JUDGMENT OF THE COURT (Sixth Chamber)

13 December 2001 *

In Case C-317/99,

REFERENCE to the Court under Article 234 EC by the College van Beroep voor het bedrijfsleven (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Kloosterboer Rotterdam BV

and

Minister van Landbouw, Natuurbeheer en Visserij,

on the validity of Article 3(1) and (3) of Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC (OJ 1995 L 145, p. 47) and on the interpretation of that provision and of Articles 65 and 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann, R. Schintgen, V. Skouris (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Kloosterboer Rotterdam BV, by K. H. Meenhorst and A. P. Eeltink, belastingadviseurs,

— the Commission of the European Communities, by C. van der Hauwaert and R. Tricot, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kloosterboer Rotterdam BV and the Commission at the hearing on 22 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 2 May 2001,

gives the following

Judgment

1 By order of 21 July 1999, received at the Court on 26 August 1999, the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) referred to the Court for a preliminary ruling under Article 234 EC six questions on the validity of Article 3(1) and (3) of Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC (OJ 1995 L 145, p. 47) and on the interpretation of that provision and of Articles 65 and 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter 'the Customs Code').

2 Those questions have been raised in proceedings between Kloosterboer Rotterdam BV ('Kloosterboer'), a customs agent, and the Minister van Landbouw, Natuurbeheer en Visserij (the Netherlands Minister for Agriculture, Natural Resources and Fisheries, 'the Minister') concerning the post-clearance recovery of additional import duty ('additional duty') in respect of the importation of chicken breasts from Brazil.

Legislation

3 The Agreement on Agriculture in Annex 1A to the Agreement Establishing the World Trade Organisation ('the WTO') was approved on behalf of the Community by virtue of the first indent of Article 1(1) of Council Decision

94/800/EC (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). Article 5 of the Agreement on Agriculture provides as follows:

'1. Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below... if:

(a) ...

(b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the cif import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned.

...

5. The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

...'

4 Article 5 of Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organisation of the market in poultrymeat (OJ 1975 L 282, p. 77), as amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105, hereinafter 'Regulation No 2777/75') provides as follows:

'1. In order to prevent or counteract adverse effects on the market in the Community which may result from imports of certain products listed in Article 1, imports of one or more of such products at the rate of duty laid down in Article 10 shall be subject to payment of an additional import duty if the conditions set out in Article 5 of the Agreement on Agriculture... have been fulfilled unless the imports are unlikely to disturb the Community market, or where the effects would be disproportionate to the intended objective.

2. ...

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

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

4. The Commission shall adopt detailed rules for the application of this article in accordance with the procedure laid down in Article 17. Such detailed rules shall specify in particular:

(a) the products to which additional import duties shall be applied under the terms of Article 5 of the Agreement on Agriculture;

(b) the other criteria necessary to ensure application of paragraph 1 in accordance with Article 5 of that Agreement'.

5 For the purpose of implementing Article 5(4) of Regulation No 2777/75, the Commission adopted, *inter alia*, Regulation No 1484/95.

6 Under Article 1 of Regulation No 1484/95, the additional duty mentioned in Article 5(1) of Regulation No 2777/75 is applied to the products referred to in Annex I to Regulation No 1484/95 and originating in the countries listed therein. That Annex refers *inter alia* to 'boneless cuts of fowls of the species *gallus domesticus* [frozen]', corresponding to CN Code 0207 41 10 and originating in Brazil.

7 Article 2(1) of Regulation No 1484/95 provides that the representative prices referred to in the second subparagraph of Article 5(3) of Regulation No 2777/75 are to be determined at regular intervals taking into account in particular the prices on third country markets, free-at-Community-frontier offer prices and prices at the various stages of marketing in the Community for imported products.

8 Article 3 of Regulation No 1484/95 is worded as follows:

'1. At the request of the importer the additional duty may be established on the basis of the cif import price of the consignment in question, if this price is higher than the applicable representative price, referred to in Article 2(1).

The application of the cif import price of the consignment in question for establishing the additional duty is subject to the presentation by the interested party to the competent authorities of the importing Member State of at least the following proofs:

— the purchasing contract, or any other equivalent document,

— the insurance contract,

— the invoice,

— the certificate of origin (where applicable),

— the transport contract, and

— in the case of sea transport, the bill of lading.

2. ...

3. In the absence of the request referred to in paragraph 1, the import price of the consignment in question to be taken into consideration for imposing an additional duty shall be the representative price referred to in Article 2(1).'

9 Under subparagraph (c) of the second paragraph of Article 65 of the Customs Code, 'no amendment [of the customs declaration] shall be permitted where authorisation is requested after the customs authorities... have released the goods'.

10 Article 220(2)(b) of the Customs Code provides that subsequent entry in the accounts of a customs debt is not to occur where 'the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration'.

Background and the questions referred for a preliminary ruling

11 Between 15 November and 19 December 1995, Kloosterboer lodged three declarations on behalf of two of its principals concerning the import into the Netherlands of consignments of chicken breasts originating in Brazil. The cif import prices declared for the consignments at issue were respectively NLG 734.70 per 100 kg, NLG 728.20 per 100 kg and NLG 742 per 100 kg. At the material time, the trigger price for the products falling within CN Code 0207 41 10, expressed in NLG, amounted to NLG 714 per 100 Kg net.

12 The competent customs authorities initially took the view that no additional duty was payable in respect of those consignments and that it was not necessary to include a request under Article 3(1) of Regulation No 1484/95 with the import declarations. It is apparent from, *inter alia*, the second indent of paragraph 2.2 of the order for reference that the customs authorities sent Kloosterboer three 'definitive notices of settlement of the declaration' including, on the first, the statement 'No additional duty due', on the second, the statement 'Price check in connection with additional duty applicable. Price per kg above reference price. Invoice value checked against current price list', and, on the third, the statement 'Invoice value in order/Trigger price checked/Documents lodged forwarded'. Hence, the declarations at issue were accepted and the goods were released without any additional duty being claimed.

13 However, during a subsequent check, the inspector from the Tax Inspectorate of the Rotterdam Customs district formed the view that it was wrong not to have charged additional duty and that Kloosterboer should pay such duty, calculated on the basis of the representative price, in respect of each of the consignments at issue, since it had not asked for additional duty to be established on the basis of the cif import price of the consignments concerned. Thus, it sent Kloosterboer three notices of post-clearance recovery.

14 When Kloosterboer's objections to those notices were rejected, it brought proceedings against the Minister before the College van Beroep voor het bedrijfsleven.

15 Before that court, Kloosterboer argued primarily that Article 3 of Regulation No 1484/95 is invalid, since it conflicts with both Article 5 of the Agreement on Agriculture and Article 5 of Regulation No 2777/75, inasmuch as it provides that additional duty calculated on the basis of the reference price is always payable when the importer has not asked for the calculation to be made on the basis of the cif import price, even when that price is higher than the trigger price.

16 In the alternative, in the event of its principal argument not being accepted, Kloosterboer claimed, first, that Article 220(2)(b) of the Customs Code precluded post-clearance levying of additional duty in the case before the national court. Second, it proposed to make a request under Article 3(1) of Regulation No 1484/95 — possibly in the form of an application for a rebate or a refund of duty — maintaining that no time-limit is prescribed for making such a request.

17 The Minister replied, first, that the interpretation of Article 3 of Regulation No 1484/95 was in no way inconsistent with Article 5 of Regulation No 2777/75, second, that Article 65 of the Customs Code precluded an application being made under Article 3(1) of Regulation No 1484/95 after the goods had been released and, third, that Kloosterboer, in its capacity as an experienced customs agent, should have realised that the customs authorities had made a mistake when they failed to claim payment of additional duty, with the result that the conditions under which Article 220(2) of the Customs Code applies were not met.

18 It was in those circumstances that the College van Beroep voor het bedrijfsleven, taking the view that the action before it called for an interpretation of Community law, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Regulation (EC) No 1484/95 valid, in so far as it makes Article 5(3) of Regulation (EC) No 2777/75 — which provides that the additional import duty referred to in Article 5 of the Agreement on Agriculture is determined on the basis of the cif import price of the consignment in question — applicable in such a way that such determination can be made only if the importer so requests and in all other cases the import price of the consignment in question to be taken into consideration for the additional import duty is the representative price referred to in Article 2(1) of Regulation (EC) No 1484/95?

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

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

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

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

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

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

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

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

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

Do the provisions of Regulation (EC) No 1484/95, in conjunction with Article 65 of Regulation (EC) No 2913/92, mean that if no request was initially made under Article 3(1) of Regulation (EC) No 1484/95 because of reliance on the information given by the customs authorities, such a request, designed to prevent application of Article 3(3) of Regulation (EC) No 1484/95, may not be accepted after the goods have been released?

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

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

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

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

The first question

19 By its first question, the national court is essentially asking whether paragraphs 1 and 3 of Article 3 of Regulation No 1484/95 are valid, inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price laid down in Article 2(1) of that regulation and that the duty is established on the basis of the cif import price of the consignment concerned only if the importer so requests.

Observations submitted to the Court

20 Kloosterboer argues that the Commission acted *ultra vires* as regards the powers conferred on it by Regulation No 2777/75, since Article 3 of Regulation No 1484/95 introduces a mechanism for determining whether or not additional duty is payable which is clearly incompatible with that put in place by the Council in Regulation No 2777/75 and that set up by Article 5 of the Agreement on Agriculture.

21 The Commission points out that in Regulation No 2777/75 the Council conferred on it extensive powers to use its discretion and to take action and it claims that it has not acted *ultra vires* as regards those powers, inasmuch as the construction that it has given Article 5 of the Agreement on Agriculture in Regulation No 1484/95 is based on a reasonable interpretation of that provision, regard being had to the objective implicit in the additional duty, namely the prevention of fraud. In that regard, it argues that where importers declare a cif import price higher than the representative price and, *a fortiori*, where the cif import price declared is higher than the trigger price (itself considerably higher than the representative price), as is the case in the main proceedings, then clearly serious doubts must arise as to the accuracy of the price declared.

