OPINION OF ADVOCATE GENERAL LÉGER

delivered on 10 December 1998 *

1. A particular feature of the common organisation of the market in fruit and vegetables established by Council Regulation (EEC) No 1035/72 of 18 May 1972 [1] is that countervailing charges may be levied periodically in order to prevent disturbances which may be caused by imports from third countries at prices that are considered to be abnormally low. A charge is levied where import prices are lower by a specific amount than a reference price which is fixed annually.

2. In the present case a German importer of sour cherries from Romania, Mr Luksch (hereinafter 'the plaintiff in the main proceedings'), refused to pay a countervailing charge claimed by the German customs authorities on the ground that the low price of the imported goods was not the result of a pricing policy on the part of the third country concerned but was due to the deterioration of the goods owing to defective storage prior to delivery.

3. Seeking to establish whether this legal argument is correct, the Finanzgericht München (Finance Court Munich) has asked the Court for an interpretation of the relevant Community rules in order in particular to define their scope.

Law

4. On 17 June 1994, on the basis of Article 2 of Regulation No 1035/72, as amended by Regulation (EC) No 3669/93, [2] the Commission adopted Regulation (EC) No 1395/94 establishing a minimum import price for sour cherries. [3]

5. The first recital in the preamble to Regulation No 1395/94 states that the regulation is designed to remedy the serious disturbances affecting the Community market as a result of the marketing over a short period at abnormally low prices of products falling within CN code 0809 20 20 and CN code 0809 20 60 (sour cherries) coming from third countries. In order to do this Regulation No 1395/94 lays down measures to prevent low-price imports, such as the adoption of a minimum

* Original language: French.

1 — OJ, English Special Edition 1972 (II), page 437.

2 — Council Regulation of 22 December 1993 amending Regulations (EEC) No 2328/91, (EEC) No 866/90, (EEC) No 1360/78, (EEC) No 1035/72 and (EEC) No 449/69 with a view to expediting the adjustment of production, processing and marketing structures as part of the reform of the common agricultural policy (OJ 1993 L 328, p. 26).

3 — OJ 1994 L 152, p. 31.

import price and the introduction of countervailing charges for products which do not comply with that price. [4]

6. Article 1 of Regulation No 1395/94 thus provides that:

'1. The minimum price to be observed for imports into the Community of sour cherries shall be ECU 40 per 100 kilograms net for the product falling within CN code 0809 20 20 and ECU 36 per 100 kilograms net for the product falling within CN code 0809 20 60.

2. If the import price is lower than the minimum price referred to in paragraph 1, a countervailing charge equal to the difference between the two prices shall be levied.'

7. Article 3(2) of Council Regulation (EEC) No 2707/72 of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables [5] provides moreover that: 'Such measures may only be taken in so far, and for as long, as they are strictly necessary.' The fifth recital in the preamble to that regulation states in this connection that 'the measures referred to above should be in keeping with circumstances so that they have none but the desired effect'.

8. As amended by Commission Regulation (EEC) No 2551/93 of 10 August 1993 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, [6] the Combined Nomenclature (hereinafter 'the CN') states that sour cherries are to be classified under subheading 0809 20 20 where they are imported into the Community between 1 May and 15 July and under subheading 0809 20 60 where they are imported between 16 July and 30 April.

9. Note 1 to Chapter 8 of the CN, entitled 'Edible fruit and nuts; peel of citrus fruits or melons', states that '[t]his chapter does not cover inedible nuts or fruits'.

Facts and procedure

10. On 4 July 1994 the plaintiff in the main proceedings requested the Hauptzollamt Weiden (the competent customs authority) to release for free circulation three consignments of sour cherries, weighing 42 286 kg in total,

4 — Second recital in the preamble.

5 — OJ, English Special Edition, 1972 (28-30.12), p. 3.

6 — OJ 1993 L 241, p. 1.

coming from Romania, under CN code 0809 20 20. The import price given was DEM 65 per 100 kg. Since that price was slightly below the minimum price of ECU 40 per 100 kg laid down in Article 1(1) of Regulation No 1395/94 the Hauptzollamt levied a countervailing charge of DEM 2 414.80.

