OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 8 MARCH 1979 [1]

Mr President,
Members of the Court,

Under Regulation No 3000/75 of the Council amending the regulation on the Common Customs Tariff, dead poultry (that is to say, fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), are to be classified within heading 02.02.

Within that tariff heading there are, apart from whole poultry, two subheadings:

— 02.02 B which covers poultry cuts (excluding offals) and, in particular, under (I) boned or boneless cuts;

— 02.02 C which covers offals.

The questions referred to the court for a preliminary ruling by the Finanzgericht (Finance Court) Münster relate to the distinction between those two subheadings. The dispute before that court is based on the following facts:

In March and April 1977 P. Biegi Handelsagentur GmbH, hereinafter referred to as "Biegi", of Frankfurt am Main, imported from the United States three consignments of frozen turkey meat. According to the facts found by the court in the main action they consisted of small pieces of turkey meat, without bones, of irregular shape, consisting for the most part of muscle tissue, individually weighing approximately 20 grams, with certain pieces however weighing up to 60 grams, 10 to 15% of which consists of fat, skin and fibrous tissue and with a small proportion of veins and glands. The product is obtained by scraping the bones remaining after the prime cuts of greater value have been removed.

Biegi asked the Zollamt [Customs Office] Gelsenkirchen to classify the product in question in tariff subheading 02.02 C, that is to say as "offal".

The authorities first accorded that request but subsequently revoked that decision after examining a sample of the imported turkey meat and then classified it in tariff subheading 02.02 B I as boned or boneless poultry cuts (excluding offals), as a result of which classification a considerably higher sum was charged by way of levy and monetary compensatory amounts.

An objection lodged by Biegi was rejected by the Hauptzollamt [Principal Customs Office] Bochum.

After the importation of the goods in question the Commission adopted, on the basis of Regulation No 97/69 of the Council on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff and in conformity with the opinion of the Nomenclature Committee, Regulation No 1669/77 of 25 July 1977 on the classification of goods under Common Customs Tariff subheading 02.02 B I.

Under that regulation that subheading is to include:

"Raw, frozen poultry-meat, in particular turkey meat, obtained by scraping poultry bones from which the prime cuts have been removed or in any other way (for example, in the reduction of larger cuts to smaller size) and consisting of small, irregularly shaped pieces,

1 — Translated from the French

sometimes with fibrous, gristly and fatty tissue attached thereto and individually weighing from 5 to 40 grams approximately . . .".

Examination of that text shows that it relates to a product similar to that previously imported by Biegi and it confirms the importer and tariff classification applied by the German customs authorities.

The Finanzgericht Münster, before which the dispute between the the German authorities was brought, stayed proceedings and, by order of 27 April 1978, referred four questions to the Court for a preliminary ruling.

The first two questions relate, on the one hand, to the validity of Commission Regulation No 1669/77; on the other, if the answer to that question is in the affirmative, to the possible retroactive effects of that regulation in the sense that courts and customs authorities in the Member States were to apply it to imports carried out before its entry into force.

In order to reply to those two questions we must take as our starting point the basic regulation, Regulation No 97/69 of the Council, which first sets out the principle of the uniform application of the Common Customs Tariff Nomenclature by means of provisions adopted at Community level, it being understood that close co-operation is required between the Member States and the Commission when drawing them up; secondly, the Council considers that the purpose of such provisions is to specify the content of the headings or subheadings of the Common Customs Tariff without, however, amending the text thereof.

In order to implement those principles the Council on the one hand set up the "Committee on Common Customs Tariff Nomenclature" composed of representatives of the Member States presided over by a representative of the Commission; on the other it empowered the Commission to adopt the provisions envisaged where they are in accordance with the opinion of the Committee.

It was in accordance with that procedure that the Commission adopted Regulation No 1669/77.

The national court asks whether that provision should be regarded as invalid in view of the fact that the Commission exceeded the powers conferred on it by Regulation No 97/69 of the Council by not only specifying but amending the content of tariff subheadings 02.02 B I and 02.02 C respectively. I do not think that that is the case.

First of all, I should like to define the problem more specifically than the national court does.

The task given to the Commission by the Council in the field of customs nomenclature is, as expressly defined in the preamble to Regulation No 97/69, to "specify" the real content of headings or subheadings of the Common Customs Tariff without amending them.

Confronted with the problem of the importation, particularly into the Federal Republic of Germany, of small pieces of poultry-meat, obtained in particular by scraping bones, but consisting for the most part of muscle tissue, the Commission deemed it necessary to specify the tariff classification of the product and took the view that it was not offal but of boned or boneless poultry cuts. In the absence of an exhaustive definition of the concept of offal in the Explanatory Notes to the Customs Tariff (which merely list, amongst edible offals, with the exception of livers, in particular hearts, combs and wattles), the Commission was legitimately able to claim, in accordance with the opinion of the Nomenclature Committee, that the pieces of turkey

meat in question were not covered by the term "offals" because of their particular characteristics.

