JUDGMENT OF THE COURT (Fourth Chamber)

16 July 2009 *

In Case C-56/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tallinna Halduskohus (Estonia), made by decision of 16 January 2008, received at the Court on 13 February 2008, in the proceedings

Pärlitigu OÜ

v

Maksu- ja Tolliameti Põhja maksu- ja tollikeskus,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis (Rapporteur) and J. Malenovský, Judges,

* Language of the case: Estonian.

Advocate General: V. Trstenjak,
Registrar: C. Strömholm, Administrator,

after considering the observations submitted on behalf of:

— Pärlitigu OÜ, by M. Maksing, advokaat,

— the Estonian Government, by L. Uibo, acting as Agent,

— the Council of the European Union, by T. Tobreluts and J.-P. Hix, acting as Agents, assisted by G. Berrisch, Rechtsanwalt,

— the Commission of the European Communities, by K. Saaremäel-Stoilov, H. van Vliet and A. Sipos, acting as Agents,

having regard to the written procedure and further to the hearing on 12 February 2009,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of subheadings 0511 91 10 and 0303 22 00 of the Combined Nomenclature which constitutes 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 (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1719/2005 of 27 October 2005 (OJ 2005 L 286, p. 1, 'the CN'), and the validity of Article 1(5) of Council Regulation (EC) No 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway (OJ 2006 L 15, p. 1).

2 The reference has been made in the course of proceedings between Maksu- ja Tolliameti Põhja maksu- ja tollikeskus ('the PMTK'), the Estonian tax and customs office, and Pärlitigu OÜ ('Pärlitigu'), a company incorporated under Estonian law, concerning a tax notice issued to the latter.

Legal context

3 Section I A of Part One of the CN, which contains the general rules for the interpretation of the CN, provides as follows:

'Classification of goods in the [CN] shall be governed by the following principles:

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

…

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise.'

4 Section I of Part Two of the NC, entitled 'Live animals; animal products', contains five chapters.

5 Among them, Chapter 3, entitled 'Fish and crustaceans, molluscs and other aquatic invertebrates', contains heading 0303, entitled 'Fish, frozen, excluding fish fillets and other fish meat of heading 0304', is divided as follows:

‘Pacific salmon (Oncorhynchus nerka, Oncorhynchus gorbuscha, Oncorhynchus keta, Oncorhynchus tschawytscha, Oncorhynchus kisutch, Oncorhynchus masou and Oncorhynchus rhodurus), excluding livers and roes:

…

0303 22 00 — — Atlantic salmon (*Salmo salar*) and Danube salmon (*Hucho hucho*)

…’.

6 The notes to Chapter 3 state:

‘1. This chapter does not cover:

… […]

(c) fish (including livers and roes thereof) or crustaceans, molluscs or other aquatic invertebrates, dead and unfit or unsuitable for human consumption by reason of either their species or their condition (Chapter 5); …

…'

7 Chapter 5 of Section I of Part Two of the CN, entitled 'Products of animal origin, not elsewhere specified or included', includes heading 0511, itself entitled 'Animal products not elsewhere specified or included; dead animals of Chapter 1 or 3, unfit for human consumption', which is subdivided as follows:

'0511 10 00 — Bovine semen

— Other:

0511 91 — — Products of fish or crustaceans, molluscs or other aquatic invertebrates; dead animals of Chapter 3:

0511 91 10 — — — Fish waste

…'

8 The notes to Chapter 5 provide the following information:

‘1 This chapter does not cover:

(a) edible products (other than guts, bladders and stomachs of animals, whole and pieces thereof, and animal blood, liquid or dried);

…’

9 The headings of the Integrated Tariff of the European Communities (TARIC) relating to Chapter 3 of Part Two, Section I, of the CN are subdivided as follows:

‘0303 22 00 11 — — — Atlantic salmon (*Salmo salar*)

0303 22 00 11 — — — — Wild

0303 22 00 12 — — — — Other

0303 22 00 12 — — — — — Whole

0303 22 00 13 — — — — — Gutted, head-on

0303 22 00 15 — — — Other'.

10 Article 1 of Regulation No 85/2006 states:

'1. A definitive anti-dumping duty is hereby imposed on imports of farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen, falling within CN codes ex0302 12 00, ex0303 11 00, ex0303 19 00, ex0303 22 00, ex0304 10 13 and ex0304 20 13 (hereinafter farmed salmon) originating in Norway.

…

4. For all … companies [other than Nordlaks Oppdrett AS] (TARIC additional code A999), the amount of the definitive anti-dumping duty shall be the difference between the minimum import price fixed in paragraph 5 and the net free-at-Community-frontier price, before duty, if the latter is lower than the former. No duty shall be

collected where the net free-at-Community-frontier price is equal to or higher than the corresponding minimum import price fixed in paragraph 5.

5. For the purpose of paragraph 4, the minimum import price set out in column 2 in the table below shall apply. Where it is found following post-importation verification that the net free-at-Community-frontier price actually paid by the first independent customer in the Community (post-importation price) is below the net free-at-Community-frontier price, before duty, as resulted from the customs declaration and the post-importation price is lower than the minimum import price, the fixed anti-dumping duty set out in column 3 of the table below shall apply, unless the application of the fixed duty set out in column 3 plus the post-importation price lead to an amount (price actually paid plus fixed duty) which remains below the minimum import price set out in column 2 in the table below. In such a case, an amount of duty equivalent to the difference between the minimum import price set out in column 2 in the table below and the post-importation price shall apply. Where such fixed anti-dumping duty is collected retrospectively, it shall be collected net of any anti-dumping duty previously paid, calculated on the basis of the minimum import price.

Presentation of farmed salmon	Minimum import price EUR/kg net product weight	Fixed duty EUR/kg net product weight	TARIC code
Whole fish, fresh, chilled or frozen	2,80	0,40	0302 12 00 12 0302 12 00 33 0303 12 00 93 0303 11 00 93 0303 19 00 93 0303 22 00 12 0303 22 00 83

Gutted, head-on, fresh, chilled or frozen	3,11	0,45	0302 12 00 13 0302 12 00 34 0302 12 00 94 0303 11 00 94 0303 19 00 94 0303 22 00 13 0303 22 00 84
Other (including gutted, head-off), fresh, chilled or frozen	3,49	0,50	0302 12 00 15 0302 12 00 36 0302 12 00 96 0303 11 00 18 0303 11 00 96 0303 19 00 18 0303 19 00 96 0303 22 00 15 0303 22 00 86
Whole fish fillets and fillets cut in pieces, weighing more than 300 g per fillet, fresh, chilled or frozen, skin on	5,01	0,73	0304 10 13 13 0304 10 13 94 0304 20 13 13 0304 20 13 94
Whole fish fillets and fillets cut in pieces, weighing more than 300 g per fillet, fresh, chilled or frozen, skin off	6,40	0,93	0304 10 13 14 0304 10 13 95 0304 20 13 14 0304 20 13 95
Other whole fish fillets and fillets cut in pieces, weighing 300 g or less per fillet, fresh, chilled or frozen	7,73	1,12	0304 10 13 15 0304 10 13 96 0304 20 13 15 0304 20 13 96

…’

11 Council Regulation (EC) No 319/2009 of 16 April 2009, clarifying the scope of the definitive anti-dumping duties imposed by Regulation No 85/2006 (OJ 2009 L 101, p. 1), replaced Article 1(1) of Regulation No 85/2006 with the following text:

'A definitive anti-dumping duty is hereby imposed on imports of farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen, falling within CN codes ex0302 12 00, ex0303 11 00, ex0303 19 00, ex0303 22 00, ex0304 10 13 and ex0304 20 13 (hereinafter farmed salmon) originating in Norway. Salmon backbones, composed of a fishbone partly covered with flesh, being an edible by-product of the fishing industry, and falling within CN codes ex0302 12 00, ex0303 11 00, ex0303 19 00, ex0303 22 00, shall not be covered by the definitive anti-dumping duty provided that the flesh attached to the backbone represents not more than 40% of the salmon backbone.'

