In Case 127/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hessisches Finanzgericht (Finance Court, Hesse) for a preliminary ruling in the action pending before that court between

HANS SPITTA & CO., Frankfurt am Main

and

HAUPTZOLLAMT (Principal Customs Office) FRANKFURT AM MAIN-OST

on the validity of Commission Regulation (EEC) No 3092/76 of 17 December 1976 on the application of monetary compensatory amounts to certain beef and veal products (Official Journal 1976 L 348 p. 18)

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. M. Donner and A. O'Keeffe, Judges

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities may be summarized as follows:

I — Facts and written procedure

Fresh, chilled and frozen beef or veal, fall within subheading 02.01 A II of the Common Customs Tariff. Monetary compensatory amounts were fixed in

1971 for products coming under that subheading when the system was established by Regulation No 947/71 of the Council of 12 May 1971 (Official Journal, English Special Edition, 1971 (I) p. 257).

On the other hand "prepared" beef and veal fall within subheading 16.02 B III (b) 1 of the Common Customs Tariff ("Other prepared or preserved meat or meat offal: Other: Containing bovine meat or offal"). No monetary compensatory amount applied in respect of these products before the entry into force of Regulation No 3092/76.

That regulation, which was published on 18 December 1976, entered into force on 20 December 1976. Its purpose was in particular to bring the intra-Community trade in "seasoned meat" within the system of monetary compensatory amounts.

Accordingly, Article 1 of that regulation provides:

"For fresh, chilled or frozen products, other than minced products, which fall within subheading 16.02 B III (b) 1 of the Common Customs Tariff and which are excluded from classification in Chapter 2 thereof solely by reason of simple seasoning (e.g. with salt and pepper), or the addition of other substances (e.g. vegetables, flours or oil), monetary compensatory amounts shall apply in trade between Member States at the level applicable to products of the same description without such treatment which fall within subheading 02.01 A II of the Common Customs Tariff."

Spitta & Co., the plaintiff in the main action, imported on 29 December 1976 and 7 January 1977 from France into the Federal Republic of Germany "forequarters of bovine animals and boned or boneless cuts of beef and veal, seasoned with pepper, falling within tariff subheading 16.02 B III (b) 1" of the Common Customs Tariff. Those goods were bought on 30 November 1976.

The Hauptzollamt Frankfurt am Main-Ost, the defendant in the main action, charged a sum of DM 13 655.01 in respect of monetary compensatory amounts. Spitta & Co. contested the relevant notices of assessment before the Hessisches Finanzgericht on the ground that the levying of such sums was based on invalid provisions, namely those of Regulation No 3092/76.

The Hessisches Finanzgericht decided, by an order of 3 May 1978, to stay the proceedings and pursuant to Article 177 of the EEC Treaty, to refer the following preliminary question to the Court of Justice:

"Is Commission Regulation (EEC) No 3092/76 of 17 December 1976 on the application of monetary compensatory amounts to certain beef and veal products (Official Journal L 348 p. 18) either invalid or inapplicable:

(a) for absence of the conditions required by Article 1 (1) of Regulation (EEC) No 974/71 of the Council;

(b) for failure to make any provision for old contracts;

(c) for restriction of intra-Community trade?"

The order of the Hessisches Finanzgericht was received at the Court on 7 June 1978.

The Court, having heard the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without a preparatory inquiry and to assign the case to the First Chamber.

II — Summary of the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by Spitta & Co.

According to Spitta & Co., Regulation No 3092/76 is unlawful and accordingly null and void on three grounds.

Regulation No 3092/76 is based on Regulation No 974/71, in particular Article 6. It is a condition for the application of Regulation No 974/71 that in a Member State there should occur a modification in the rate of exchange in excess of the margin of fluctuation authorized by the international rules in force on 12 May 1971. The power conferred under Article 6 applies only to the detailed rules for the application of the regulation. Regulation No 3092/76 is thus based exclusively on the enabling provision in Article 6 of Regulation No 974/71 when in a Member State there occurs a fluctuation in the rate of exchange wider than the permitted margin. In the Federal Republic of Germany there was no alteration in the partity of the currency, either in December 1976 or during the previous period, after October 1976.

Secondly, Regulation No 3092/76 makes no provision for contracts in the course of implementation and thus breaches the principles of the protection of good faith and of legitimate expectation. It is true that in certain cases concerning long-term contracts the Court of Justice has ruled that the importer himself must seek the appropriate remedy (cf. Case 68/77 *IFG* [1978] ECR 354) but this ruling cannot be extended to contracts to be executed within a very short period. It is in fact unreasonable to make the importer liable for the entire commercial risk of intervention by the authorities. If an importer has reason to fear that goods purchased by him are liable at any moment to be rendered subject to charges which he cannot pass on to his customer the only solution remaining to him is to refrain from making any imports.

Thirdly, intra-Community trade in the products listed in Article 1 of Regulation No 3092/76 have suffered discrimination as compared with trade with third countries to which the system of compensatory amounts was applied only by Regulation No 425/77 of 14 February 1977 amending the wording of tariff subheading 16.02 B III (b) 1 concerning meat and veal. This constitutes an infringement of Article 9 (1) of the Treaty prohibiting customs duties on imports and exports and charges having equivalent effect between Member States. The present case entails a general discrimination against intra-Community trade as compared with trade with third countries. This is in fact the very characteristic of a tax having an effect equivalent to a customs duty within the Community.

B — Observations submitted by the Commission

According to the Commission all the conditions listed by Regulation No 974/71 for the fixing of monetary compensatory amounts in intra-Community trade were fulfilled, with regard to the products referred to in the present case, when Regulation No 3092/76 was adopted.

Spitta & Co. is mistaken in particular in considering that Article 1 (1) of Regulation No 974/71 means that it is a condition for the inclusion of a product within the scope of the system of monetary compensatory amounts that a "modification of the rate of exchange" should occur. The application of the system is conditional only upon the rate of exchange of a given currency being in excess of the margin of fluctuation; the currency fluctuations themselves, that is to say the variations in the rate of exchange, affect the size of the amounts, as is clear from Article 2 of Regulation No 974/71.

Since "seasoned" meat is merely the fresh meat referred to in Chapter 2 of the Common Customs Tariff where only a little spice or some other substance has been added, currency fluctuations had the same effect on prices for such meat. There was thus a risk of disturbances in the trade in such products also by reason of monetary measures. The Commission, in including "seasoned" meat within the scope of the system of monetary compensation, acted in pursuance of the very wide discretionary powers which it enjoys in that sphere.

Monetary measures affecting fresh meat have led in the Community to abnormal patterns of trade in "seasoned" meat not covered by the system of compensatory amounts, and these patterns constitute a danger for the level of prices in the Member States concerned. Thus in the last months of 1976 importations from Ireland into the Federal Republic of meat products coming under subheading 16.02, which includes "seasoned" meat, increased considerably. When compensatory amounts were applied to such products also in January 1977, after the adoption of Regulation No 3092/76, the importations returned to their normal level.

The Commission doubts whether consideration of the necessity for enacting transitional measures to protect individuals is appropriate in a procedure for a preliminary ruling under Article 177 of the Treaty concerning the validity of a regulation. A regulation can only be valid or invalid. The invalidity of a regulation can scarcely be restricted to certain persons whose legitimate expectations have been frustrated. Such persons are always entitled to institute proceedings for damages under Article 215 of the Treaty.

Regardless of the reply to the doubt expressed above, the conditions which, according to the case-law of the Court, must be fulfilled before it can be acknowledged that there has been a breach of that principle have not been fulfilled in this case. The principle that legislation generally has immediate effect in the absence of express and exceptional provision to the contrary applies also to the future effects of situations which came into being under the earlier legislation. Derogations from that principle are permissible only in quite exceptional circumstances, the existence of which is appraised in accordance with the most stringent criteria.

Spitta & Co. did not conclude an "irrevocable" transaction within the meaning of the case-law of the Court of Justice. "Irrevocable" transactions in the sense that the trader can in fact no longer withdraw from them, are considered to be those which the trader has definitively committed himself to carry out and this applies also as against the competent authorities.

It was not impossible for Spitta & Co. to foresee that the system introduced by Regulation No 3092/76 might be brought into force. It should have known that products falling within subheading 16.02 B III (b) 1 of the Common Customs Tariff constituted a sensitive area. In this connexion it is sufficient to refer to the developments occurring in the rules applicable to imports of seasoned meat from non-member countries (the discussions in Case 68/77 (previously cited) and Case 90/77, *Stimming* [1978] ECR 995, turned on these rules). The undertakings were fully aware of the special nature of the product which they had termed "seasoned meat" and similar "preparations". They were not unaware that the product in question was one which was "made to measure" for no other purpose than to enable them to avoid the provisions then applicable to fresh meat.

The foregoing applies in full to Spitta & Co., as is clearly shown by the terms in which they described the goods imported from France into Germany. In the order making the reference these goods are described as "forequarters of bovine animals and boned or boneless cuts of beef and veal, seasoned with pepper, falling within tariff subheading 16.02 B III (b) 1". Such wording is nowhere to be found in heading 16.02 of the Common Customs Tariff. There are no terms applicable to beef and veal except "Other prepared or preserved meat or meat offal: Other: Containing bovine meat or offal". On the other hand the words employed by Spitta & Co. appear in subheading 02.01 A II (a) which covers fresh, chilled or frozen meat of domestic bovine animals.

Finally, the measure adopted by the Commission was indispensable in the general interest. A more or less lengthy transitional period would have entailed increased risks and would certainly have encouraged traders to import further significant quantities "in time", that is to say before the compensatory amounts were actually applied. It was impossible to contemplate excluding from the scope of the new provisions all supplies made in implementation of earlier contracts. In practice the Commission would thus have been deprived of all means of countering effectively certain economic tendencies.

As far as intra-Community trade is concerned traders are free to conclude contracts of unlimited duration for unlimited quantities. The implementation or otherwise of such contracts is not subject to penalties under Community law since there is no system of licences or deposits.

Finally, it was very easy to export meat covered by heading 02.01 from Germany to any other Member State and thereby to benefit from increased monetary compensatory amounts and subsequently, after "preparing" the meat by adding a few grains of pepper, to re-export it to the Federal Republic under heading 16.02 without being charged any monetary compensatory amount.

The fact that "seasoned" meat and similar products were subject to the system of monetary compensatory amounts only in respect of trade between Member States is justified on objective grounds. From the legal point of view different situations must be accorded different treatment. When Regulation No 3092/76 was adopted "seasoned" meat no longer occupied anything but a very minor place in trade with non-

member countries since it was covered by the protective measures then in force and there was accordingly no risk that the monetary measures would entail disturbances in trade with non-member countries.

The Commission accordingly suggests that the reply should be that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Regulation No 3092/76.

Spitta & Co., represented by G. Breit, Rechtsanwalt of Frankfurt am Main, and the Commission of the European Communities, represented by G. zur Hausen, acting as Agent, presented oral argument at the hearing on 9 November 1978.

The Advocate General delivered his opinion at the hearing on 14 December 1978.

Law

1 By an order of 3 May 1978, which was received at the Court on 7 June 1978, the Hessisches Finanzgericht referred to the Court of Justice under Article 177 of the EEC Treaty a preliminary question on the validity of Regulation (EEC) No 3092/76 of the Commission of 17 December 1976 on the application of monetary compensatory amounts to certain beef and veal products (Official Journal L 348, p. 18).

2 This question was raised in the course of an action concerning the charging of monetary compensatory amounts in respect of importations of forequarters of bovine animals and boned or boneless cuts of beef and veal, seasoned with pepper, falling within tariff subheading 16.02 B III (b) 1 of the Common Customs Tariff which were effected by Spitta & Co., the plaintiff in the main action, from France into the Federal Republic of Germany on 29 December 1976 and 7 January 1977.

The competent customs office, the defendant in the main action, in pursuance of Regulation No 3092/76 charged a sum of DM 13 655.01 in respect of monetary compensatory amounts.

Spitta & Co contested the relevant notices of assessment before the Hessisches Finanzgericht on the ground that Regulation No 3092/76 was invalid.

3 The question submitted by the Hessisches Finanzgericht inquires whether Regulation No 3092/76 is either invalid or inapplicable:

(a) for absence of the conditions required by Article 1 (1) of Regulation No 974/71 of the Council;

(b) for failure to make any provision for old contracts; or

(c) for restriction of intra-Community trade.

The first part of the question

4 Fresh, chilled or frozen bovine meat coming under subheading 02.01 A II (Chapter 2: "Meat and edible meat offals") of the Common Customs Tariff was brought in 1971 within the system of monetary compensatory amounts set up by Regulation No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition, 1971 (I) p. 257).

On the other hand that system was applied to products coming under subheading 16.02 B III (b) 1 of the Common Customs Tariff (Chapter 16: "Other prepared or preserved meat or meat offal: Other: Containing bovine meat or offal") only by Regulation No 3092/76, the validity of which is challenged.

Article 1 of that regulation states:

"For fresh, chilled or frozen products, other than minced products, which fall within subheading 16.02 B III (b) 1 of the Common Customs Tariff and which are excluded from classification in Chapter 2 thereof solely by reason of simple seasoning (e.g. with salt and pepper), or the addition of other substances (e.g. vegetables, flours or oil), monetary compensatory amounts shall apply in trade between Member States at the level applicable to products of the same description without such treatment which fall within subheading 02.01 A II of the Common Customs Tariff."

5 The application of monetary compensatory amounts is subject to the condition prescribed in Article 1 (1) of Regulation No 974/71, as amended by Regulation No 509/73 of the Council of 22 February 1973 (Official Journal L 50, p. 1) that a Member State allows the exchange rate of its currency to fluctuate by a wider margin than that permitted by international rules in force on 12 May 1971.

Contrary to the claims of the plaintiff in the main action, that provision does not prescribe as a condition for the application of monetary compensatory amounts that there should have been a recent alteration in the exchange rate of the currency of the Member State in question.

It is sufficient that at the time when the monetary compensatory amounts are applied the exchange rate exceeds the fluctuation margins permitted by the international rules in force on 12 May 1971.

It is common ground that at the time when the Commission adopted Regulation No 3092/76 the currencies were continuing to fluctuate beyond the margins laid down in Article 1 (1) of Regulation No 974/71.

6 According to the second subparagraph of Article 1 (2) of Regulation No 974/71 as amended by Regulation No 2746/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (28-30 December) p. 64) monetary compensatory amounts may only be applied if the monetary measures referred to in paragraph (1) would lead to disturbances in trade in agricultural products, a condition which the plaintiff maintains had not been fulfilled at the time when Regulation No 3092/76 was adopted.

According to the Commission, since seasoned meat was in reality only fresh meat coming under Chapter 2 of the Common Customs Tariff seasoned with a little spice or some other substance, an abnormal pattern of trade in "seasoned" meat, to which monetary compensatory amounts did not apply, developed at the end of 1976, in particular from Ireland and the United Kingdom to the Federal Republic of Germany.

When in January 1977 monetary compensation was applied to the said product following the adoption of Regulation No 3092/76 such importations returned to a normal level.

7 On the basis of those considerations the Commission was justified in fixing monetary compensatory amounts in respect of the products in question.

The second part of the question

8 The plaintiff in the main action claims that Regulation No 3092/76 makes no provision for exemption in respect of contracts already concluded and thereby breaches the principles of the protection of good faith and of legitimate expectation and that in fact it concluded the contract for the purchase of the goods in question on 30 November 1976, that is, before the publication of Regulation No 3092/76.

9 However, the import system at issue in this case did not require any previous authorization or any firm commitment on the part of the person concerned with respect to the authorities responsible for the management of the organization of the markets in question and the Commission gave importers no indication which could have justified the expectation that, regardless of the development of conditions on the market, the previous rules would be maintained without alteration.

Furthermore, the measure adopted by the Commission could not have surprised prudent traders who could not be unaware that the products in question, coming under subheading 16.02 B III (b) 1, constituted a sensitive area and were no different in practice from the fresh meat coming under Chapter 2 of the Common Customs Tariff.

In those circumstances the establishment of a transitional period would probably have prompted traders to import significant quantities of "seasoned" meat before the compensatory amounts were in fact applied, thereby rendering ineffective the measure adopted by the Commission.

The third part of the question

10 Article 1 (1) of Regulation No 974/71 cannot be interpreted as requiring that monetary compensatory amounts should be applied simultaneously in intra-Community trade and in trade with non-member countries even when the situations are different.

11 Furthermore, following the adoption of the regulation in dispute, "seasoned" meat practically ceased to feature in trade with non-member countries since it was brought within the scope of the protective measures by Regulation No 2033/75 of the Commission of 5 August 1975 (Official Journal L 207, p. 8).

At the time there was accordingly no longer any risk that the monetary measures would entail disturbances in trade with third countries.

Costs

12 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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 (First Chamber),

in answer to the questions referred to it by the Hessisches Finanzgericht by order of 3 May 1978, hereby rules:

Consideration of the question submitted has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 3092/76.

Mertens de Wilmars Donner O'Keeffe

Delivered in open court in Luxembourg on 31 January 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber