JUDGMENT OF THE COURT
4 OCTOBER 1972[1]

Georg Brunner KG v Hauptzollamt Hof[2] (Reference for a preliminary ruling by the Finanzgericht München)

'Coming from Poland'

Case 9/72

Summary

Agriculture — Common organization of the market — Poultrymeat — Importation from Poland — Concept
(Regulation No 565/68, Article 1)

Article 1 of Regulation No 565/68 must be interpreted as meaning that goods must be considered as 'coming from' Poland when they remain until the moment when they are delivered in the Community at the disposal and under the direct control of the seller who is bound *vis-à-vis* the Polish People's Republic to comply with the undertakings entered into with regard to prices and when in the course of transportation they have not been given customs clearance, put into free circulation or processed in any way.

In Case 9/72

Reference of the Court under Article 177 of the EEC Treaty by the Finanzgericht München for a preliminary ruling in the action pending before that court between

GEORG BRUNNER KG, Munich,

and

HAUPTZOLLAMT HOF,

on the interpretation of Article 1 of Regulation No 565/68 of the Commission of 24 April 1968 (OJ, English Special Edition 1968 I, p. 110) on the non-fixing of an additional amount for slaughtered fowls, ducks and geese imported from Poland,

1 — Language of the Case: German.
2 — CMLR.

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars (Rapporteur) and H. Kutscher, Presidents of Chambers, A. M. Donner and R. Monaco, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and of procedure

The facts and the procedure may be summarized as follows:

1. In order to avoid disturbances on the market in poultrymeat in the Community caused by offers made at abnormally low prices, Articles 7 and 8 of Regulation No 123/67 of the Council of 13 June 1967 (OJ, English Special Edition, 1967, p. 63) on the common organization of the market in poultrymeat provide for the fixing of sluice-gate prices and lay down that the levy applicable to a product shall be increased by an additional amount when the free-at-frontier offer price of that product falls below the sluice-gate price.
Article 8(2) however specifies that: 'The levy shall not be increased by this additional amount as regards third countries which are prepared and in a position to guarantee that the *price* for imports into the Community *of products originating in and coming from* their territory will not be lower than the sluice-gate price for the product in question and that any deflection of trade will be avoided'.
The Government of the Polish People's Republic asked for that exemption and gave the guarantees required for its application. Consequently Regulation No 565/68 of the Commission of 24 April 1968 (OJ, English Special Edition, 1968 (I), p. 110) provided that with regard to certain sorts of poultry coming under heading 02.02, and in particular in respect of slaughtered ducks, the levies fixed in accordance with Article 4 of Regulation No 123/67/EEC would not be increased by an additional amount.

2. In the course of the winter of 1968/69 the undertaking *Georg Brunner* of Munich, the plaintiff in the main action, declared to the customs office of Schirnding-Bahnhof, at the frontier between the Federal Republic and Austria, 17 truckloads of slaughtered ducks with a total weight of 181 775 kg, giving Poland as the country of production, origin and purchase and stating that the ducks were despatched by the State foreign trade agency Animex in Warsaw. In support of its declarations it produced attestations and inspection certificates from the Polish veterinary services together with invoices drawn up in its name on Animex forms.
The German customs authority, which had accepted the declarations made by Brunner, took the view after a check that the relevant goods had been sold and supplied by Animex to an Austrian undertaking which had in its turn resold them to Brunner. Consequently it decided that the goods could no longer be considered as products originating in and coming from Poland

and, by an amended assessment of 17 December 1969, claimed the additional amount provided for in Article 8 of Regulation No 123/67.