11. When the fruit was delivered it was apparent that it was already in an advanced state of decay, which an expert attributed to storage at too high a temperature. The plaintiff in the main proceedings was therefore obliged to sell the goods to a distillery at a price of DEM 10 per 100 kg instead of the DEM 105 per 100 kg which he had anticipated he would receive. So far as he was concerned the transaction resulted in a reduction in profits of some 75%.

12. By notice of amendment of 8 February 1995, the Hauptzollamt increased the countervailing charge to DEM 34 726.86, and subsequently to DEM 40 124.02 following the objection lodged against that notice.

13. The plaintiff in the main proceedings brought an action contesting that decision before the Finanzgericht München, arguing essentially that the minimum price rules were not applicable to spoiled goods. The Hauptzollamt for its part took the view that, in view of the strict requirements of Community law, it was not possible to ignore Article 1 of Regulation No 1395/94 and waive the countervailing charge. In its opinion even spoiled fruit should be classified under subheading 0809 20 20.

14. The national court points out that the countervailing charge introduced by Regulation No 1395/94 does not apply in situations such as those at issue in the main proceedings where there is no risk of disturbance caused by imports from third countries at abnormally low prices. It also considers that the spoiled sour cherries delivered to the plaintiff in the main proceedings do not fall within subheading 0809 20 20 or 0809 20 60 since the fruit was not fit for human consumption.

15. However, being unsure how to interpret the relevant Community law — necessary in order to resolve the case before it — it has referred the following questions to the Court for a preliminary ruling:

'1. Is Article 1 of Commission Regulation No 1395/94 of 17 June 1994 to be interpreted as meaning that a countervailing charge is to be levied on sour cherries which have deteriorated through the formation of mould and incipient

fermentation to such an extent that the only economic use to which they can be put is distillation?

If Question 1 is answered in the affirmative:

2. Is Annex I to Regulation No 2658/87, in the version in Regulation No 2551/93 of 10 August 1993, and in particular Note 1 to Chapter 8 of the Combined Nomenclature, to be interpreted as meaning that the goods described in Question 1 are to be classified under subheading 0809 20 20 or 0809 20 60?'

16. By its first question the national court seeks to ascertain whether Article 1 of Regulation No 1395/94 applies to sour cherries with the characteristics of those in this particular case. By its second question it asks the Court to rule whether sour cherries which are in a state of decay should still be regarded as edible fruit within the meaning of Note 1 to Chapter 8 of the CN. Since Article 1 of regulation No 1395/94 applies, according to Note 1 to Chapter 8 of the CN, only to 'edible' fruit, I propose to answer the second question first.

The answer to the questions

Question 2

17. Should sour cherries which, when they are delivered, are spoiled to such an extent that they are unfit for human consumption without further processing be regarded as edible fruit within the meaning of Note 1 to Chapter 8 of the CN or do they, because of their state, come under another chapter of the CN and fall within a subheading other than subheading 0809 20 20 or 0809 20 60, with the result that the regulation in issue is not applicable to them?

18. In order to interpret a heading of the CN it is necessary to examine its content and purpose.

19. The Court has consistently held that 'in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN ... There are also explanatory notes drawn up, as regards the CN, by the European Commission and, as regards the Harmonised Commodity Description and Coding System, by

the Customs Cooperation Council, which may be an important aid to the interpretation of the scope of the various tariff headings but which do not have legally binding force'. [7]

20. Subheadings 0809 20 20 and 0809 20 60 appear in Chapter 8 of the CN, entitled 'Edible fruit and nuts; peel of citrus fruits or melons', indicating that inedible fruit may not be classified under that chapter, a point which is expressly confirmed in Note 1 thereto.

21. In order to assess whether the fruit is "edible" it is therefore necessary to ensure that it is objectively fit for human consumption. On this point there are two conflicting views.

