Case 154/84

Fleischwaren- und Konserven-Fabrik (FKF) Schulz und Berndt GmbH
v
Hauptzollamt Berlin-Süd

(reference for a preliminary ruling
from the Finanzgericht Berlin)

'Beef intended for the manufacture of meat preserves —
Exemption from levy'

Summary

Agriculture — Common organization of markets — Beef — Frozen meat intended for processing — Suspension of the levy on importation — Proof of processing — Detailed rules — Regulation No 3584/81 — Temporal application

(Commission Regulation No 1136/79, Art. 2 (3) and (4), as amended by Regulation No 3584/81)

Commission Regulation No 3584/81, amending Regulation No 1136/79 laying down detailed rules for the application of special import arrangements for certain types of frozen beef intended for processing, is also applicable to operations carried out before its entry into force, provided however that proof of the quantity of meat actually processed was furnished by the importers concerned within the period prescribed by the first paragraph of Article 2 (3) of Regulation No 1136/79.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 2 July 1985 *

Mr President,
Members of the Court,

I. Background

For a short survey of the relevant provisions, facts and questions in the order for reference, I propose in this case as before to take as a basis the Report for the Hearing. However, I have added to the facts outlined in the Report for the Hearing certain information which emerged during the written and oral procedures and which

* Translated from the Dutch.

in my view is crucial for the assessment of the case.

Pursuant to Article 14 (1) of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187), as amended by Council Regulation (EEC) No 425/77 of 14 February 1977 (Official Journal 1977, L 61, p. 1), frozen meat intended for processing, which does not contain characteristic components other than beef and jelly, qualifies for the total suspension of the levy.

The detailed rules for the application of those special import arrangements are set out, as regards the relevant period, in Commission Regulation (EEC) No 1136/79 of 8 June 1979 (Official Journal 1979, L 141, p. 10).

In order to ensure that the meat is used for the purpose envisaged by the Community legislation, a security must be provided pursuant to Article 2 (1) (b). Article 2 (3) provides that the security is not to be released unless, within seven months following the month of importation, proof is furnished that all or part of the imported frozen meat has been processed within three months following the month of importation.

Article 2 (4) reads as follows:

'In the case of frozen meat imported under the arrangements referred to in paragraph 1 (a) (aa) [namely meat intended for the preparation of preserves], the proof referred to in paragraph 3 shall not be regarded as furnished unless the quantity of preserves manufactured from such meat is at least equivalent to the quantity imported.

The coefficients for determining the quantity of frozen boned meat contained in a given quantity of preserves are set out in the Annex hereto'.

The coefficients set out in the annex to Regulation No 1136/79 are as follows:

Product	Coefficient
I. Preserved food, other than homogenized, containing the following percentages of meat of bovine animals:	
(1) 80% or more of meat, excluding offal and fat	1.50
(2) 60% or more but less than 80% of meat, excluding offal and fat	1.10
(3) 40% or more but less than 60% of meat, excluding offal and fat	0.90
(4) 20% or more but less than 40% of meat, excluding offal and fat	0.30
II. The coefficient applicable in respect of homogenized preserves shall correspond to the quantity, expressed in kilograms of boned frozen meat, used in the manufacture of one kilogram of preserves.	

It is clear from a letter dated 17 October 1980 from the German Federal Ministry for Food to the Commission's Directorate-General for Agriculture, which is annexed to the Commission's written observations, that the Commission has been aware at least since the summer of 1980 that the contested coefficient of 0.30 for certain types of beef preserves indicated in Category I.4 was absolutely inadequate as regards the quantity of meat which was in fact necessary for the production of such

preserves. According to certain statements made at the hearing by the plaintiff in the main proceedings, which have not been challenged but have not been confirmed either, it is clearly apparent from the production statistics recorded since 1953 and from tests carried out on the products since 1962/63 that the coefficient for a considerable quantity of preserves in this category (in 1953, 37 000 tonnes; in 1964, 57 000 tonnes; in 1979, 52 000 tonnes; and in 1980, 45 000 tonnes, constituting over one-half of the category in question) should have been 0.50 or more. [1] In the case of the products with the largest share of the market, the coefficient, according to the German goods inspection carried out in 1980, should have been as high as 0.60, as is also suggested by the Commission in the working paper (VI/4443/(81) which it has submitted. According to that working paper, the Commission had in mind in particular the product known as 'goulash'.

However, by Regulation (EEC) No 3584/81 of 14 December 1981 (Official Journal 1981, L 359, p. 16), the Commission opted for a different solution and added to Article 2 (4) of Regulation No 1136/79 the following subparagraph:

'If the quantity of meat required to make a product of the type indicated at I.4 of the Annex differs markedly from the quantity given by application of the coefficient 0.30 specified for this type, the competent authority may under the system of administrative supervision accept specific proof of the quantity of frozen meat required to manufacture the product, in cases where this is requested by the processing concern appearing on the import licence.'

1 — It may be assumed, as was also emphasized by the Commission at the end of the hearing, that the said quantities apparently (on account of the limited imports) also included beef originating in the Community. However, the plaintiff in the main proceeding has correctly pointed out that there are grounds for assuming that the relative significance of preserves with a high meat content for cheaper imported beef was somewhat greater than for processed meat originating in the Community.

Fleischwaren- und Konserven-Fabrik (FKF) Schulz und Berndt GmbH (hereinafter referred to as 'FKF') produces preserves with a 20 to 40% beef content. Between 6 September 1979 and 28 April 1980 FKF imported into the Federal Republic of Germany consignments of frozen beef from Argentina. Since those consignments were intended for the preparation of preserves, no levy was charged.

However, the competent customs authorities repeatedly found that, when the coefficient of 0.30 fixed in Regulation No 1136/79 was applied to preserves with a 20 to 40% meat content, the quantity of meat in respect of which proof of processing was furnished was smaller than the quantity imported. The customs authorities therefore demanded payment of the levy from FKF for the quantity of meat in respect of which no proof of processing had been furnished.

FKF contested that claim on the ground that the quantity of meat which it had actually used for the preparation of preserves corresponded to a coefficient of 0.45 in relation to the total weight of the finished product, and not 0.30 as provided for in the annex to Regulation No 1136/79.

The dispute was brought before the Finanzgericht [Finance Court], Berlin, which, by judgment of 22 December 1983, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(a) Is Commission Regulation (EEC) No 3584/81 of 14 December 1981 (Official Journal 1981, L 359, p. 16) a procedural provision which should be applied retroactively — that is, applied also to circumstances which arose before its adoption?

If not:

(b) Is Commission Regulation (EEC) No 1136/79 of 8 June 1979 (Official Journal 1979, L 141, p. 10) to be interpreted as meaning that proof of

processing is to be furnished exclusively according to the so-called coefficient provision, even when the result is demonstrably incorrect?

(c) Do the percentages of beef by weight set out in the annex to Regulation (EEC) No 1136/79 refer only to the beef still contained in the preserves, or do they also include the juice (jelly) exuded by the meat in processing?

(d) Is Regulation (EEC) No 1136/79 invalid on the ground that it does not deal with the questions raised in paragraphs (b) and (c) above, and is the coefficient provision contrary to the principle of equality in that, for example, a coefficient of 0.30 is applied in the case of a beef content of 39% by weight, whereas for a beef content of 40% by weight a coefficient of 0.90 (three times as much) is applied?'

II. Answer to the questions submitted

II.1. *Preliminary remarks*

In my assessment of this case I should like to begin by stating, on the basis of the preceding survey of the relevant facts, that it is sufficiently clear in my view that the coefficient of 0.30 fixed in Regulation No 1136/79 for Category I.4 was already at the time of the adoption of the regulation considerably lower as regards products within that category and with a substantial share of the market (presumably over 50%) than what may be considered appropriate under the basic rule embodied in Article 2 (3) of the regulation. That rule is as follows:

'Except in case of *force majeure*, the security referred to in paragraph 1 (b) shall not be released in whole or in part unless, within seven months following the month of importation, proof is furnished to the satisfaction of the competent authorities of the importing Member State that all or part of the imported frozen meat has been processed, in the establishment specified on the import licence, within three months following the month of importation.'

That basic rule thus lays emphasis chiefly on proof that all or part of the imported frozen meat has been processed into the preserves concerned.