3. The main action concerns the annulment of the assessment claiming payment of that amount. In the course of the procedure before the Finanzgericht having jurisdiction the defendant explained the reasons why the goods entered Germany by way of Austria.
Ducks originating in Poland which were sold by Animex to an Austrian undertaking, Höllmüller, were rejected by the latter because of late delivery. A Swiss undertaking acted as agent for Animex in order to offer the ducks to the defendant which accepted the offer in the belief that it came from Animex. After delivery it credited Animex's bank account in Switzerland. According to Brunner if it is not contested that the ducks originated in Poland it is likewise impossible to contest that they come from there since the goods merely passed through Austria in transit.
On the other hand, the defendant in the main action asserts that it has by no means been proved that the ducks were bought from Animex by the plaintiff. In addition, it considers that the expression 'coming from the Polish People's Republic' in Regulation No 565/68 can only refer to immediate transportation, that is to say, an exportation directly from Poland to the Federal Republic of Germany. In fact the Polish Government may only guarantee prices, as the consideration for exemption from the additional amount, for products which Poland has itself sold and despatched to the Federal Republic of Germany.

4. Since the Finanzgericht München considered that settlement of the dispute involved the interpretation of a Community regulation, it stayed the proceedings and referred the following questions to the Court of Justice:

'(a) Are the words "and coming from" appearing in Article 1 of Regulation No 565/68 of the Commission of 24 April 1968 on the non-fixing of an additional amount for slaughtered fowls, ducks and geese imported from Poland (OJ, English Special Edition, 1968 (I), p. 110) to be interpreted as meaning that the relevant products satisfy this criterion only if they have not remained in a transit country and if they have not formed the subject-matter there of legal measures on grounds other than of their transportation, or,

(b) Do they also satisfy this criterion,

(aa) if they were sold and delivered to a trader established in a third country and subsequently resold and consigned to a purchaser established in a Member State without undergoing processing, or, if the answer is in the negative,

(bb) if they were originally sold and delivered to a trader established in a third country and then consigned by that trader who rejected them on the ground of late delivery to a purchaser established in a Member State without undergoing processing.'

5. The Government of the Kingdom of the Netherlands and the Government of the Italian Republic availed themselves of the right accorded them by the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice to submit statements of case or written observations.
After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided that there was no need for a preparatory inquiry.
The plaintiff in the main action and the Commission of the European Communities presented oral argument at the hearing on 28 June 1972.
The plaintiff in the main action was represented by Mr Ehle of the Cologne Bar; the Commission was represented by its Legal Adviser, Mr Kalbe.
The Advocate-General delivered his opinion at the hearing on 13 July 1972.

II — Summary of the observations

The observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

A — *Observations of the Netherlands Government*

The *Netherlands Government* observes that the criterion relating to the expression 'coming from' employed in Article 8 of Regulation No 123/67 and in Regulation No 565/68 should be restrictively interpreted so that goods will only satisfy that criterion if they have not remained in any transit country and have not formed the subject-matter of dealings other than for reasons relating exclusively to their transportation.

Without that restrictive interpretation the Polish People's Republic could not honour the guarantee which it has given.

With regard, more generally, to the use of the concept of 'coming from' and its application to the cases referred to in Question (b) referred by the national court, the Netherlands Government observes first that under the rules in force in the Netherlands the country from which a product comes is regarded as the most distant country, in terms of the transport route, in which goods were consigned to the Netherlands. In the case of delivery to a trader established in a third country followed by resale to a purchaser established in a Member State, such third country is 'the most distant' country and thus that from which the product comes in the abovementioned sense.

The Netherlands Government observes secondly that if the subsequent consignment follows from a refusal by the trader established in the third country to take delivery, for example on the grounds of late delivery, the goods still considered as coming from the country of the first seller provided that they have not yet been put into free circulation in the third country in which they were rejected. On that condition they may still be considered as coming from the country of the first seller even if they were in transit through the country of the purchaser who rejected them.

B — *Observations of the Government of the Italian Republic*

The *Government of the Italian Republic* observes that the expression 'coming from' must be interpreted in terms of a systematic analysis of the actual provisions in question.

In view of the objective of charging the additional amount, as stated in particular in the second recital of the preamble to Regulation No 565/68, the exemption can only be applied to products which the Polish State has guaranteed will not be imported at prices lower than the sluice-gate price. Such a guarantee only applies with regard to products sent directly to a destination in the Community without any middleman by the State foreign trade agency, Animex. If there were any such middleman Animex would be unable to fulfil its obligations and the exemption provided for by Regulation No 565/68 could not come into operation.

Consequently, the exemption cannot be granted with regard to products which, although originating in Poland and initially despatched from Poland, arrive in the Community through another third country (in the present case, Austria).

The fact that the goods, which come from a third country other than the Polish People's Republic, came into such third country from Poland does not alter the above conclusions because, in such a situation, it is impossible to guarantee that the price charged by the Austrian middleman is not lower than the sluice-gate price.

The Italian Government consequently proposes that the question referred by the Finanzgericht München should be answered to the effect that the expression 'and coming from' must be interpreted as meaning that only products which formed the subject-matter of legal transactions and measures in the transit country exclusively in relation to transportations can be considered as 'products coming from' but that those conditions are not fulfilled in the two cases (aa) and (bb)

described in Question (b) referred by the Finanzgericht München.

C — *Observations of the Commission of the European Communities*

1. The *Commission of the European Communities* makes an introductory observation to the effect that the concept 'coming from' has not yet received a general and express definition in law. The only existing definitions of this concept have been provided in specific fields in particular in relation to Community transit.
The concept and the legal effects deriving from it must nevertheless be interpreted and applied uniformly through the Community if the effectiveness of the system of additional amounts and of the rules governing the exception provided for in Article 8 of Regulation No 123/67 and Article 1 of Regulation No 565/68 is not to be jeopardized.

2. The Commission then observes that the exemption from the additional amount was granted by Regulation No 565/68 on the basis, on the one hand, of the guarantee that the prices ruling for exports coming within the exemption are not lower than the threshold prices prevailing on the date when customs clearance is obtained and, on the other, that the exports are made directly by the State foreign trade agency 'Animex'.
In using the words 'product coming from Poland', Regulation No 565/68 consequently lays down the condition that only direct deliveries from Poland are exempt.
Nevertheless this concept does not imply that only the last territory where the products were can be considered as the country from which they come. Indeed Poland has no common frontiers with the Community. This concept refers to the country from which the products in question are sent into the Community even if they have passed through other countries in transit.
In order to distinguish between the country of dispatch and the transit country it is necessary to consider from which country the products were consigned to the Community and only accept as the country of dispatch, and consequently as the country from which the goods came, the country from which they were initially dispatched to the Community without such destination being changed before the product has reached the Community.

3. In order to know whether delivery was direct the actual course of the transportation from Poland into the Community should be examined instead of considering the details of the commercial transactions. Transportation from Poland is direct if the products despatched from Poland to a specific place in the Community arrive there without undergoing in the course of their transit through third countries delays, transactions or legal measures other than those inherent in their transportation.
On the other hand, in the cases referred to in the last two questions referred by the national court, according to which the Austrian trader was the initial purchaser but dispatched the goods to the Community as a result of circumstances which arose subsequently, it is probable that it is no longer Poland but Austria which is the country from which the goods come. It is also doubtful whether Poland is the country from which the products come if they remained in Austria longer than was required for their transportation since this fact casts doubt on their original destination.

4. The Commission finally observes that it is impossible to rely upon the fact that it is irrelevant with regard to the honouring by Animex of the price guarantee that the goods have come directly from Poland or, on the other hand, that a detour was made through Austria, for, even although they came from Austria for the account and on the instructions of Animex, that agency can ensure that its guarantee with regard to the price of the goods is upheld.
This view is unacceptable as the customs authorities of the Community cannot be required to examine the details of each case. The Community can only be completely certain that its sluice-gate prices are maintained when the exemption from additional amounts is restricted to products which undoubtedly come directly from Poland.

5. The Commission proposes that the reply to the questions should be as follows:

1. (a) For the purposes of the implementation of regulations on the non-fixing of additional amounts such as Regulation (EEC) No 565/68, the country which must be considered as that from which the goods come is the country from which the goods were dispatched and consigned directly to the Community.

(b) If goods cross the territory of third countries after leaving the country of despatch and before reaching the Community, they are directly consigned, when no delays, transactions or legal measures have taken place other than those inherent in transportation and which do not interrupt the latter or change the destination of the product.

2. The other questions referred to the Court by the Finanzgericht München under point (b) of the order for reference are intended to obtain particulars of the consequences of the argument set out above if, as far as can be judged, the relevant products were originally intended for the Austrian market and were delivered there from Poland. In those circumstances it is probable that on their importation into the Community the ducks will not be considered as coming from Poland whatever the fare and manner in which the various contracts for purchase were to be performed may have been. The national court must decide the question of the application of Community law to the present case.

D — *Oral observations of the plaintiff in the main action*

1. The *Georg Brunner undertaking* observes that the concept of 'coming from' as used in Regulation No 123/67 and Regulation No 565/68 must be interpreted uniformly throughout the Community within the framework and in terms of those specific Community regulations. For this interpretation to be helpful in settling the dispute it must moreover take account of the details of the present case.

2. With regard to the present case, the plaintiff in the main action states that Animex initially sold the goods to an Austrian purchaser (Höllmüller) and after the latter had rejected them resold the goods to Brunner without the goods undergoing any processing. The present case thus concerns goods in transit the destination of which was changed at the volition of the seller after the purchaser in the original country of destination refused to accept the goods and they have not been given customs clearance or processed in the latter country.

3. In the abovementioned case the goods must be considered as coming from Poland. In fact, although Regulation No 123/67 and Regulation No 565/68 used the words 'coming from' they did so in order to provide a certain price guarantee and the restrictions on the entry of imported goods without the payment of additional amounts may only be permitted to the extent to which they further that guarantee. When the goods are re-routed by the first seller, who remains bound by the price guarantee *vis-à-vis* the Community, they must be regarded as continuing to come from the initial country.
On the other hand, to require that the goods be sent directly by the initial seller to a Community country is illogical from the economic point of view and moreover is unnecessary with regard to the price guarantee.
The plaintiff in the main action maintains in the alternative that goods which have passed through foreign economic territories without being put into free circulation must be considered as 'coming from'. Changes of destination may still be easily checked by the customs authorities.

4. The plaintiff in the main action suggests that the following reply should be given to the questions referred by the Finanzgericht München:

'The expression "and coming from" ap-

pearing in Article 8(2) of Regulation No 123/67 and in the first paragraph of Article 1 of Regulation No 565/68 must be interpreted as meaning that the goods fulfil the required condition not only if they do not remain in a transit country and do not form the subject-matter of legal measures there except on grounds of their transportation but also if the real seller established in the guarantor country has sold them first of all in a third country and subsequently sells them in the Community because of refusal to take delivery of the goods or on other grounds whilst observing the guaranteed price and without subjecting them to processing.'

Grounds of judgment

1 By an order of 2 March 1972 which arrived at the Court Registry on 9 March 1972 the Finanzgericht München referred to the Court under Article 177 of the Treaty establishing the European Economic Community two questions on the interpretation of the expression 'coming from' appearing in Article 1 of Regulation No 565/68 of the Commission of 24 April 1968 (OJ, English Special Edition 1968(I), p. 110) on the non-fixing of an additional amount on imports of certain poultry originating in and coming from Poland.

2 In the first question the Court is asked whether this expression, in relation to products exempted from the additional levy on the conditions laid down in Article 1 of Regulation No 565/68, must be interpreted as meaning that the products in question are only exempt from the additional levy if they have not remained in a transit country and have not formed the subject-matter there of legal measures on grounds other than of their transportation.

3 In the second question the Court is asked whether such products also fulfil this condition:

(a) When they are sold and delivered to a trader established in a third country and subsequently resold and consigned to a purchaser established in a Member State without having undergone processing, or, if the answer is in the negative,

(b) When they are initially sold and delivered to a trader established in a third country but afterwards consigned by that trader, who rejected them on the ground of late delivery, to a purchaser established in a Member State without having undergone processing.

4 Regulation No 123/67 of the Council (OJ, English Special Edition 1967, p. 63) on the common organization of the market in poultrymeat provides that a levy shall be charged on imports of slaughtered poultry from third countries. Under Article 8 of the same regulation, where the free-at-frontier offer price falls below the sluice-gate price, the levy applicable shall be increased by an additional amount

equal to the difference between the sluice-gate price and the free-at-frontier offer price. Nevertheless, under Article 8(2) the levy shall not be increased by this additional amount as regards third countries which are prepared and in a position to guarantee that the price for imports into the Community of products originating in and coming from their territory will not be lower than the sluice-gate price for the product in question and that any deflection of trade will be avoided.

5 In implementation of that provision Regulation No 565/68 of the Commission of 24 April 1968 provides that certain poultry originating in and coming from the Polish People's Republic shall be exempted from the additional amounts charged on imports into the Community.

It is clear from the recitals of the preamble to that regulation that this exemption was granted as a result, on the one hand, of the guarantee given by the Government of the Polish People's Republic that exports would only be made by the State foreign trade agency Animex which would not deliver the said products at free-at-frontier prices lower than the sluice-gate prices and, on the other, of its undertaking to enable the Commission to exercise continuous supervision of the effectiveness of the measures it has taken.

6 The expression 'coming from' must be interpreted in terms of the objectives and of the general scheme of Regulation No 565/68 which, as its recitals recall, is intended to ensure the effectiveness of the price guarantee given by third countries who benefit from the exemption and to enable its effectiveness to be continuously supervised.

7 The expression 'coming from' in conjunction with the expression 'originating in' shows that the guarantee that the price will not be lower than the sluice-gate price can only be honoured if delivery to a purchaser in the Community is made by a seller who is bound to comply with the undertakings entered into with regard to prices *vis-à-vis* the authorities of the third country which benefits from the exemption. Furthermore, in the course of transportation the goods must not have been given customs clearance, put into free circulation or processed in any way.

8 On the other hand, legal measures which, whilst not directly connected with the transportation of the products, reserve to the seller, who is bound to abide by the guaranteed price, the right to dispose of and directly to control the goods do not jeopardize the conditions of the said exemption. Indeed, as long as the seller retains the right to dispose of the goods he is in a position to carry out his undertaking to deliver them only at the price which was guaranteed by the third State. In such a case it may be ascertained immediately by inspection of the transport certificates and customs documents that the seller and the goods have remained unchanged, that the latter have not undergone any processing and have been invoiced at the guaranteed price.

9 On the other hand this is not the case when, for whatever reason, goods are sold and delivered to a trader established in a third country and subsequently resold and consigned, even without having undergone processing, by that purchaser to a purchaser established in a Member State.

Costs

10 The costs incurred by the Commission of the European Communities and by the Netherlands and Italian Governments which 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 Finanzgericht München, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 123/67 of the Council of the European Economic Community of 13 June 1967;
Having regard to Regulation No 565/68 of the Commission of the European Communities of 24 April 1968;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Finanzgericht München pursuant to the order issued by that court on 2 March 1972, hereby rules:

Article 1 of Regulation No 565/68 must be interpreted as meaning that goods must be considered as 'coming from' Poland when they remain until the moment when they are delivered in the Community at the disposal and under the direct control of the seller who is bound vis-à-vis the Polish People's Republic to comply with the undertakings entered into with regard to prices and when in the course of transportation they have not been given customs clearance, put into free circulation or processed in any way.

Lecourt Mertens de Wilmars Kutscher

Donner Monaco

Delivered in open court in Luxembourg on 4 October 1972.

A. Van Houtte
Registrar

R. Lecourt
President