**Member State, pays the monetary compensatory amounts payable by the latter State, is bound by the tariff classification adopted by the latter and must pay the monetary compensatory amounts due from the importing Member State at the rate which corresponds to the tariff classification adopted by the latter.**

3. **The provisions of Regulation No 974/71 of the Council, and in particular of Article 2 a thereof, and those of Regulation No 1380/75 of the Commission of 29 May 1975 must be interpreted as meaning that the exporting Member State is not empowered to pay traders the difference between the monetary compensatory amount applicable on export which corresponds to the tariff classification made by that Member State, and the lower monetary compensatory amount on export which corresponds to the tariff classification applied on import by the importing Member State.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 1 October 1981.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

## OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 2 JULY 1981

*My Lords,*

This case comes to the Court by way of a reference for a preliminary ruling made by the President of the High Court in Ireland on 31 July 1980, in an action in which Anglo-Irish Meat Company Limited claims from the Irish Minister

for Agriculture £442 069.16. This sum is said to be the outstanding balance of monetary compensatory amounts ("MCAs") due to the company in respect of a series of consignments of beef imported into the United Kingdom from Ireland between 20 March 1978 and 28 April 1979. The Irish Minister for Agriculture is sued because of an agreement between the two Member States that Ireland would "pay the compensatory amount which should be granted by" the United Kingdom as the importing Member State pursuant to Article 2 a of Regulation No 974/71 of 12 May 1971 (OJ L 106/1 of 12. 5. 1971) as amended by Regulation No 1112/73 of 30 April 1973 (OJ L 114/4 of 30. 4. 1973).

At the relevant time the company carried on the business of buying cattle and selling meat. A large part of its export trade was to the United Kingdom. The meat in question in these proceedings consisted of chilled forequarters of beef from which the atlas bone had been removed. The atlas bone is approximately 0.5 kg in weight and is to be found in the animal's neck.

When completing the export formalities the company declared the meat as falling within subheading 02.01 A II (a) 4 aa of the Common Customs Tariff ("the CCT"), namely other "unboned (bone-in)" chilled meat, and entered that on Control Copy T 5, the internal Community transit document required for these transactions. The Irish authorities accepted that as being the correct classification, and on export charged the company, which paid, MCAs at the appropriate rate for this subheading. On import of the goods into the United Kingdom, however, the British customs authorities endorsed the T 5 forms with various words indicating that that classification under the declared subheading was in dispute and giving a file reference number. That this endorsement constituted a formal classification of the goods under another tariff heading was disputed by counsel for the company at the hearing. In the order for reference, however, it is stated that the goods were released for home use in the United Kingdom under subheading 02.01 A II (a) 2 bb and that the United Kingdom customs authorities notified their Irish counterparts of this, pursuant to Article 10A (4) of Regulation No 1380/75 of 29 May 1975 (OJ L 139/37 of 30. 5. 1975), as amended by Article 1 (2) of Regulation No 1556/77 of 11 July 1977 (OJ L 173/10 of 30. 7. 1977). It is clear, whatever the form of endorsement, that the United Kingdom took the position that this meat fell within subheading 2 bb namely other separated or unseparated forequarters. MCAs for forequarters were lower than for unboned (bone-in) meats. The Irish Minister for Agriculture paid this lower amount as determined by the United Kingdom. The difference between the two amounts is the subject-matter of the action.

Although it is not apparently normal practice in the trade for the atlas bone to be removed, and although its removal does not affect the product commercially, the company has contended that if, by removing the bone, it can ensure the classification of the meat under a different and more beneficial heading, it is perfectly entitled to do so. Other traders adopted comparable practices, and in an area of tight profit margins the

company had no option. Accordingly it protested the classification for the purpose of the payment of MCAs on import. After some correspondence the United Kingdom customs authorities wrote to the Commission requesting that the matter be put before the CCT Nomenclature Committee. The problem was first considered by the Nomenclature Committee on 4 December 1978, but was not formally put to the vote until 6 April 1979. Its opinion was that forequarters from which the atlas bone had been removed did not fall within subheading 02.01 A II (a) 2 bb but subheading 02.01 A II (a) 4 aa and, shortly afterwards, on 11 May 1979 the Commission adopted Regulation No 936/79 (OJ L 117/19 of 12. 5. 1979) which came into force in June 1979 and which classified separated forequarters under subheading 4 aa in accordance with the Committee's opinion. In addition the rate for MCAs in respect of meat falling within the two subheadings was made the same with effect from 30 April 1979 (see Article 1 of Commission Regulation No 745/79 of 11 April 1979 (OJ L 95/1 of 16. 4. 1979)).

