2. Orders the Kingdom of the Netherlands to pay the costs.

Pescatore O'Keeffe Everling

Bosco Koopmans Bahlmann Galmot

Delivered in open court in Luxembourg on 20 April 1983.

P. Heim
Registrar

P. Pescatore
President of the Second Chamber,
acting as President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 10 MARCH 1983

My Lords,

This is an action brought by the Commission under Article 169 of the EEC Treaty for a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty in that, contrary to Article 1 of Council Directive 71/235 of 21 June 1971 (OJ L 143, 29. 6. 1971, p. 28, English Special Edition, 1971 (II), p. 398), it has authorized the packing of butter from third countries stored in customs warehouses.

Customs warehouse procedure was harmonized by Council Directive 69/74 of 4 March 1969 (OJ L 58, 8. 3. 1969, p. 7, English Special Edition, 1969, p. 82). Article 2 (1) provides that the effect of the customs warehouse system "shall be that customs duties, charges having equivalent effect and agricultural levies are not collected during the period of storage of goods". When the goods leave the warehouse, they must either be cleared for home use, placed under another customs procedure or exported (see Article 2 (2)). According to the preamble, "since the essential purpose of customs warehouses is to store goods, handling of goods during storage is only permissible if its purpose is to ensure their preservation or to improve packaging or marketable quality, and where goods in store receive other handling they are no longer eligible for the customs warehousing procedure and are thus no longer governed by the rules of this directive . . .".

The customs warehouse procedure can be contrasted with inward and outward processing, the procedure for which was harmonized by Council Directive 69/73 of 4 March 1969 (OJ L 58, 8. 3. 1969, p. 1, English Special Edition, 1969, p. 75) and Council Directive 76/119 of 18 December 1975 (OJ L 24, 31. 1. 1976, p. 58, respectively. Inward processing is the system whereby imported goods "may be processed without giving rise to liability for payment of customs duties, of charges having equivalent effect or of agricultural levies, where such goods are intended for export outside the customs territory of the Community" (Article 2(1) of Directive 69/73); outward processing is the corresponding system, "whereby goods of whatever kind or origin may be temporarily exported outside the customs territory of the community with a view to their being re-imported in the form of compensating products . . . wholly or partly free of import duties, after they have undergone one or more processing operations . . . outside the customs territory of the Community" (Article 2(1) of Directive 76/119; compensating products are those produced by one or more of the processes defined in Article 3, i.e. working, including fitting, assembling or adjusting, processing and repair).

Although the customs warehouse and the inward and outward processing systems allow the levying of customs duties to be suspended for a certain period of time, they serve different purposes. Inward processing enables goods which are not intended for the Community market to be imported duty-free so that they may be processed by undertakings based in the Community and then re-exported. Outward processing arrangements apply where the processing of goods intended for the Community market takes place outside the customs territory of the Community. The customs warehouse system, on the other hand, is simply an arrangement for the storage of goods so that, for example, an importer can accumulate stocks, paying duties and other charges on the goods as and when they are released on to the Community market.

It is common ground that some operations can be carried out while the goods are stored in a customs warehouse. This is plain from the preamble to Directive 69/74, and from Article 9, which provides that:

"(1) It must be possible for goods deposited in warehouses to undergo there, under the conditions laid down by the competent authorities, such usual forms of handling as are needed to ensure preservation or to improve packaging or marketable quality. Not later than one year after the notification of this directive, the Council shall, on a proposal from the Commission, draw up a common list of the usual forms of handling referred to in the first subparagaph which may be carried out in the various types of warehouse.

(2) Goods which undergo treatment other than the usual forms of handling referred to in paragraph 1 shall be subject to the rules in force relating to inward processing."

The common list of usual forms of handling is to be found in Directive 71/235. By virtue of Council Directive

74/147 of 4 March 1974 (OJ L 84, 28. 3. 1974, p. 1) they are also operations which may be carried out under inward processing. Conversely, some operations which may be carried out under inward processing arrangements do not qualify under the customs warehouse provisions.