Thus the Commission regulation denied the national customs authorities the opportunity, existing before the entry into force of the regulation, of interpreting the customs nomenclature themselves for the purposes of applying it to particular cases.

It laid down a rule for the uniform application of subheading 02.02 B I as regards pieces of turkey meat obtained in particular by scraping the bones.

In the Bollmann case *(Hauptzollamt Hamburg* v *Bollmann,* Case 40/69 [1970] 1 ECR at p. 80) the Court ruled that "the common organizations of the markets in agriculture ... can only achieve their objectives if the provisions adopted for their realization are *applied in a uniform manner* in all Member States. The description of goods covered by these organizations must therefore have exactly the same range in all Member States. Such a requirement would be placed in jeopardy if, whenever there was a difficulty in the classification of any goods for tariff purposes, each Member State could determine the range covered by the descriptions in question by way of interpretation."

None the less, this reminder of the need for the uniform application of the description of goods covered by a common organization of the markets — descriptions contained in the Common Customs Tariff — must not lead the Court to ascribe a retroactive effect to Regulation No 1669/77.

In this connexion the Court has indeed clearly ruled, in particular in its judgment of 24 November 1971 *(Siemers* v *Hauptzollamt Bad Reichenhall* [1971] 2 ECR at p. 928) that a regulation adopted in order to specify the tariff classification of certain goods (the regulation in question was Regulation No 241/70 of the Commission concerning mayonnaise) "cannot be applied for the purpose of determining the classification of products imported before its entry into force. This regulation, which makes *detailed provision for the conditions for classification* under heading 21.07, is of a *legislative* nature and cannot have retroactive effect."

It should be noted that the provision in question was legally based, as is Regulation No 1669/77, on Regulation No 97/69 of the Council and shortly afterwards the Court confirmed, in terms more general than in the Siemers case, by judgment of 15 December 1971 (Case 77/71 *Gervais-Danone* v *Hauptzollamt München* [1971] 2 ECR 1127) that measures adopted by the Commission under the said Council regulation for the purpose of specifying the tariff classification of certain products cannot have retroactive effect.

Mr Advocate General Reischl took the same view in Case 53/75 *(Belgium* v *Vandertaelen* [1975] 2 ECR at pp. 1658 and 1659).

In view of the fact that Regulation No 1669/77 is not applicable to the imports in question, which occurred before its entry into force, it is now necessary to examine the third question raised by the national court, that is to say to attempt to define classification in tariff subheadings 02.02 B I — poultry cuts (excluding offal): boned or boneless — on the one hand and 02.02 C — offals — on the other.

In this respect the Finanzgericht Münster asks whether the shape, the weight and the quality of the goods or the use to which they are to be put and their value are decisive factors.

In this respect the plaintiff in the main proceedings argues that it is necessary, first, to have regard to the descriptions expressly laid down by the customs tariff.

It then reasons by analogy. As tariff subheading 02.02 B II, relating to unboned (bone-in) poultry cuts, lists only clearly identified poultry cuts, the meat of which still retains its initial structure, Biegi infers that similarly only boned or boneless poultry cuts with the same characteristics may be classified in tariff subheading 02.02 B I.

May I say immediately to answer that argument that such an assimilation fails to take account of the specific nature of boned or boneless poultry cuts which cannot be expected to have the same clearly defined appearance as unboned poultry cuts.

In Biegi's view account should also be taken, secondly, but equally decisively, of the quality of the poultry cuts which may be defined by the way in which each part is obtained, its shape, its size and its weight, whether or not it has been boned.

In addition, finally, it argues that it is also necessary to take into consideration the way in which the goods were obtained and the use to which they are to be put. As regards the manner in which they were obtained offals are clearly distinguished from other poultry cuts by the fact that they are only produced when the higher quality poultry cuts have been removed.

As regards the use to which they are put, it is claimed that the pieces in question can only be used by the processing industry for inclusion, with meat from other sources, in the production of meat products or for making pies or potted meats. The fact that they are used in this way distinguishes them from higher quality poultry cuts which may be sold to the final consumer through the retail trade.

In my view these arguments cannot be accepted.

In the decided cases the Court has consistently established that the determination of the tariff heading applicable to a product depends, subject to certain exceptions, on its objective characteristics at the time of its examination by the customs authorities.

The Court so ruled in particularly clear terms in the judgment of the Second Chamber of 16 December 1976 (Case 38/76 *Luma* v *Hauptzollamt Duisburg* [1976] 2 ECR at p. 2036) in the seventh paragraph of which it is stated:

"Whilst the Customs Tariff does indeed in certain cases contain references to manufacturing processes and to the use for which goods are intended it is generally preferred, in the interests of legal certainty and ease of verification, to employ criteria for classification based on the objective characteristics and properties of products which can be ascertained when customs clearance is obtained."

As regards the two subheadings within which the goods in question may be classified, neither the Customs Tariff itself nor the explanatory documents make reference to the way in which the goods are manufactured or the use to which they are to be put.

Thus the general rule laid down in the decided cases is applicable here "in the interests of legal certainty and ease of verification" to use the terms of the judgment of the Court in the *Luma* case. Consequently, the way in which the goods were obtained and the use to which they are to be put cannot properly be relied on in order to classify the goods in question, contrary to the arguments put forward by the plaintiff in the main action.

Similarly, the argument as to the commercial value of the goods must be

rejected. That value depends to a large extent on the tastes and habits of consumers in the different Member States. Thus, as the Commission states, the price of a product depends essentially on its freshness and its quality and it also varies according to commercial factors independent of the question whether it is poultry cuts or offals.

Finally, the argument relied on by Biegi relating to the quality of the product also does not appear to me to stand analysis. In stating that the quality of a product is determined by the manner in which it is obtained the plaintiff in the main action relies on a criterion derived from the method of production to define the criterion of quality. As I have already rejected the former I must naturally reject the latter. I am also unable to agree altogether with Biegi in its contention that the quality of the product in question may be deduced from its objective characteristics. That is only partly true. For the rest, as with the commercial value, quality is too blurred, too variable, too subjective a concept for there to be founded on it the classification of a product in the Common Customs Tariff in accordance with the requirements, laid down by the case-law of the Court, of legal certainty and ease of verification.

What, then, are the objective characteristics making it possible for a given piece of turkey meat to be classified as "offal" or some other cut within the meaning of the Common Customs Tariff?

I incline to the view that if the pieces in question consist, for the most part, of muscle or fragments of muscle including only a very small proportion of tendons, gristly and fatty tissue and skin they are boned or boneless poultry cuts (excluding offals) within the meaning of subheading 02.02 B I of the tariff. On the other hand if they are not so constituted they are offals within the meaning of subheading 02.02 C of the tariff.

Of course it is not for the Court to rule on the classification of the product imported by Biegi but merely to give an appropriate interpretation of the Common Customs Tariff.

As the Court ruled in its judgment of 14 December 1972 (Case 38/72 *Van de Poll* v *Hauptzollamt Trier* [1972] 2 ECR at p. 1338) "practical considerations arising in individual cases from the *application* of criteria laid down by the Customs Tariff are a matter for the national courts".

It is for the Finanzgericht Münster, therefore, to undertake that factual appraisal taking into account the actual objective characteristics of the boneless pieces of turkey meat presented for customs clearance by the plaintiff in the main proceedings.

To turn, finally, to the fourth and last question raised by the national court it appears to me axiomatic that, as the interpretation of the Customs Tariff must be unequivocal, that interpretation necessarily applies whether the tariff classification is made for the purpose of imposing a levy or for the purpose of monetary compensation.

Support for this view may be found in particular in a recent judgment of the Court delivered on 4 July 1978 (Case 5/78 *Milchfutter* v *Hauptzollamt Gronau* [1978] ECR at p. 1609) wherein it is stated (paragraph 12 of the decision) that "in the absence of any express provision, it would be inappropriate for the headings of the Common Customs Tariff to be applied in different ways to the same product depending on whether they are used for the classification thereof in connexion with the levying of customs duties, the application of the system of the common organizations of the market or the application of the system of monetary compensatory amounts".

In conclusion, therefore, I propose that the Court should rule as follows:

1. Commission Regulation No 1669/77 correctly specified the content of tariff subheading 02.02 B I without amending the text thereof.

2. As the said regulation is legislative by nature it cannot have retroactive effect; it is therefore not applicable to importations carried out before its entry into force.

3. Pieces of turkey meat obtained by scraping the bones after the turkeys have been boned were to be classified, even before the adoption of Commission Regulation No 1669/77, under subheading 02.02 B I of the Common Customs Tariff as "Poultry cuts (excluding offals): Boned or boneless" on condition that the pieces consisted, for the most part, of muscle or fragments of muscle and contained only a very small proportion of tendons, gristly and fatty tissue and skin.

4. That classification is applicable both for the imposition of levies and for the application of monetary compensation.