Secondly, I note that, according to the statements made at the hearing by FKF and by the Commission, which are consistent in this respect, the serious error concerning the underlying facts on which the contested coefficient is based did not come to light until 1980. The reason for the delay in the emergence of the true facts was that the competent authorities of the Member States (particularly the German authorities) were satisfied until approximately the middle of 1979 with proof that the imported frozen meat had actually been processed, without applying the coefficient provision in that regard. In this particular case, that is also apparent from the third paragraph in the grounds of the order for reference.

Thirdly, the Commission explained at the end of its observations at the hearing that the supplementary evidential rule introduced for all products in the category in question by Regulation No 3584/81 was adopted in order to prevent any discrimination within that category. Although the Commission had previously stated in its observations that the contested coefficient provision was not contrary to the prohibition of discrimination laid down by Article 40 (3) of the EEC

Treaty, it thereby implicitly recognized in my view the discriminatory character of the original rule. Be that as it may, I consider that the rule is clearly discriminatory. Contrary to the first four recitals in the preamble to the regulation, it makes the importation free of levy and the processing of frozen beef falling within the regulation impossible as regards large quantities of beef which are actually used, in conformity with the preamble, for the preparation of preserves as indicated in the regulation. The Commission's discretion is not so extensive as to enable it thereby arbitrarily to place certain producers of preserves holding between them a substantial share of the market at a disadvantage in relation to other producers falling within the same category. In my view, this is a clear-cut case of severe discrimination, within the meaning of Article 40 (3) of the EEC Treaty, as a result of a serious error in the appraisal of the circumstances on which the coefficient provision at I.4 of the annex to Regulation No 1136/79 was based.

In that respect, I consider that the most obvious solution to the problem under consideration would be for the Court to declare, in reply to the Finanzgericht's fourth question, that the second sub-paragraph of Article 2 (4) of Regulation No 1136/79 is void in so far as it relates to Category I.4 in the annex to that regulation.

However, I consider that a less drastic solution is possible on the basis of the Finanzgericht's first question.

II.2. *Answer to the first question*

In its first question the Finanzgericht asks the Court, as stated earlier, whether 'Commission Regulation (EEC) No 3584/81 ... [is] a procedural provision which should be applied retroactively — that is, applied also to circumstances which arose before its adoption'.

As the Court may remember, the Commission itself answered that question in the affirmative at the end of the hearing in reply to a question from a Member of the Court, in so far as it considered that the regulation in question could have retroactive effect in cases in which proof within the meaning of Regulation No 3584/81 is furnished in accordance with Article 2 (3) of Regulation No 1136/79 within seven months following the month of importation.

As regards the question submitted by the national court in general terms (that is, without a temporal restriction of that kind), both parties relied on, and drew different conclusions from, the judgment of the Court of 12 November 1981 in Joined Cases 212 to 217/80 (*Amministrazione delle Finanze delle Stato* v *Salumi* [1981] ECR 2735). In paragraph 9 of that decision, the Court stated *inter alia* that 'procedural rules are generally held to apply to all proceedings pending at the time when they enter into force'. In her Opinion in that case Mrs Advocate General Rozès throws more light on those words in the following passage (p. 2755, second column, penultimate paragraph): 'According to a principle generally accepted in the law of the Member States, procedural laws apply immediately to all actions pending at the time of their entry into force, although they are not retroactive'. I would add that *a fortiori* a procedural rule of that kind applies by its very nature to all actions brought *after* its entry into force. Moreover, in all the Member States there is an indissoluble link between administrative decisions and the possibility of challenging them in a court of law. The entire case-law of the Court of Justice concerning the division of powers between the Court and the national judicial authorities is based on

that premise. Provided that proof of processing which is considered satisfactory by the plaintiff and — at the time at which it is presented — also by the competent authorities is furnished with the application for release of the security within the period prescribed by Article 2 (3) of Regulation No 1136/79, the additional possibility of furnishing proof can still be relied upon in my view in proceedings instituted before the competent court after the entry into force of Regulation No 3584/81.