Under Article 6 of Directive 71/235 the Member States were to have implemented the measures necessary to comply with the directive by 31 December 1971. In the Netherlands this was done by a decree, the Besluit Douane en Accijnzen, which was subsequently amended on 9 February 1976. Article 210 of the decree refers to Article 1 of Directive 71/235 so far as the definition of the usual forms of handling is concerned. The first paragraph of Article 1 sets out the common list, which comprises:

"(1) Examinations, stocktaking and sampling;

(2) Elementary repairs following damage incurred during storage or transport;

(3) Cleaning;

(4) Removal of damaged parts;

(5) Sorting, straining, sifting, mechanical clarification, filtering, unpotting, drawing off and any other similar simple treatment;

(6) The affixing to the goods themselves, or to their packings, of marks, seals, labels, or other similar distinguishing signs, on condition that there is no risk of that giving the goods an apparent origin different from their real one;

(7) Altering the marks and numbers on packages, on condition that there is no risk of that giving the goods an apparent origin different from their real one;

(8) Packing, unpacking, change of packings, repair of packings, decanting and simple transfer into other containers;

(9) Fixing goods on stands for packaging or for their presentation;

(10) Simple sorting and classification operations;

(11) Examination, testing and putting into working order of machines, apparatuses or vehicles, if only simple operations are involved;

(12) Mixing of goods other than liqueurs, brandy, wines and other spirits, if only simple operations are involved;

(13) Mixing of liqueurs with one another;

(14) Mixing of potable spirits with one another;

(15) Coupage of wines, and other current oenological practices;

(16) Dilution of spirits with water with a view to reducing their alcoholic strength;

(17) Desalination, cleaning and butting of hides;

(18) Crushing of dried vegetables;

(19) Dividing up of goods, if only simple operations are involved;

(20) All handling intended to ensure preservation of goods in sound condition during storage such as airing, drying (even by means of artificial heat), refrigeration and chilling, addition of preservatives, fumigation and sulphur treatment

(anti-parasitic), greasing, anti-rust painting, application of protective coating for transport."

It has been pointed out that power to prohibit the use of inward processing arrangements in respect of butter was given by Council Regulation No 3066/75 of 24 November 1975 (OJ L 307, 27. 11. 1975, p. 3) as extended to 1981 by Council Regulations No 875/77 of 26 April 1977 (OJ L 106, 29. 4. 1977, p. 23) and No 1363/80 of 5 June 1980 (OJ L 140, 5. 6. 1980, p. 15). This, however, was only when the butter was "intended for the manufacture of products listed in Article 1" of Regulation (EEC) No 804/68 (OJ L 148, 28. 6. 1968, p. 13) "or of goods listed in the Annex to the same regulation". The Commission by Regulation No 3352/75 of 23 December 1975 (OJ L 330, 24. 12. 1975, p. 28) prohibited the use of inward processing arrangements for butter intended for such manufacture but added "and in particular ... the processing of bulk butter into small packages for the retail trade". That provision was amended by Commission Regulation (EEC) No 2119/78 of 7 September 1978 (OJ L 246, 8. 9. 1978, p. 12) which prohibited the use of butter from third countries on which a levy had not been charged "for making up into small packages". Although the matter has not been fully argued, it does not seem to me at first glance that making up butter from bulk into small packages constitutes the manufacture of a product listed in Article 1 of, or the Annex to, Regulation No 804/68. However, it does not seem that these provisions affect the question to be decided by the Court in this case.

The issue between the parties is whether the packaging of butter stored in a customs warehouse is one of the usual forms of handling envisaged in the list. According to the information available to the Court, the butter, which comes in part from Finland, Norway and Sweden and in part from supplies marketed in the Netherlands, is stored in the warehouses in boxes of 15 or 25 kg at a temperature of about -18 °C. In this state it is too hard to be worked or cut. It is taken out of the freezer and allowed to thaw out to a temperature of about +10 °C when the external and internal packaging, normally of cardboard and a special type of paper, respectively, is removed. The blocks of butter are placed by hand in a machine which works it into a homogeneous mass and squeezes it into a particular form, usually a long pipe with a rectangular cross-section. Working is apparently necessary because sometimes the colour of the butter on the outside of the block is different from the colour at the centre of the block, which is also harder than the outside. It is then transported by mechanical means to a packing machine which slices it into pieces of the desired weight and wraps it or puts it into boxes. The butter is normally intended for packets of 10, 15 or 250 grams or boxes of 1 000 grams. A conveyor belt takes the packets or boxes to a packing counter where they are packed into crates by hand. These operations appear to form one continuous process. All the butter packed is sold and delivered for use on ships.