The President of the High Court referred three questions to the Court:

"1. Are the provisions of the Common Customs Tariff of the European Communities (as contained in Council Regulation (EEC) 950/68 as amended) to be interpreted in respect of the period between the 20th day of March 1978 and the (28th) day of April 1979 as requiring a separated forequarter of beef in a chilled state from which the atlas bone had been removed, to be entered for customs purposes under Heading No 02.01 A II (a) 4 aa and to be dealt with accordingly in the calculation of monetary compensatory amounts levied upon export or granted upon import in trade between the Member States?

2. If the answer to question 1 above is in the affirmative, are the provisions of Article 10 a and Article 11 (2) of Regulation 1380/75 to be interpreted as placing upon the defendant an obligation to grant to the plaintiff a monetary compensatory amount at the rate applicable to the tariff heading in question rather than at the rate applicable to a different heading notified in accordance with Article 10 a (4) as having been used for release of the goods in question upon import in the Member State of destination?

3. If the answer to either of the questions above is in the negative, are the said provisions of Regulation 1380/75 to be interpreted as imposting upon the defendant an obligation to refund to the plaintiff the excess monetary compensatory amounts levied upon the export of the said goods from Ireland and attributable to the application of tariff heading 02.01 A II (a) 4 aa?"

## The first question

Heading No 02.01 A II (a) 2 of the CCT simply specifies "separated or unseparated forequarters". The Additional Notes at the beginning of the chapter define separated and unseparated forequarters for the purposes of the subheading as follows:

"... the front part of a (half) carcase comprising all the bones and the scrag, neck and shoulder, with a minimum of four (pairs of) ribs and a maximum of ten (pairs of) ribs ..."

The Irish customs authorities took the view that the removal of the atlas bone prevented the meat from falling within the definition of separated and unseparated forequarters because it could then no longer be said to comprise "all the bones". As a result, it was to be classified as an "unboned" or "bone-in" cut. The United Kingdom authorities, however, appear to have considered that "all the bones" referred to the rib bones only so that removal of the atlas bone did not affect the classification of the meat, alternatively, semble, that the removal of this small bone of no commercial significance did not prevent the carcase from being said to include "all the bones".

Regulation No 936/79 which came into force in June 1979 clearly put the meat under subheading 4 aa (unboned (bone-in)). It seems to be agreed that, it does not have retrospective effect (see, for example, Case 30/71 *Siemers* v *Hauptzollamt Bad Reichenhall* [1971] ECR 919 at p. 928 and Case 158/78 *Biegi* v *Hauptzollamt Bochum* [1979] ECR 1103 at p. 1119). In consequence, it is not binding as to the classification to be given to goods, like those in this case, imported before it came into effect. The plaintiff, the Minister for Agriculture and the Commission are however agreed in saying that the classification made by the United Kingdom authorities was erroneous and all rely on the regulation, not as determining the answer to this question, but as valuable evidence to indicate what is the correct interpretation. In its written observations, the United Kingdom Government has taken the view that the wording of the Additional Notes would have been different if it had been intended that the absence of a small neck bone precluded classification under subheading 02.01 A II (a) 2 bb; and that the Additional Notes are, at the least, ambiguous, with the result that, as the removal of the atlas bone does not alter the essential character of a forequarter of beef or prevent it being bought and sold in the trade as such, the correct classification is as a forequarter rather than a bone-in cut.

The rules for the interpretation of the CCT Nomenclature provide that, for legal purposes, classification is to be determined according to the terms of the headings and the applicable section or chapter notes. The reference to the last mentioned includes, in my opinion, the "Additional Notes" found at the beginning of Chapter 2, which are described as such because they supplement the chapter notes drawn from the Customs Cooperation Council Nomenclature, on which the CCT is based. The phrase "comprising all the bones" in the definition of "forequarters" set out in the Additional Notes does not, in my view, refer to the rib bones alone, as the United Kingdom contends, not least because the Notes go on to allow between four and ten ribs or pairs of ribs to be present. This margin does not seem to make sense if the forequarter must comprise "all the ribs". While it may be true that the Notes might have been more happily phrased and whilst the reason for the initial distinction may not be obvious, nothing has been suggested in my view to justify a conclusion that the phrase "comprising

all the bones" should be given other than its ordinary meaning. All the bones means all the bones and not all but one of the bones or all but a commercially insignificant bone.

Moreover, that the atlas bone is to be included, if the meat is to be a forequarter, seems supported by reference to the CCT Explanatory Notes. These state, in the version published in 1978, in relation to subheading 02.01 A II, "For the purposes of the definitions of forequarters ... the following considerations apply: (a) the scrag and neck is taken to be the muscular part of the neck with the seven cervical half vertebrae ..." At the hearing counsel for the plaintiff and for the Commission were able to confirm that the atlas bone is one of the seven cervical half vertebrae. Accordingly, if this is so, it seems that it must be present as part of the "scrag and neck".

The correct classification of this meat was therefore in my view under subheading 02.01 A II (a) 4 aa. Since this view is reached independently of, but is consistent with, the opinion of the majority of the Nomenclature Committee it does not seem necessary to comment on the submissions made as to the weight to be attached to the views of that majority as an aid to the construction of the CCT.

## The second question

As far as the second question is concerned, the Court held in Case 795/79 *Handelsmaatschappij Pesch* v *Hoofproduktschap voor Akkerbouwprodukten*, Case 795/79 [1980] ECR 2705, that Article 1 of Regulation No 974/71 placed the responsibility for the granting of MCAs on imports on the Member State into which the goods are imported and that Article 2 a of the Regulation does not put the responsibility on the exporting State to pay an MCA on importation, but only allows the exporting Member State the opportunity "to pay by agreement with the importing Member State and on its behalf the monetary compensatory amount upon importation which the importing Member State itself is required to grant". Since the grant of the MCAs is dependent on the tariff classification of the goods, it follows that the exporting Member State can only pay the MCAs at the rate appropriate to the tariff heading attributed to the goods by the importing Member State. "The exporting Member State in paying the compensatory amounts for which the importing Member State is liable is bound by the tariff classification which the importing Member State applies to the products in question for the purposes of their importation".

The company has sought to distinguish the decision in the *Pesch* case from the present. It is said that the fact that here the matter was referred to the Nomenclature Committee which decided the issue in the way contended for by the company means that the Irish Minister for Agriculture is bound to pay the sum which, on the basis of that opinion, should have been paid. I do not, however, read paragraph 11 of the judgment in the *Pesch* case as meaning that, if the machinery for submitting a dispute to the Nomenclature Committee is followed, the result is an automatic correction of the tariff classification made by the authorities of the importing State. As far as the exporting State is concerned, the classification of the

importing State is determinative, particularly where, as apparently happened here, the opinion of the Committee was obtained after the United Kingdom had made its classification in respect of the goods in issue.

In the alternative, it is said that, where there is doubt, the exporting Member State is bound to make such enquiries as are necessary to resolve a dispute concerning the classification made by the importing Member State because its duty under Article 2 a of Regulation No 974/71 is to pay the MCAs which the latter "should have granted" on a proper interpretation of Community law. Although it is clearly arguable that an obligation to pay the amount which the importing State "should have granted" means that the exporting State should pay what is the correct amount and not merely what the importing State wrongly takes as the correct amount, such an argument is in my opinion inconsistent with the decision of the Court in the *Pesch* case.

In that case, the Court stressed that under Article 2 a, the importing Member State remains responsible for granting the MCA and, therefore, for classifying the goods in order to determine the appropriate MCA rate. The exporting Member State has no function other than to make the payment so determined. Secondly, it pays on production of and in accordance with the Community transit document relating to the goods. The exporting Member State is, as counsel for the Commission pointed out, merely an agent of the importing Member State in the payment of the MCAs due. It has no authority to go behind the assessment of the importing Member State as evidenced by the transit document.

Article 10 a (4) of Regulation No 1380/75 provides that, when imports are released for home use under a customs heading different from that which is entered in the transit document, the customs office of departure is to be informed. In the normal course of events, this will be done by endorsing the transit document before returning it to the office of departure (see Article 12 of Regulation No 223/77 of 22 December 1976 (OJ L 38/20 of 9. 2. 1977)). Payment of the MCA may be delayed pursuant to Article 16 of Regulation No 1380/75, as counsel for the plaintiff suggested at the hearing, "... where administrative inquiries have been commenced owing to doubts concerning the accuracy of the evidence produced". But this covers the situation where it is suspected that the transit document does not accurately represent the completion of the import formalities and the payment of any duties and charges having equivalent effect or where, for example, it is unclear from looking at the document under what classification the goods were cleared for home use in the importing Member State. It does not, in my view, entitle or require the exporting Member State to delay payment of the MCAs while it pursues its own inquiries as to the accuracy of the tariff classification made by the importing Member State.

If the importer or exporter contends that the tariff classification made by the importing Member State is wrong, it

seems to me that he must request its competent authorities to review the classification. In the present state of the law, if the importing Member State refuses to review its classification or declines to follow an opinion issued by the Nomenclature Committee, the remedy is to bring proceedings before the national courts. The person concerned cannot in my view compel the authorities of the exporting Member State to correct the situation.

Counsel for the Commission has submitted that even though the United Kingdom authorities were mistaken in their classification of the goods in question, they were still entitled to grant MCAs at the rate appropriate for forequarters rather than bone-in cuts if they took the view that there was a manipulation or abuse of the MCA system and a consequent risk of trade distortion. On the view I have taken of the Court's decision in the *Pesch* case, it does not seem to me that the question arises in the present proceedings. Accordingly I do not express any opinion as to whether the cases referred to by the Commission support the wide proposition contended for, or whether the facts of the present case can properly be said to constitute a manipulation or abuse of the MCA system.

## The third question

The national court then asks, in its third question, whether the Minister for Agriculture is obliged to refund to the plaintiff the MCAs levied on the export of the meat from Ireland since they were imposed at a rate higher than that appropriate for the tariff classification adopted when the meat was imported into the United Kingdom. The answer, in my view, is no. The classification made by the Irish authorities was, it is agreed, correct and the MCAs were levied at the correct rate. There is no basis in the Regulations for compelling the refund of MCAs which are properly levied whatever may happen on import.

The plaintiff has complained that this leads to a patently unjust result because it means that two inconsistent classifications are applied to the same product at the same time and in the course of a single transaction, resulting in the application of the MCAs at different rates. The remedy, if any, however, does not lie against the authority of the exporting Member State which has acted pursuant to an agreement made under Article 2 a of Regulation No 974/71 as amended.

For these reasons, I am of the opinion that the questions referred to the Court should be answered as follows:

(1) Between 20 March 1978 and 28 April 1979, separated forequarters of beef in a chilled state from which the atlas bone had been removed fell

within subheading 02.01 A II (a) 4 aa of the CCT and were subject to MCAs at the rate appropriate to that subheading;

(2) Under Article 2 a of Regulation No 974/71 and Articles 10 and 11 of Regulation No 1380/75, the authorities of the exporting Member State are bound to pay MCAs at the rate determined by the importing Member State even if the tariff classification on which the rate is based is held to be erroneous;

(3) Regulation No 1380/75 does not oblige the authorities of the exporting Member State to refund MCAs correctly levied on the export of the goods merely because they are levied or granted by the importing Member State at a different rate.