12 Article 2 of Regulation No 319/2009 provides as follows:

'For goods not covered by Article 1(1) of Regulation (EC) No 85/2006 as amended by this Regulation, the definitive anti-dumping duties paid or entered into the accounts pursuant to Article 1(1) of Regulation (EC) No 85/2006 in its initial version and the provisional anti-dumping duties definitively collected pursuant to Article 2 of that Regulation shall be repaid or remitted.

…'

13 According to Article 3 thereof, Regulation No 319/2009 is to apply retroactively from 21 January 2006.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 19 January 2006, Pärlitigu purchased in Norway, under an invoice from Fossen AS, 13 050 kg of frozen backbones of farmed Atlantic salmon (*Salmo salar*), obtained after filleting the fish, at a price of EEK 6.54 per kg. It can be seen from the order for reference, and, in particular, from the first question referred to the Court, that the products at issue are fit for human consumption and normally marketed as foodstuffs.

15 On 23 January 2006, Pärlitigu imported those goods into Estonia under customs declaration No I 5446, in which they were designated as fish waste under CN heading 0511 91 10, on which no customs duty is levied. On the same date, the PMTK accepted that declaration and placed the goods in free circulation. At that time, Pärlitigu paid value added tax of EEK 15 370.

16 On 25 January 2006, Pärlitigu sold the same goods to Alkfish OÜ at a price of EEK 8.47 per kg.

17 On 23 March 2006, a PMTK official, carrying out an inspection subsequent to importation, took a sample of the goods in question at the warehouse of Alkfish OÜ in order to ascertain whether the CN heading mentioned in the import declaration was correct. The analysis of the sample showed that the goods were fit for human consumption.

18 In the light of that conclusion, the PMTK allocated a new CN heading to the goods, namely, 0303 22 00, and classified the goods under TARIC heading 0303 22 00 15. On 30 March 2007, it issued Tax Notice No 12-5/177, taking account, in particular, the anti-dumping duty laid down in Regulation No 85/2006.

19 On 11 April 2007, Pärlitigu challenged that notice before the Tallinna Halduskohus (Tallinn Administrative Court), seeking annulment of the notice and suspension of its operation by way of interim measure.

20 In those circumstances, the Tallinna Halduskohus decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'[1.] Must the [CN] be interpreted as meaning that frozen backbones (bones with fish meat) of farmed Atlantic salmon (*Salmo salar*), obtained after filleting the fish, fit for human consumption and normally marketed as a foodstuff, come under

(a) subheading 0511 91 10, "fish waste", or

(b) subheading 0303 22 00 15, "Atlantic salmon (*Salmo salar*) — other — other"?

[2.] If the answer to Question 1 is alternative (b), is the table in Article 1(5) of [Regulation No 85/2006] void as contrary to the principle of proportionality laid down in Article 5 [EC] in so far as, according to that table, the minimum import price established for frozen salmon backbones is higher than the minimum import price for whole fish and gutted head-on fish?'

The questions referred to the Court

The first question

21 By its first question, the referring court essentially asks whether frozen backbones of farmed Atlantic salmon, obtained after filleting the fish, come under CN subheading 0511 91 10 as fish waste or CN subheading 0303 22 00 as Atlantic salmon (*Salmo salar*) and, in particular, under TARIC subheading 0303 22 00 15.

22 According to Pärlitigu, the CN must be interpreted as meaning that the goods at issue must be classified under CN subheading NC 0511 91 00, entitled 'fish waste', since that description corresponds to the nature of the goods and there is no other, more precise, subheading which corresponds to them. The Estonian Government and the Commission of the European Communities consider, on the other hand, that since

the goods in question are fit for human consumption, they come under CN subheading 0303 22 00 and, more particularly, under TARIC subheading 0303 22 00 15.

23 It should be recalled that, when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria the implementation of which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, *a fortiori* since the Court does not necessarily have available to it all the information which is essential in that regard. In any event, the national court is in a better position to do so (Joined Cases C-260/00 to C-263/00 *Lohmann and Medi Bayreuth* [2002] ECR I-10045, paragraph 26, and Case C-500/04 *Proxxon* [2006] ECR I-1545, paragraph 23). However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (see, in particular, Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 30).

24 It should also be recalled that it is settled case-law 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 and in the section or chapter notes (see, in particular, Case C-396/02 *DFDS* [2004] ECR I-8439, paragraph 27; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; and Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 27).

25 In the present case, it must be noted that the goods at issue in the main proceedings are not expressly referred to either in the wording of the CN headings in question or in the section or chapter notes thereto. It is common ground, however, that the goods in question come under Section I of Part Two of the CN entitled 'Live animals; animal products'. That section is divided into five chapters, among which are Chapter 3, entitled 'Fish and crustaceans, molluscs and other aquatic invertebrates', and Chapter 5 entitled 'Products of animal origin, not elsewhere specified or included'. It is clear from the wording of the latter title that Chapter 5 concerns products which correspond to

none of the descriptions in the other four chapters of that section. In addition, note 1(a) to Chapter 5 states that the chapter does not cover edible products, other than guts, bladders and stomachs of animals, and animal blood. In that context, the criteria which could justify the possible classification of the goods at issue in the main proceedings under a subheading in Chapter 3 of Part Two, Section I, of the CN must be determined.

26 It is settled case-law that both the notes which head the chapters of the Common Customs Tariff and the Explanatory Notes to the Customs Cooperation Council Nomenclature are important means of ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation (Case C-338/95 *Wiener SI* [1997] ECR I-6495, paragraph 11, and Case C-276/00 *Turbon International* [2002] ECR I-1389, paragraph 22).

27 In the present case, note 1(c) to Chapter 3 of Part Two, Section I, of the CN states that that chapter does not cover fish unsuitable for human consumption by reason of either their species or their condition. It is therefore clear from the wording of that note that the decisive criterion for determining whether the goods at issue in the main proceedings come under Chapter 3 lies in the fact that they are fit for human consumption. Under those circumstances, the determinant question is whether, at the time that they were cleared through customs, the frozen backbones of farmed Atlantic salmon, obtained after filleting the fish, constituting those goods, were fit for human consumption (see, by analogy, Case C-395/93 *Neckermann Versand* [1994] ECR I-4027, paragraph 8, and Case C-14/05 *Anagram International* [2006] ECR I-6763, paragraph 26), which it is for the national court to ascertain.

28 The applicant in the main proceedings claims that the limited value of the goods in question indicates that, even if the product of which it is composed is fit for human consumption under certain conditions, it cannot be regarded as a food product. The structure of Chapter 3 of Part Two, Section I of the CN concerns fish of which parts or

the products thereof can still be used as whole fish or the essential parts of fish. Fish backbones do not meet those requirements because they no longer have the essential properties and characteristics which make it possible, on an objective basis and in the light of economic considerations, to classify them under a subheading in Chapter 3.

29 However, since, in accordance with the case-law cited in paragraph 24 of the present judgment, the classification of the goods at issue in the main proceedings must be based on the objective characteristics and properties of those goods, having regard to the objective characteristics and properties defined by the wording of the subheadings and the notes to Chapter 3 of Part Two, Section I of the CN, it is obvious that, in regard to those goods, the decisive factor in classifying them lies in the fact that they are fit for human consumption and not in their value or quantity.

30 Having regard to the foregoing, the answer to the first question must be that the CN must be interpreted as meaning that frozen backbones of farmed Atlantic salmon (*Salmo salar*), obtained after filleting the fish, must be classified under CN heading 0303 22 00 if the goods are fit for human consumption at the time that they are cleared through customs, which it is for the national court to ascertain.

The second question

31 By its second question, the national court is asking whether Article 1(5) of Regulation No 85/2006 is void as contrary to the principle of proportionality in so far as the minimum import price established for frozen salmon backbones is higher than the minimum import price for whole fish and gutted head-on fish.

32 That regulation imposes a definitive anti-dumping duty on imports of farmed salmon, whether or not filleted, fresh, chilled or frozen, originating in Norway in respect of goods coming under TARIC heading 0303 22 00 15, entitled 'Other (including gutted, head-off), fresh, chilled or frozen', in which the goods at issue in the main proceedings must be classified in accordance with tax notice No 12-5/177 issued by PMTK. Article 1(4) of the said regulation provides that the amount of the definitive anti-dumping duty is to be the difference between the minimum import price fixed in paragraph 5 and the net free-at-Community-frontier price, before duty, if the latter is lower than the former. For goods coming under TARIC heading 0303 22 00 15, the table in paragraph 5 fixes a minimum import price on importation of EUR 3.49 per kg, which is indeed higher than the prices fixed for whole fish and gutted head-on fish, which are EUR 2.80 and EUR 3.11 per kg respectively.

33 The scope of Regulation No 85/2006 was later clarified by Regulation No 319/2009, which entered into force on 16 April 2009.

34 It is clear from the fifth to seventh recitals in that regulation, that, in the light of the second question raised in the present reference for a preliminary ruling, the Commission initiated a partial interim review of the anti-dumping measures applicable to farmed salmon originating in Norway, limited to the examination of the product scope. It was considered appropriate to examine whether frozen backbones of salmon fall within the definition of the products concerned by Regulation No 85/2006, and in particular those referred to under the heading 'Other (including gutted, head off), fresh, chilled or frozen', which correspond, inter alia, to TARIC heading 0303 22 00 15.

35 That examination led to the conclusion that salmon backbones and farmed salmon, as defined in Article 1(1) of Regulation No 85/2006, are two different products because they are not interchangeable and do not compete with each other on the Community market. Consequently, Article 1(1) of that regulation, as amended by Regulation

No 319/2009, now provides that salmon backbones, composed of a fishbone partly covered with flesh, being an edible by-product of the fishing industry, and falling within CN codes ex0302 12 00, ex0303 11 00, ex0303 19 00, ex0303 22 00, are not covered by the definitive anti-dumping duty imposed by Regulation No 85/2006 provided that the flesh attached to the backbone represents no more than 40% of the salmon backbone weight.

36 In addition, Article 3 of Regulation No 319/2009 provides that the latter is to apply retroactively from 21 January 2006. Consequently, Article 2 of the regulation provides for repayment or remission of the definitive anti-dumping duties paid or entered into the accounts pursuant to Article 1(1) of Regulation No 85/2006 in its initial version and of the provisional anti-dumping duties definitively levied in respect of goods not covered by Article 1(1) of Regulation No 85/2006, as amended by Regulation No 319/2009.

37 It must be said that the retroactive amendment of Regulation No 85/2006 by Regulation No 319/2006 has deprived the Court's answer to the national court's second question of any interest for the resolution of the dispute in the main proceedings.

38 It is apparent from the order for reference that the national court has evidence, provided by the applicant, which shows that, in the goods at issue in the main proceedings, the flesh attached to the backbone does not exceed 24% of the weight thereof, which is precisely what led that court to raise the question whether the anti-dumping duties applied to those goods under Regulation No 85/2006 complied with the principle of proportionality.

39 Having regard to that established fact, it is clear that, by virtue of Regulation No 319/2009, those goods are deemed never to have come within the scope of the antidumping duty introduced by Regulation No 85/2006.

40 Under those circumstances, it is not necessary to answer the second question.

Costs

41 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

The Combined Nomenclature, which constitutes 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 (EC) No 1719/2005 of 27 October 2005, must be interpreted as meaning that frozen backbones of farmed Atlantic salmon (*Salmo salar*), obtained after filleting the fish, must be classified under CN heading 0303 22 00 if the goods are fit for human consumption at the time that they are cleared through customs, which it is for the national court to ascertain.

[Signatures]