On behalf of the Commission it is said that the intention behind the common list of usual forms of handling was not to itemize the practices authorized by the Member States but to harmonize them. In consequence the list is exhaustive and the Member States cannot authorize other forms of handling to be effected in customs warehouses. In addition, the list must be strictly construed because the authorization given by Article 9(1) of Directive 69/74 to the carrying out of such forms of handling "as are needed to ensure preservation or to improve packaging or marketable quality" is a derogation from the basic principle that customs warehouses are used only for storage. On this basis, it is said that the operations in question do not constitute a form of handling covered by the list, in particular subparagraph 8, because:

(1) other operations are involved (weighing, working and shaping) than merely putting the butter into a packet or container and

(2) the list envisages only forms of handling which are "simple" and this excludes mixing or separation, working, shaping and weighing which necessitate equipment more complicated than that required for simple packing.

Moreover, according to the Commission, the operations are carried out using factory machinery not normally to be found in a warehouse and the cost is higher than that of processing butter into butter oil.

Counsel for the Dutch Government contends on the other hand that the purpose of the common list of usual forms of handling was to set out the practices traditionally followed in the Member States; these processes were traditionally part of handling in the Netherlands. They are done as one operation for the purpose of improving packaging or marketable quality and they fall squarely within subparagraph 8 of Article 1 which in any event only requires the process of transfer into other containers to be "simple".

Reference has been made to the minutes of the meeting held on 4-5 February 1970 between representatives of the Commission and the Member States for the purpose of drafting the list and to the Commission's proposal dated 20 October 1970. From the former it seems clear that some element of harmonization was considered necessary because certain operations were regarded as inward processing in some Member States and as falling within the customs warehouse system by others, and that some operations were excluded from the list, even though they were traditional in one Member State. The preliminary observations attached to the Commission's proposal recite that the list of usual forms of handling was drawn up on the basis of the forms in force in the Member States, taking account not only of traditional commercial practice but also of the requirements of users of customs warehouses and free zones and the evolution of techniques and means of control. I do not consider these to be admissible guides to the interpretation of the regulation but they do as a matter of history show that the list was drawn up by agreement and was not intended to include every form of handling allowed by each Member State at the time. The fact that the operations in question had been traditionally carried out in Dutch customs warehouses does not therefore mean that they must be covered by the list.

It is plain from the preamble to Council Directive 69/74 that the object of

making the list was to achieve harmonization. It seems to me to follow that the list should be read as being exhaustive, as the Commission contends, so that Member States may only authorize forms of handling which are included in it.

The only forms of handling which qualify are those which are needed "to ensure preservation or to improve packaging or marketable quality". Accordingly, the processes listed in Article 1 of Council Directive 71/235 must be interpreted as satisfying one of these purposes, even if this means reading some of them restrictively.

Although the purposes of the inward processing system and the customs warehouse procedure are different, they are not expressed to be mutually exclusive, and as has been seen some operations are common to both. The dividing line is not entirely clear. None the less it seems to me that where goods are shown to have been brought into the Community with the intention that they may be processed, and then re-exported, rather than for the essential purpose of storage with incidental handling, they ought to be dealt with under the inward processing system. Accordingly, to the extent that any butter was in fact imported for the purpose of processing and re-export, it seems to me that it should not have been dealt with under the customs warehousing procedure, but under the inward processing arrangements.

The argument has, however, really involved the question whether, on the assumption that goods are placed in store, the process or processes carried out are such that they still qualify for exemption from the collection of duties. Otherwise by virtue of Article 9 (2) of Regulation No 69/74, they are to be subject to the rules in force relating to inward processing.

"Preservation" is not relevant here. The English text which follows is "to improve packaging", the French "améliorer la présentation". The latter, like several of the other language versions, seems to me to be wide enough to embrace the packing of the goods in a form or shape which is not necessarily the same as that in which they arrive. "To improve their marketable quality" can be construed narrowly, as the Commission would construe it, as referring simply to the essential quality of the goods, or more broadly, as referring to an improvement in their marketability, which would include a change of size or shape if that made them more readily saleable. On balance, the latter seems to me to be the right construction. If it were otherwise, it seems that a number of the processes listed in the Council directive would be *ultra vires* — or at any rate, so limited as to be of little utility. I take by way of example, dividing, sorting, classification. I do not accept the Commission's argument that the phrase is to be limited to maintaining quality, such, for example, as removing goods which have gone bad from other goods. That is covered by "preservation", and the argument gives insufficient weight to the word "improvement". I would accordingly accept that if the division of goods into smaller packages is covered by an item or items in the list in the directive, it is capable of being within the purposes specified in Article 9 of Regulation No 69/74.

It is said that the items in this list should be restrictively construed because they are in effect providing exemption from liability for duties or charges. I find that argument difficult to accept. A wide range of different processes with no obvious common factor is given, which plainly go far beyond "handling", in the sense of moving into storage, moving about in storage and moving out of storage. Crushing of dried vegetables, cleaning of hides, "coupage" of wines and other current oenological practices, "mechanical clarification" are obvious examples, and which are no less surprising as items of "handling", in a customs warehouse than the process involved in the present case.

Nor do I accept that all processes to qualify must be "simple", unless they are otherwise expressly so qualified in the text, or that the use of machinery, other than rudimentary equipment, disqualifies a process. It is the nature of the process rather than the equipment which is relevant. To sort two kinds of seeds by a sophisticated machine rather than by hand is still, in my opinion, "simple sorting". Nor is "packing" limited to a minimal form of wrapping; it seems to me that "packing" is capable of including contemporary forms and methods of packing and presentation which may be elaborate.

If the Dutch Government is right (as I think) in its contention that the division of bulk butter into retail-size packets is one process, with ancillary stages, then the only possible items in subparagraph 8 are "change of packings" and "simple transfer into other containers".

I do not regard the wrapping into which butter is placed as "a container" in the present case so that there is no transfer here to other containers. It is clearly arguable that "change of packings" must be strictly construed as meaning the taking off of one wrapper and the putting on of another, without more. Seen in the light of the purposes set out in Article 9 of Regulation No 69/74 and in the context of the list as a whole, particularly having regard to the breadth and extent of some of the processes, I am, on balance, of the view that this is not the right construction and that "change of packings" permits products to be packed in different sizes and also permits the carrying out of incidental processes for the purpose of packing which do not change the nature or composition of the product. A hogshead does not have to be decanted to another hogshead to qualify. It may be decanted into bottles. Putting bags of twenty-four apples into bags of six apples each is not a mere division: it involves also a change of packing within the meaning of item 8. So equally, in my view, dividing a product into parts and packing each part separately, is a change of packing within the meaning of this item. The fact that the butter has to be thawed, kneaded, and cut in order to change the packing does not seem to prevent this result in the present case. These processes are incidental to and only done in order to change the packing: the butter as butter does not change.

If there is not here, properly regarded, one process, then there is nothing in the directive which prevents more than one process being carried out as part of the permitted handling. In the present case on this approach there is unpacking (item 8), possibly mixing (item 12), if the kneading to ensure that the colour is even is to be treated as a separate process, dividing (item 19) and repacking (item 8). These are all acceptable forms of handling.

Accordingly, although there are strong arguments both ways, I conclude that in respect of butter stored in customs warehouses (other than that imported to be processed within the Community with the intention that it should be exported outside the customs territory of the Community to which Directive 69/73 applies) the process of packing in smaller quantities, involving the ancillary processes of thawing, kneading and dividing, but involving no change in the composition or quality of the butter itself, constitutes "a change of packing" within the meaning of item 8 of paragraph 1 of Council Directive 71/235, and accordingly the Kingdom of the Netherlands has not failed in respect of any such butter to comply with Directive 71/235. I am of the opinion therefore that there should be a declaration to that effect and that the Commission should pay the costs of the application.