22. According to the national court and the plaintiff in the main proceedings, fruit is inedible when, at the time of assessment, owing to the particular state it is in (for example advanced decay) it is unfit for direct human consumption in that state.

23. The Commission for its part considers that fruit should be regarded as edible where by its nature it is generally fit for human consumption, whatever its quality at the time it is assessed (for example, fruit which is not yet ripe such as green bananas) or if it has already lost its quality (for example, fruit which is rotten). In other words, an assessment of whether fruit is edible must be made according to its general fitness for human consumption, irrespective of whether it is directly fit for human consumption. In this connection it is sufficient that the product can be consumed after processing, even if before such processing it is unappetising and in some way harmful to health. The Commission refers to the explanatory notes to both the CN of the European Communities [8] and the Harmonised Commodity Description and Coding System of the Customs Cooperation Council. [9]

24. The general remarks relating to Chapter 8 of the explanatory notes to the CN of the European Communities state that '[t]his chapter includes fruit for distillation purposes in the form of a coarse pulp, even if natural fermentation has commenced'.

25. That description exactly fits the sour cherries delivered to the plaintiff in the main proceedings.

7 — Case C-270/96 *Laboratoires Sarget* [1998] ECR I-1121, paragraph 16. See also Case C-201/96 *LTM* [1997] ECR I-6147, paragraph 17.

8 — OJ 1994 C 342, p. 1.

9 — Second Edition 1996, Volume I.

26. Furthermore, the explanatory notes to the Harmonised Commodity Description and Coding System relating to Chapter 8 confirm the Commission's interpretation that Chapter 8 still covers fruit which, although not directly fit for immediate human consumption, could become so after processing.

27. Thus, the general remarks in those explanatory notes state that: 'This Chapter covers fruit ... generally intended for human consumption (whether as presented or after processing). [It] may be fresh ... frozen ... or dried ... *provided* they are unsuitable for immediate consumption in that state, [it] may be provisionally preserved (eg, by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions).'

28. Similarly, those notes also state that Chapter 8 covers cola nuts used both as a masticatory and as a base in the manufacture of beverages; dessert apples and pears for making beverages (eg, cider or perry) or for industrial purposes (preparation of apple paste, jam or jelly, extraction of pectin ...).

29. Lastly, the explanatory notes give examples of fruit and nuts which by their nature are generally unfit for human consumption and which are therefore excluded from Chapter 8. These include copra, the dried and shredded flesh of coconut used for the expression of coconut oil and unsuitable for human consumption. They also include 'orange peas' or 'orangettes', which are immature inedible oranges that have fallen soon after the tree has blossomed, and are gathered dry with a view, in particular, to extraction of their essential oil (petit-grain).

30. It is apparent from the foregoing that Chapter 8 should be interpreted as excluding only fruit which by its nature and irrespective of its state is totally unfit for human consumption, and as including all fruit which, even if only in certain states, is fit for human consumption.

31. Since after processing (distillation) the sour cherries in issue become fit for human consumption, it must be concluded that they come under Chapter 8 of the CN.

32. Furthermore, in view of the facts adduced, it seems that they were imported and that the customs declaration of release for free circulation was accepted between 1 May and 15 July. Hence they should be classified under subheading 0809 20 20.

33. I would therefore propose that the Court answer this question as follows: Annex I to Regulation (EEC) No 2658/87 of 23 July 1987,[10] as amended by Regulation No 2551/93, in particular Note 1 to Chapter 8 of the CN, should be interpreted as meaning that sour cherries which have deteriorated through the formation of mould and incipient fermentation to such an extent that the only economic use to which they can be put is distillation should be regarded as edible fruit within the meaning of Chapter 8 of the CN and classified under subheading 0809 20 20 or 0809 20 60, depending on the date on which the customs declaration releasing them for free circulation was accepted.

Question 1

34. By this question the national court seeks to ascertain whether Article 1 of Regulation No 1395/94 should be interpreted as meaning that the countervailing charge must be levied in circumstances such as those pertaining in the main proceedings.

35. I would point out that Article 1 of Regulation No 1395/94 provides that the minimum import price laid down in Article 1(1) and the countervailing charge provided for in Article 1(2) which must be levied if the import price is lower than that minimum price, applies to all sour cherries falling within subheadings 0809 20 20 and 0809 20 60.

36. Two cumulative and objective conditions are therefore laid down by Regulation No 1395/94 in order for the protective measure introduced by that regulation to be triggered: first, it is only imports of sour cherries falling within subheadings 0809 20 20 and 0809 20 60 which are concerned; secondly, the countervailing charge is to be levied only if the import price for the cherries is lower than the minimum price set.

37. From the facts set out in the order for reference it seems that both conditions are met. However, it is for the national court to make this assessment.

38. The Commission, the national court and the plaintiff in the main proceedings consider that a third condition, which is not expressly laid down in Article 1 of Regulation No 1395/94 but which results directly from the legal basis on which that regulation was adopted, is required in order to trigger the protective measure provided for in that regulation. In their view the countervailing charge can only be levied where it is strictly needed in order to achieve the purpose pursued by that regulation or, in other words, if it complies with the principle of proportionality.

10 — OJ 1987 L 256, p. 1.

39. The plaintiff in the main proceedings relies in this connection on the judgment of the Court in Case C-81/92 *Dinter*. [11]

40. That case involved the interpretation of certain provisions of Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries, [12] and more specifically determination of the method of calculating the import price for such fruit when imported from third countries if the Community importer has bought the goods from an intermediary who is not resident in the country of origin of the imported goods. This measure, adopted on the basis of Regulation No 1035/72 in order to remedy the serious disturbance affecting the Community market owing to the marketing at abnormally low prices of Morello cherries imported from third countries, lays down a minimum import price for Morello cherries within the Community and provides for a countervailing charge to be levied on goods which do not comply with that minimum price. The relevant provisions in the *Dinter* case, cited above, are therefore similar to those in the present case.

41. The competent German Customs authority required Hans Dinter (the plaintiff company in the main proceedings) to pay a countervailing charge on the ground that the purchase price of frozen Morello cherries originating in Yugoslavia paid by the Austrian intermediary was lower than the minimum price fixed by the Community regulation, whereas it had been shown that both the price paid by Hans Dinter to the intermediary and the resale price charged by Hans Dinter exceeded the minimum import price.

42. Referring to the objective of the Community regulations in issue, the Court ruled that '[since] those protective measures may only be taken "to such extent and for such length of time as is strictly necessary" ... [i]t follows that when the purpose pursued by the protective measures is achieved, the levying of a countervailing charge is unlawful'. [13]

43. The line of reasoning followed by the Court in that judgment can be transposed perfectly to the present case in view of the similarity of the objectives pursued by the Community laws in question.

44. Indeed, it has been seen that by adopting appropriate protective measures such as the introduction of a minimum import price and the levying of countervailing charges on products which do not comply with that price, Regulation No 1395/94 is also designed to remedy serious disturbances likely to jeopardise the objectives of Article 39 of the EC Treaty due to the marketing at abnormally

11 — [1993] ECR I-4601.

12 — OJ 1985 L 156, p. 13.

13 — *Dinter* judgment, cited above, paragraph 19.

low prices of sour cherries from third countries falling within codes CN 0809 20 20 and CN 0809 20 60.

45. This objective is strictly in accordance with that assigned by the Community legislature to Regulation No 1035/72, and in particular to Article 29(2) thereof, the legal basis for Regulation No 1395/94. Article 29(2) of Regulation No 1035/72 authorises the Commission to adopt appropriate measures in trade with third countries if the market experiences or is threatened with serious disturbances which may endanger the objectives set out in Article 39 of the Treaty.

46. Action by the Commission is also subject to compliance with the principle of proportionality. [14]

47. It is well known that this principle, which, as the Court has consistently held, forms an integral part of the general principles of Community law, requires that in order to be lawful measures which impose financial charges on traders must be appropriate and necessary for the attainment of the objectives legitimately pursued by the regulations concerned; where there is a choice between several appropriate measures it is necessary to select the measure which is least restrictive, and the charges imposed must not be excessive in relation to the objective being pursued. [15]

48. In short, the protective measures provided for in Regulation No 1395/94 are valid only where the abnormally low price being charged is the result of a policy on the part of third countries which is causing serious disturbances on the Community market. In other words, under Article 1 of Regulation No 1395/94 the only measures which may be adopted are those designed to prevent sour cherries being placed on the Community market at low prices for which third countries are responsible. Furthermore, when implementing those measures, even if those conditions are met, it is necessary to ensure that the principle of proportionality is observed.

49. In this particular case it is a matter of determining whether the importation, at a price slightly below the minimum price, of sour cherries which have deteriorated to such an extent that the only economic use to which they can be put is distillation, after being sold to the distilleries at a price lower than the purchase price, presents a risk of disturbance to the market in sour cherries which can be offset by applying the protective measures provided for in Article 1 of Regulation No 1395/94. I should mention that the reference

14 — See in this connection the fifth recital in the preamble to Regulation No 2707/72 and Article 3(2) of that regulation.

15 — See for example Case C-352/96 *Italy* v *Council* [1998] ECR I-6937.

market is not limited to the market in fresh fruit or fruit industrially processed into foodstuffs (jam, fruit juice, crystallised fruit, etc), but includes the market in fruit processed in distilleries. In other words, the market in sour cherries processed in distilleries is also protected by that regulation against the risk of disturbances caused by the importation of sour cherries from third countries at abnormally low prices.

50. It should be pointed out that the sour cherries in issue might possibly be in competition with the market in fruit intended for distillation rather than the market in fresh fruit.

51. It is therefore necessary to ascertain first of all whether the price of the fruit imported by the plaintiff in the main proceedings is lower than the minimum price and, if so, whether the Community reference market has been disturbed or risks being disturbed as a result.

52. Secondly, it is necessary also to determine the reasons why such a price was charged and, in particular, whether that low price is due to circumstances beyond the control of the exporting third country and the plaintiff in the main proceedings.

53. It must be said that the documents before the Court do not indicate whether the Community market is experiencing or is likely to experience any disturbance as a result of this transaction.

54. As regards the second legal requirement, from the details provided by the national court it seems that the particularly low price at which the importer resold the sour cherries is the result of circumstances totally beyond his control and unrelated to any pricing policy on the part of the exporting third country. This being so, an essential factor for the application of the measure provided for in Article 1 of Regulation No 1395/94 is missing. However, it is for the national court to assess the various factors.

55. It is apparent from the foregoing that levying the countervailing charge in circumstances such as those in the main proceedings would not enable the objective of protection pursued by the protective measures to be achieved. It would therefore be unlawful.

56. In consequence, the answer to the first question should be that in the circumstances of this case Article 1 of Regulation No 1395/94 does not apply.

Conclusion

57. In the light of the foregoing, I suggest that the questions referred by the Finanzgericht München should be answered as follows:

(1) Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EEC) No 2551/93 of 10 August 1993, in particular Note 1 to Chapter 8 of the Combined Nomenclature, should be interpreted as meaning that sour cherries which have deteriorated through the formation of mould and incipient fermentation to such an extent that the only economic use to which they can be put is distillation should be regarded as edible fruit within the meaning of Chapter 8 of the Combined Nomenclature and, in particular, should be classified under subheading 0809 20 20 or 0809 20 60, depending on the date on which the customs declaration releasing the fruit for free circulation is accepted.

(2) Article 1 of Commission Regulation (EC) No 1395/94 of 17 June 1994 establishing a minimum import price for sour cherries should be interpreted as meaning that the countervailing charge should not be levied on sour cherries released for free circulation in the Community at an abnormally low price where that price is totally beyond the control of the importer and where it is not the result of a pricing policy for which the exporting third country is responsible.