in order to ascertain whether they make it possible to establish the precise amount of the premium actually granted.

21. A few remarks will suffice in answer to the third question in which the High Court asks the Court of Justice to clarify the scope of the limitation of the temporal effects of the *Lomas* judgment, in order to define precisely the period for which operators who initiated proceedings before 10 March 1992 are entitled to reimbursement of the clawback unduly paid.

According to settled case-law, the retroactive effect which judgments given by the Court in proceedings for a preliminary ruling generally have may be limited by the Court in the interest of legal certainty in exceptional circumstances. However, in order to avoid a situation in which even those persons who brought actions in time before a national court are denied judicial protection in the event of a breach of Community law by the institutions, the Court of Justice may rule that the judgment should retain retroactive effect at least in respect of those persons. [18]

22. In stating that principle, the Court has never further delimited the taking of action by the persons defined above, still less circumscribed the period from when they are entitled to rely on the declaration of invalidity given by the Court.

18 — See also Case C-228/92 *Roquette Frères* v *Hauptzollamt Geldern* [1994] ECR I-1445.

It follows that in the absence of an express ruling by the Court to the contrary, and without prejudice to any national provisions concerning limitation periods (applicable however within the limits to be specified below, in point 24 et seq.), operators who, before the date of the *Lomas* judgment, had initiated proceedings or lodged an equivalent complaint seeking the reimbursement of the clawback unduly paid may, within the context of their legal action, rely on the invalidity of Article 4(1) and (2) of Regulation No 1633/84 as from the date those provisions came into force.

23. I now turn to the sixth and final question in which, as indicated, the national court seeks to establish the applicable provisions for quantifying the amount of reimbursement of the sums which the plaintiffs claim they paid unduly by way of clawback.

In particular, it first asks what substantive rules of Community law (if any) apply in this case and, secondly, whether it may, or must, take account of the following factors as a matter of national law: (a) the general principle that the plaintiff has the burden of proving the undue payment; (b) the fact that the payments were made under a mistake of law and not under protest; (c) the fact that repayment of the sums unduly paid may not give rise to unjust enrichment of the plaintiff; (d) the application of the rules on limitation periods in force.

24. Let me first point out that, according to settled case-law, in the absence of Community rules it is for the national authorities to ensure the repayment of the sums unduly charged on the basis of Community regulations which are subsequently declared invalid, and also to settle all ancillary questions in accordance with the national law applicable. The application of national law is not, however, subject to no limits: the procedural formalities required must not have the effect of making it virtually impossible to exercise rights conferred by Community law, and must not be less favourable than those prescribed for similar claims under domestic law. [19]

In the present case, Regulation No 1922/92 contains a number of provisions which must necessarily be applied by the national court: those determining the persons entitled to bring an action for repayment

19 — See Case 130/79 *Express Dairy Foods* v *Intervention Board for Agricultural Produce* [1980] ECR 1887, paragraphs 12 and 14; more recently, *Roquette Frères* (cited at footnote 18), paragraph 18. With regard to the burden of proof, see the *San Giorgio* judgment (cited at footnote 15), paragraph 14 (it should be noted that the proof at issue here is that of an undue payment, not the proof discussed in points 14 and 15 relating specifically to the amount of the premium); as regards unjust enrichment, see also Case 811/79 *Amministrazione delle Finanze dello Stato* v *Ariete* [1980] ECR 2545, paragraph 13; as regards limitation periods, see Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16.

(operators who initiated appropriate legal proceedings before 10 March 1992) and establishing the amount claimed and the information to be communicated before 30 November 1992 in order to quantify that amount (Article 2(1) and (2)).

25. For cases not governed by the regulation, however, Article 2 expressly refers to the time-limits and procedures laid down in the relevant national law.

Accordingly, not only the case-law of the Court but also the actual wording of the regulation leave it to national law, subject of course to the limits set out above, to lay down the rules on bringing actions before the national courts, in particular in relation to the burden of proof, findings of unjust enrichment and the time-limits for bringing those actions.

26. As to the last point, however, the argument put forward by the Commission and the United Kingdom that the three-year limitation period contained in Article 2(2) of Council Regulation No 1430/79 on the repayment of import or export duties [20] applies to this case by analogy instead of the relevant provisions of national law must be dismissed forthwith.

Given the express reservation contained in the regulation, I do not see why it should be necessary to adopt an analogous interpretation of a regulation adopted to regulate comparable but not identical situations when, on the other hand, the application of national law subject to the limits set out in the Court's case-law can ensure adequate protection of the rights conferred on individuals by Community law.

27. The position is different, however, with regard to factor (b), namely the possibility of taking into account a principle of national law which allows for the exclusion from the class of persons entitled to bring an action of operators who have not challenged the payments before the national authority.

As I have said, Regulation No 1922/92 expressly states which persons are entitled to make a claim for reimbursement without making such a claim subject to further conditions as to their conduct at the time of payment. It is self evident, therefore, that no such principle can apply in the present case.

20 — Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1).

28. In the light of the foregoing, I therefore propose that the Court reply as follows to the questions raised by the High Court of Justice, Queen's Bench Division:

(1) Consideration of Article 4 of Commission Regulation (EEC) No 1633/84 of 8 June 1984, as amended by Article 1 and Article 2 of Commission Regulation (EEC) No 1922/92 of 13 July 1992, has disclosed no factor of such a kind as to affect the validity of those provisions.

(2) Article 4 of Commission Regulation (EEC) No 1633/84 of 8 June 1984, as amended by Article 1 and Article 2(2) of Commission Regulation (EEC) No 1922/92 of 13 July 1992, must be interpreted as meaning that it is for the national authorities, in accordance with national legislation and procedure, to determine whether the proofs produced by operators make it possible to ascertain with sufficient precision the amount of the premium actually granted.

(3) Paragraph 30 of the Court's judgment in Joined Cases C-38/90 and C-151/90 *Lomas* must be interpreted as meaning that, without prejudice to the national rules applicable to limitation periods, operators or those entitled through them who prior to 10 March 1992 initiated proceedings or made an equivalent complaint under the applicable national law may rely on the invalidity of Article 4(1) and (2) of Commission Regulation (EEC) No 1633/84 of 8 June 1984, in its original version, as from the entry into force of those provisions.

(4) For cases not governed by Commission Regulation (EEC) No 1922/92 of 13 July 1992 and in the absence of Community rules, it is for the national authorities, in particular the national courts, to ensure the repayment of sums unduly charged by virtue of Article 4(1) and (2) of Commission Regulation (EEC) No 1633/84 of 8 June 1984, which has been declared invalid by the Court, and also to apply the applicable national law to settle questions concerning burden of proof, unjust enrichment and limitation periods. National law must not, however, be applied in such a way as to subject those actions to less favourable regulation than similar claims under domestic law or in such a way as to make it too difficult or virtually impossible for individuals to exercise the rights conferred on them by Community law.