For the sake of completeness, however, having regard to the wording of the first question submitted for a preliminary ruling and to the views expressed by the Commission and FKF concerning the nature of that additional possibility of furnishing proof, I wish to add the following remarks:

The Commission maintains that Article 2 of Regulation No 1136/79, as amended by Regulation No 3584/81, must be considered as a whole and that it contains chiefly substantive provisions, namely a list of requirements which must be fulfilled by an undertaking in order to qualify for suspension of the import levy. The Commission does not deny that, in so far as they relate to proof of compliance with those requirements, Article 2 (3) and (4) considered in isolation are concerned with the procedure to be followed under the special import arrangements. However, it maintains that those provisions are so closely connected, in terms of their content, with the substantive provisions that it is legally impossible to apply the amendment inserted into Article 2 (4) by Regulation No 3584/81 to situations which arose before the entry into force of that regulation. The Commission draws an analogy with the state of affairs which the Court in the second sentence of paragraph 11 of its decision in the *Salumi* case described as follows: 'Replacing the relevant national provisions with Community provisions, [the regulation at issue] contains both procedural and substantive rules which form an indivisible whole and the individual provisions of which may not be considered in isolation, with regard to the time at which they take effect'.

Starting from the premise stated in the second sentence of paragraph 9 of that decision that substantive rules are 'interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them', the Court concluded in paragraphs 12 to 15 that the regulation at issue in that case did not have retroactive effect.

It is clear from the provisions of Regulation No 1697/79 (on the post-clearance recovery of import or export duties), referred to in the part of the said judgment setting out the facts and issues that the procedural and substantive rules of that regulation formed an indivisible whole. [2] In my view, however, that is not so in this case. Only the first two paragraphs of Article 2 of Regulation No 1136/79 contain rules which are clearly substantive, namely the basic requirements applicable to producers engaged in the importation and processing of meat. As regards paragraph (3) of Article 2 it may

2 — I would point out in that connection that this once again confirms the importance for legal practitioners of knowing the relevant facts to which the grounds of the judgment relate. My practice of now rehearsing the relevant facts *in extenso* in my Opinion stems from that consideration.

also be possible to argue that the duty to furnish proof which it lays down and the substantive provisions concerning the time-limit for processing form an indivisible whole.

The actual detailed rules on the furnishing of proof, which are at issue in this case, are set out separately in Article 2 (4), in which a further subparagraph was inserted by Article 1 of Regulation No 3584/81, as specified earlier. In particular, that supplementary evidential rule, with which the national court is exclusively concerned in its first question, must in my view definitely be regarded as a procedural provision which does not form an indivisible whole with the substantive rules, or at least no more so than is inevitably the case with regard to provisions concerning proof. Subject to the conditions mentioned earlier and further to the passage from the Opinion of Mrs Advocate General Rozès to which I referred earlier, I consider such a rule concerning proof to be directly applicable (not only to proceedings instituted subsequently but also) to all proceedings pending at the time of the regulation's entry into force, without there being any question of retroactive effect in that regard.

II.3. *Conclusion*

In the light of those considerations, I suggest that the Court should answer the Finanzgericht's first question as follows:

'Commission Regulation (EEC) No 3584/81 of 14 December 1981 (Official Journal 1981, L 359, p. 16) contains a procedural provision that must also be taken into account in legal proceedings instituted after 1 January 1982 concerning applications which were submitted earlier but were rejected wholly or in part by the competent administrative authorities for the release of a security pursuant to Article 2 (3) of Regulation (EEC) No 1136/79 of the Commission of 8 June 1979 (Official Journal 1979, L 141, p. 10), provided that the application for the release of the security was submitted within seven months following the month of importation together with all the supporting documents that were customarily supplied until that time for attesting that the imported frozen meat had been processed within three months following the month of importation. This answer also applies *mutatis mutandis* to claims made by the competent admininstrative authorities as in this case.'

If the Court is unable to endorse that approach, I suggest that, on the basis of the grounds set out in Section II, 1 of my Opinion (discrimination within the meaning of Article 40 (3) of the EEC Treaty), it should answer the Finanzgericht's fourth question in the following manner:

'The second subparagraph of Article 2 (4) of Regulation No 1136/79 is invalid in so far as it relates to Category I.4 in the annex to that regulation.'

In any event, I consider that there is no need for the Court to answer the Finanzgericht's second and third questions.