22 Regulation No 1484/95 thus provides a mechanism for detecting fraud, which involves requiring the importer to make a formal request for the additional duty to be established on the basis of the cif import price and to provide a number of supporting documents, by reference to which the declared cif import price is verified. According to the Commission, it was necessary and reasonable to provide further that, in the absence of such a request and the requisite documentary evidence, the products are deemed to have been imported at that market price, namely the representative price, and that, as a result, the additional duty is established on that basis.

Findings of the Court

23 First of all, it must be pointed out that Regulation No 3290/94 was adopted for the purpose of implementing the agreements concluded during the Uruguay Round, including the Agreement on Agriculture and makes the necessary adjustments to, *inter alia*, the common organisation of the market in the poultrymeat sector set up by Regulation No 2777/75. In that regard, the fourth recital in the preamble to Regulation No 3290/94 states that 'in order to maintain a minimum level of protection against the adverse effects on the market as a result of tarification, the Agreement [on Agriculture] permits the application of additional customs duties under precisely defined conditions but only to products subject to tarification' and that 'the corresponding provisions should accordingly be inserted into the basic regulations concerned'.

24 It is Article 5 of the Agreement on Agriculture which defines the conditions under which additional duties are to apply. First, it allows additional duty to be levied if the price at which imports of the products concerned may enter the customs territory of WTO members falls below a determined trigger price and, second, it provides for the cif import price of the consignment concerned to be taken into consideration for the determination of the duty.

25 The corresponding provision under Community law is Article 5 of Regulation No 2777/75, which was reformulated by Regulation No 3290/94. Paragraph 3 thereof provides that the import prices to be taken into consideration for imposing an additional duty are to be determined on the basis of the cif import prices of the consignment in question and specifies that cif import prices are to be checked to that end 'against the representative prices for the product on the world market or on the Community import market for the product'.

26 Article 5(4) of Regulation No 2777/75 makes the Commission responsible for adopting detailed rules for the application of the article, which must specify, in particular, the 'criteria necessary to ensure application of paragraph 1 in accordance with Article 5 of [the Agreement on Agriculture]'.

27 The Commission adopted Regulation No 1484/95 specifically to prescribe for the poultrymeat and egg sectors and for egg albumin detailed rules for the application, in accordance with Article 5 of the Agreement on Agriculture, of the arrangements put in place by Article 5 of Regulation No 2777/75.

28 According to settled case-law, the Commission is authorised to adopt, in particular with regard to agriculture, all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council (see *inter alia* Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR I-645, paragraph 37, and Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 36).

29 However, if the provisions of Regulation No 1484/95 are examined in the light of the basic legislation, it is apparent that in enacting Article 3(1) and (3) of that regulation, the Commission acted *ultra vires*, exceeding its implementing powers.

30 It is quite clear from the wording of the first paragraph of Article 5(3) of Regulation No 2777/75 that only the cif import price of the consignment may serve as a basis for determining any additional duty. In particular, it is appropriate to point out that no conditions or exceptions are attached to application of that rule. Moreover, the second paragraph of Article 5(3) of Regulation No 2777/75

provides just as unambiguously that the representative price for the product concerned is taken into account only for the purposes of checking the accuracy of the cif import price.

31 However, under paragraphs (1) and (3) of Article 3 of Regulation No 1484/95, the cif import price is taken into consideration in establishing the additional duty only on condition that the importer submits a formal request to that effect accompanied by certain supporting documents, and in all other cases the price taken into consideration must be the representative price, which is thus to be the general rule.

32 That finding is also borne out by the fourth recital in the preamble to Regulation No 1484/95, in which the Commission states that 'the importer may choose that the additional duty is calculated on a basis which is different from the representative price'.

33 However, as has already been pointed out in paragraph 30 above, Article 5(3) of Regulation No 2777/75 does not provide any exception to the rule that additional duty is established on the basis of the cif import price and includes a reference to the representative price solely for the purposes of checking the accuracy of the cif import price.

34 As regards the Commission's argument that Regulation No 1484/95 includes a procedural safeguard, the purpose of which is to ensure that any additional duty has been correctly calculated and levied, particularly in cases in which there is a real risk that the duty might be evaded, it must be made clear that, although Article 5(3) enables the accuracy of the cif import price to be checked by reference to the representative price, it in no way entitles the Commission to derogate from the rule laid down therein as to the basis upon which any additional duty is imposed.

35 It is clear from that analysis that paragraphs (1) and (3) of Article 3 of Regulation No 1484/95 conflict with Article 5(3) of Regulation No 2777/75.

36 Therefore, the answer to be given to the first question is that paragraphs (1) and (3) of Article 3 of Regulation No 1484/95 are invalid, inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price laid down in Article 2(1) of that regulation and that the duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests.

The other questions

37 In view of the answer to the first question, there is no need to reply to the other questions referred by the national court.

Costs

38 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the College van Beroep voor het bedrijfsleven by order of 21 July 1999, hereby rules:

Paragraphs (1) and (3) of Article 3 of Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EC, are invalid, inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price laid down in Article 2(1) of Regulation No 1484/95 and that the duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests.

Colneric Gulmann Schintgen

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 13 December 2001.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber