# OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 30 May 2006 [1]

1. Under which terms does Community law permit the redispatch of products from third countries that are offered for import in the Community, when veterinary checks demonstrate that those products do not fulfil the import conditions? When are the competent border authorities required to order the destruction of those products? These are the questions that lie at the heart of the two cases here at issue.

2. In early 2002, in two similar cases, the border authorities of the Netherlands ordered the destruction of consignments of duck and rabbit meat imported from China. The consignments failed to satisfy Community import conditions, because they contained substances that pose a hazard to human health. The importing companies contended that, rather than ordering that the consignments be destroyed, the national authorities should have allowed redispatch to China.

3. Uncertain about the precise obligation imposed on the national authorities in these situations, the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) (the Netherlands) referred four questions to the Court of Justice. The questions, which are identical in both cases, ask the Court to interpret Articles 17(2) and 22(2) of Council Directive 97/78/EC of 18 December 1997, [2] together with Article 5 of Council Regulation (EEC) No 2377/90 of 26 June 1990. [3]

## I — Legal framework

4. Directive 97/78 lays down the principles governing the organisation of veterinary checks on products entering the Community from third countries. It envisages three types of checks that competent authorities at border inspection posts must conduct on products originating from third countries: a

1 — Original language: Portuguese.

2 — Laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries (OJ 1998 L 24, p. 9).

3 — Laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin (OJ 1990 L 224, p. 1).

documentary check, an identity check and a physical check. A documentary check consists of an examination of the documents and certificates accompanying the consignment. An identity check entails a visual inspection to ensure that the veterinary certificates and/or other documents actually correspond to the product being imported.

5. Article 2(2)(d) of the directive emphasises that a physical check constitutes 'a check on the product itself which may include checks on packaging and temperature and also sampling and laboratory testing'. The objective of the physical check, according to Article 4(4)(b)(i) of the directive, is to verify that the products satisfy Community import requirements and can indeed be used for the purpose specified in the accompanying certificate or document.

6. Article 17(2) of the directive identifies the options available to the national authorities when products from third countries do not satisfy the import conditions:

'2. Where the checks referred to in this Directive show the competent authority that the product does not satisfy the import conditions, or where such checks reveal an irregularity, the competent authority in consultation with the person responsible for the load or his representative, shall decide:

(a) either to redispatch the product outside the territories listed in Annex I from the same border inspection post to a destination agreed with the person responsible for the load, using the same means of transport, within a maximum time limit of 60 days, where this is not precluded by the results of the veterinary inspection and health requirements.

...

(b) or, if redispatch is impossible or the 60-day time limit referred to in (a) has elapsed or the person responsible for the load gives his immediate agreement, [to] destroy the products in the facilities provided for that purpose nearest to the border inspection post ...'

7. Article 22 of the directive specifies the mandatory safeguard measures that the

competent national authorities must take in case of serious hazards to public health in the Community. Article 22(2) states that:

'2. If any one of the checks provided for in this Directive indicates that a consignment of products is likely to constitute a danger to animal or human health, the competent veterinary authority shall immediately take the following measures:

— it shall seize and destroy the consignment in question,

— it shall immediately inform the other border inspection posts and the Commission of the findings and of the origin of the products ...'

8. Regulation No 2377/90 lays down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin.

9. Article 5 of the regulation recognises that for some pharmacologically active substances used in veterinary medicinal products, no maximum residue limit can be established 'because residues of the substances concerned, at whatever limit, in foodstuffs of animal origin constitute a hazard to the health of the consumer'.

10. In accordance with Article 5, Annex IV to the regulation establishes a list of pharmacologically active substances for which no maximum limits can be fixed.

## II — Facts and reference for a preliminary ruling

11. In February 2002, Coxon & Chatterton Ltd (hereinafter 'Coxon') imported two consignments of frozen duck meat from China into the Netherlands. In March of that same year, NV Raverco (hereinafter 'Raverco') imported a consignment of frozen rabbit meat. When the consignments reached a border inspection post in the Netherlands, the veterinary authorities subjected them to the requisite sample checks and laboratory tests provided for in Directive 97/78.

12. The tests performed on the samples taken from Coxon's consignments of duck meat revealed residues of furazolidone (16 ppb) in one consignment and, in the other consignment, residues of chloramphenicol (1.4 ppb) and furazolidone (49 ppb). The tests performed on the samples taken from Raverco's consignment of rabbit meat revealed residues of furazolidone (2.7 ppb). Chloramphenicol and furazolidone are listed in Annex IV to Regulation No 2377/90 as pharmacologically active substances for which no maximum limit can be established.

13. On 1 March 2002, on the basis of the results of the veterinary checks, the official veterinarian of the Rijksdienst voor de keuring van Vlee en Vlees (national inspection of livestock and meat service; hereinafter 'the RVV'), refused the import of Coxon's consignments of duck meat and ordered their destruction. On 22 March 2002, the RVV similarly ordered the destruction of Raverco's consignment of rabbit meat.

14. On 18 March 2002, Coxon lodged a complaint against the RVV's decision before the Minister van Landbouw, Natuur en Voedselkwaliteit (Ministry of Agriculture), alleging that, rather than being destroyed, the consignments of duck meat should be redispatched to China. On 26 April 2002, Raverco lodged a similar complaint.

15. The complainants alleged that redispatching the products would not pose a risk to human or animal health in the Netherlands or the Community. Indeed, the companies maintained that, since the animal products could have been lawfully marketed in China, the consignments should not be destroyed.

16. Rejecting both Coxon's and Raverco's claims, the Ministry of Agriculture insisted that Community law required the destruction of the contaminated consignments of duck and rabbit meat. The companies challenged those decisions before the College van Beroep voor het Bedrijfsleven.

17. The College van Beroep referred the same four questions to the Court in the case of Raverco (C-129/05) and in the case of Coxon (C-130/05):

'(1) Must the introduction to and subparagraph (a) of Article 17(2) of Directive 97/78/EC be so interpreted that the objection to the redispatch of a consignment that does not satisfy the import conditions lies in the non-satisfaction of the Community conditions for import

or in the conditions that apply at the destination outside the territories listed in Annex I to Directive 97/78/EC agreed with the person responsible for the load?

(2) Must the introduction to and subparagraph (a) of Article 17(2) of Directive 97/78/EC, read in conjunction with Article 22(2) of Directive 97/78/EC and Article 5 of Regulation (EEC) No 2377/90, be so interpreted that in all cases in which any one of the checks provided for in Directive 97/78/EC indicates that a consignment of products is likely to constitute a danger to animal or human health this provision imperatively requires the destruction of the consignments of animal products concerned?

(3) Must Article 22 of Directive 97/78/EC, in conjunction with Article 5 of Regulation (EEC) No 2377/90, be so interpreted that the mere fact that residues of a substance listed in Annex IV to Regulation (EEC) No 2377/90 are found in a consignment means that the consignment in question is likely to constitute such a danger to animal or human health as to preclude redispatch?

(4) If the second question is answered in the negative, must Article 17(2) of Directive 97/78/EC be so interpreted that it also serves to protect the interests of the third country into which, after redispatch, the consignment is to be imported, even if those interests do not also involve the protection of an interest that can be located in Member States of the EU?'

18. By order of 2 April 2005, the Court joined the cases for the purposes of the oral procedure and the judgment, pursuant to Article 43 of the Rules of Procedure.

19. Coxon, the Netherlands Government, the Greek Government and the Commission have submitted written observations to the Court. The Court heard their oral argument at the hearing on 9 March 2006.

## III — Appraisal

### A — *The first question*

20. By its first question, the national court wishes to determine whether the objection to

the redispatch of a consignment pursuant to Article 17(2)(a) of Directive 97/78 is founded on the non-satisfaction of the Community import conditions or, instead, on the conditions that apply in the third country to which the products are to be redispatched.

21. All the parties that submitted observations, including Coxon, are of the opinion that the obstacles to the redispatch of the consignments which fail to satisfy the relevant requirements reside in the non-satisfaction of Community import conditions. I agree with that interpretation.

22. The directive unequivocally provides for a system of veterinary inspections to establish if products fulfil the *Community* import conditions. [4] For instance, Article 4(4)(b)(i) provides that the official veterinarian must carry out a physical check on each consignment 'in order to ascertain that the products satisfy the requirements of Community legislation'. [5]

23. Pursuant to Article 17(2), redispatch may be precluded by the results of the veterinary inspection and health requirements, 'where the checks referred to in this Directive show ... that the product does not satisfy the import conditions'. Article 2(2)(j) of the Directive defines 'import conditions' as veterinary import requirements 'as laid down in Community legislation'. None of the checks to which Article 17(2) refers requires the competent authorities, in addition, to carry out inspections in order to establish the conformity of the products with the import conditions in third countries.

24. Moreover, if the decision to redispatch the products were based on the conditions that apply in the country to which the products are to be redispatched, the competent authorities at the Community border inspection posts would have to apply the rules of those countries. Yet, as the Netherlands Government maintains, these authorities have no reason to know the details of the health and sanitary conditions established in third countries.

25. Therefore, the answer to the first question, concerning the interpretation of Article 17(2)(a) of Directive 97/78, should be that the objection to the redispatch of a consignment lies in the non-satisfaction of the Community conditions for import.

4 — See also the 11th recital in the preamble to Directive 97/78, which states that 'those products which comply with Community requirements for importation should be separated from those which do not; whereas to take account of these differences, separate checking systems should be laid down'.

5 — Other examples of references to Community rules or Community legislation within the scheme of the directive can be found in Article 8(2) ('to verify in particular where the products concerned comply with Community rules'), Article 8(4) ('monitored pursuant to Community legislation'), Article 10(2)(a) ('Community requirements'), Article 10(2)(f) ('standards laid down by Community law'), Article 12(4) ('Community requirements') and Article 17(3) ('Community veterinary legislation').

B — *The second and third questions*

26. By its second and third questions, the national court essentially seeks to ascertain whether Directive 97/78 requires that foodstuffs entering the Community from third countries be destroyed when veterinary checks show that they contain a residue of a substance mentioned in Annex IV to Regulation No 2377/90.

27. I shall first consider Articles 17(2) and 22(2) of Directive 97/78. In particular, I shall examine how these provisions are interrelated, in order to determine under which terms they allow for the redispatch and under which terms they require the destruction of products that do not satisfy the Community import conditions. Next, I shall look at Article 5 of and Annex IV to Regulation No 2377/90, concerning pharmacologically active substances for which no maximum residue limits can be fixed.

(a) Articles 17(2) and 22(2) of Directive 97/78

28. Although both provisions deal with products that do not satisfy the Community import conditions, Articles 17(2) and 22(2) differ in their scope of application.

29. Article 17(2) is of general applicability, directed at all situations where the checks required at the border inspection posts reveal either that the product does not satisfy the import conditions or that there is an irregularity. To comply with the import conditions, a consignment of products must satisfy the independent requirements of all three types of checks, the documentary check, the identity check and the physical check. A product may fail to satisfy the import conditions because it has not fulfilled the administrative requirements of the documentary check, for instance. In such a case, Article 17(2) would apply.

30. By contrast, Article 22(2) applies only when the checks indicate that a consignment of products is likely to constitute a danger to animal or human health. Article 22(2) therefore has a much narrower scope than Article 17(2). Indeed, Article 22(2) is a *lex specialis* by reference to Article 17(2).

31. When Article 17(2) applies, the competent veterinary authority should redispatch

the consignment of products within 60 days, unless this is precluded by the results of the veterinary inspection and health requirements. If redispatch is impossible, or if the 60 day time period has expired, or if the person responsible for the load gives his immediate agreement, then pursuant to Article 17(2)(b), the competent authority should destroy the consignment. Accordingly, subject to certain exceptions, Article 17(2) requires redispatch where a product fails to satisfy the import conditions.

32. Article 22(2), on the other hand, does not mention the possibility of redispatch. It states that 'if any one of the checks ... indicates that a consignment of products is likely to constitute a danger to animal or human health, the competent veterinary authority shall immediately ... seize and destroy the consignment in question'.

33. It is common ground among the parties that Article 17(2) becomes irrelevant once it has been established that a consignment of products is 'likely to constitute a danger to animal or human health' within the meaning of Article 22(2). In such a situation, the competent national authorities have no choice but to destroy the consignment. Opinions differ, however, as to when a consignment of products is to be considered 'likely to constitute a danger to animal or human health'.

34. Coxon assumes that the Community's border checks are effective and essentially argues that, following redispatch, products that failed to satisfy the Community import conditions no longer pose a risk to animal or human health within the Community. In Coxon's view, Article 22(2) consequently does not apply when redispatch to the country of origin is possible. In this connection, Coxon submits that the Community veterinary checks do not, and in fact could not, have the objective of protecting animal or human health outside the Community.

35. The Commission takes the view that, as long as the third country in question does not consider it problematic, Article 22 poses no obstacle to the redispatch of products that fail to satisfy the Community import conditions. Nevertheless, the Commission underlines that in order to ensure a basic level of protection of public health, the competent authorities are always allowed to destroy consignments which constitute a

clear and immediate danger to human health. Second, the Commission emphasises that Article 22(2) requires the destruction of consignments which constitute a potential danger, even indirectly, to human or animal health within the Community. As an example of an indirect danger, the Commission mentions the risk of fraudulent re-import of the consignments in question through another border inspection post.

36. According to the Greek and Netherlands Governments Article 22(2) applies at all times when the products in question are dangerous to the health of the consumer. Both Governments maintain that Articles 17(2) and 22(2) seek to ensure that such products do not remain available on the market. They point out that, if these products are not destroyed, there is always a risk that they will find their way into the Community and reach the Community consumer. In this regard, the Greek Government submits that a less rigorous interpretation of Article 22(2) would encourage attempts to import dangerous products. The costs of such attempts would be negligible for the importer if products found to constitute a health risk remained at its disposal.

37. I concur with the view of the Netherlands and Greek Governments. When products originating from third countries are offered for import into the Community, they become subject to the Community mechanisms of health control. The strict regime of Article 22(2) of the directive seeks to protect human and animal health within the Community. In that respect, the directive complements the equivalent regime that applies to intra-Community products: when veterinary checks in intra-Community trade establish that a consignment is 'likely to constitute a serious hazard to animals or humans', the competent authorities of the Member States must order its destruction, regardless of whether the products could potentially be marketed outside the Community. [6] Likewise, products originating from third countries should not be redispatched merely because they can be marketed outside the Community. [7] Accordingly, importers and intra-Community traders of animal products ought to assume the risk that their products may be destroyed, if they do not satisfy Community health standards.

6 — Article 7(1)(a) of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market provides that '[i]f, during a check carried out at the place of destination of a consignment or during transport, the competent authorities of a Member State establish ... any cause likely to constitute a serious hazard to animals or humans ... they shall ... order the batch to be destroyed' (OJ 1989 L 395 p. 13).

7 — Naturally, the destruction of products in accordance with Article 22(2) also has the effect of limiting the risk to animal or human health outside the Community. However, that does not mean that disallowing the redispatch of products which present a risk to human or animal health primarily serves non-Community interests.

38. Moreover, as the Netherlands and Greek Governments contend, if the option of redispatching the products were to remain available, the risk of reimportation into the Community would persist. Coxon's argument that the effectiveness of Community border checks would prevent such reimportation is not convincing. Permitting the redispatch of products which constitute a risk to animal or human health may significantly increase the attempts on the part of importers to introduce such foodstuffs into the Community market. Importers of these products would not have to bear the risk of loss, since the option of destruction would be virtually non-existent.

39. In support of its reading of Articles 17(2) and 22(2) of Directive 97/78, Coxon relies on Regulation No 882/2004. [8] This regulation contains certain rules on redispatch of feed and food products that are unsafe for animal or human health. [9] However, as the Greek Government correctly pointed out at the hearing, these rules have no bearing on the present case. By adopting Regulation No 882/2004, the Community legislature did not alter the harmonised import procedures established for food of animal origin by Directive 97/78. [10]

40. What remains to be determined is whether products which are found to contain residues of a substance mentioned in Annex IV to Regulation No 2377/90 are 'likely to constitute a danger to animal or human health' within the meaning of Article 22(2) of Directive 97/78.

(b) Article 5 of and Annex IV to Regulation No 2377/90

41. Council Regulation No 2377/90 introduces a uniform procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of

8 — Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1).

9 — Coxon refers to Articles 19(2)(c) and 20 of the regulation.

10 — See the 25th recital in the preamble to Regulation No 882/2004. Even though Article 58 of Regulation No 882/2004 amends parts of Directive 97/78, both Article 17 and 22 remain untouched.

animal origin. The establishment of uniform rules on maximum residue levels aims at protecting public health, [11] and, at the same time, at facilitating trade of foodstuffs of animal origin. [12]

42. Annex IV to the regulation lists pharmacologically active substances used in veterinary medicinal products for which a maximum residue limit cannot be established. According to Article 5 of the regulation, 'residues of the substances concerned, at whatever limit, in foodstuffs of animal origin constitute a hazard to the health of the consumer'. For that reason, Article 5 prohibits the use of these substances throughout the Community.

43. One is drawn to conclude, therefore, that a consignment of products which contains residues of a substance listed in Annex IV to Regulation No 2377/90 is 'likely to constitute a danger to animal or human health' within the meaning of Article 22(2) of Directive 97/78.

44. The referring court notes in its order for reference that, in consultation with the Commission, the Netherlands authorised the redispatch of a number of consignments of Chinese products which contained less than 5 ppb of nitrofuranes. Thus, the Netherlands authorities temporarily derogated from the zero-limit for furazolidone (nitrofuranes include furazolidone). The derogation did not apply to the consignments of Coxon and Raverco at issue in these proceedings. [13] None the less, the referring court considers that this temporary practice of the Netherlands authorities calls into question the conclusion that Article 22(2) of Directive 97/78 imperatively requires the destruction of products which are found to contain residues of furazolidone, a substance listed in Annex IV to Regulation No 2377/90.

45. The Netherlands Government submits that an impending trade conflict with China forced it to derogate temporarily from the strict regime of destruction. At the time, not every Member State had at its disposal testing methods that could establish the

11 — Third recital in the preamble to Regulation 2377/90.

12 — Fifth and seventh recitals in the preamble.

13 — It appears that the Netherlands authorities had not yet decided to derogate from the zero-limit for nitrofuranes at the time when Coxon and Raverco offered their consignments for import. At any rate, the amount of furazolidone found in Coxon's consignments was too high for the derogation to apply.

presence of less than 5 ppb of nitrofuranes in animal products. The Netherlands Government points out that this situation led to inequalities: in some Member States the competent authorities would accept products with less than 5 ppb nitrofuranes for import, while the authorities in a Member State with more accurate testing methods would order their destruction. The Netherlands authorities had ordered the destruction of several consignments of products originating from China with residues of nitrofuranes below 5 ppb. In response, the Chinese authorities announced an import ban on animal products from the Netherlands. The Netherlands subsequently agreed with the Chinese authorities that it would redispatch products containing less than 5 ppb of nitrofuranes, provided that these products did not contain any other dangerous residues. Only consignments which had been offered for import before 15 March 2002 would benefit from the agreement. As of that date, Member States had to apply a general ban on imports of animal products from China, pursuant to Decision 2002/69/EC of 30 January 2002. [14]

46. One may legitimately wonder, as did the referring court, whether the decision to temporarily redispatch products containing nitrofuranes can be squared with the stringent wording of Article 22(2) of Directive 97/78, read in conjunction with Article 5 of Regulation No 2377/90. However, to my mind, the temporary practice of the Netherlands authorities of redispatching products from China with less than 5 ppb of nitrofuranes does not affect the interpretation of those provisions.

47. Hence, where veterinary checks show that foodstuffs entering the Community from third countries contain a residue of a substance mentioned in Annex IV to Regulation No 2377/90, the competent authorities must seize and destroy the foodstuffs in question pursuant to Article 22(2) of Directive 97/78.

## C — *The fourth question*

48. The referring court asks its fourth question in the event that the second question is answered in the negative. Consequently, in light of the foregoing considerations, there is no need to answer the fourth question.

14 — Concerning certain protective measures with regard to the products of animal origin imported from China (OJ 2002 L 30, p. 50).

## IV — Conclusion

49. I propose that the Court should give the following answers to the questions referred to it for a preliminary ruling:

(1) Pursuant to Article 17(2)(a) of Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries, the competent national authorities' objection to the redispatch of a consignment lies in the non-satisfaction of the Community conditions for import.

(2) Article 22(2) of that directive requires the competent national authorities to seize and destroy foodstuffs which originate in a third country and are offered for import into the Community, where veterinary checks demonstrate that the foodstuffs in question contain a residue of a substance mentioned in Annex IV to Council Regulation (EEC) No 2377/90 of 26 June 1990 laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin.