OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 14 DECEMBER 1983 [1]

Mr President,
Members of the Court,

1. Introduction

1.1. In order to clarify the legislative, factual and procedural background to Case 327/82 and the substance of the questions raised by the College van Beroep voor het Bedrijfsleven I shall first set out the relevant introductory part of the Report for the Hearing.

Under Article 18 of Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187), the difference between the prices of products referred to in that regulation on the world market and prices within the Community may be covered by an export refund. The amount of that refund was established by Commission Regulation (EEC) No 2787/81 of 25 September 1981 (Official Journal, L 271 of 26. 9. 1981, p. 44) which, in the annex thereto, set out the list of products for which the export refund is granted.

In that list there appeared, under Common Customs Tariff heading "ex 02.01 A II", "Meat of bovine animals; (a) Fresh or chilled: ...; 4. Other: ... (bb) Boned or boneless, excluding the thin flank, the shin and the shank, each piece individually wrapped".

On 23 October and 6 November 1981 Ekro BV Vee- en Vleeshandel of Apeldoorn declared to the collector of customs and excise at Bergh an export transaction to the Vatican City of two consignments of meat, amounting to 2 380 kg and 2 602 kg respectively, which it described as "Veal cuts (boned or boneless) (other), chilled (excluding thin flank, shin and shank, each piece individually wrapped)". It applied for export refunds in respect of those two consignments of meat.

In each of those consignments there were, *inter alia*, pieces of breast which also included a certain piece of meat cut out in the shape of a pistol, and in the main proceedings it is disputed whether that must be considered to be "thin flank". The total weight of the pieces of breast amounted to 1 156 kg, of which a part amounting to 201 kg was made up by the aforementioned pieces cut out in the shape of a pistol whose definition is disputed.

The Produktschap voor Vee- en Vlees [Cattle and Meat Board, hereinafter referred to as "the Board"], Rijswijk, refused to grant Ekro export refunds in respect of the exportation of the 1 156 kg of breast.

Ekro appealed to the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry] against that refusal.

In that dispute the parties to the main action are, on the one hand, in disagreement on the question of whether the aforementioned cuts in the shape of a pistol must be regarded as "thin flank". The Board, which answers that question in the affirmative, is of the view that "thin flank" is to be understood as the

1 — Translated from the Dutch.

flank meat situated between the back and the shoulder blade on the one hand and the hindquarters of the animal on the other. Ekro, which answers it in the negative, is of the opinion that "thin flank" is to be understood as the flank meat belonging to the hindquarters together with the part belonging to the two last ribs.

Furthermore, the parties to the main action disagree on the question of whether a refund is payable in respect of the exportation of a piece of the breast or brisket of a bovine animal which includes a piece of "thin flank". The Board answers that question in the negative. Ekro answers it in the affirmative, stating that a refund ought to be granted, calculated according to the weight of the meat exported less the weight of the "thin flank" which it includes.

Considering that the dispute concerned questions of interpretation of Community law the College stayed the proceedings and by a decision of 17 December 1982 referred the following two questions to the Court pursuant to Article 177 of the EEC Treaty:

1. On a correct interpretation of heading 02.01 A II (a) 4. ex (bb) of the Common Customs Tariff what is to be understood by "thin flank" and how may "thin flank", which does not fall within that tariff heading, be distinguished from boned or boneless cuts, which do?

2. Does the correct interpretation of Regulation No 2787/81 mean that no refund may be granted in respect of the export to non-member countries of a boned or boneless cut if a piece of "thin flank" is attached to it, or does it mean rather that in such a case the refund must be granted on the basis of the total weight of the meat exported less the weight of the "thin flank"?

1.2. My first point as regards those questions is that at the hearing all the parties agreed that the second question was more important than the first. I share that view and would conclude that the answer to the first question must be formulated in such a way as to be of the greatest possible use to the national court in interpreting the answer to the second question.

Next, with regard to the second question, I would point out that, in view of the facts of the case and the way in which the questions are worded, the Court's answer may be confined to the legal rules in force in the period between 1 October 1981 and 1 November 1982.[1] On 1 October 1981 Commission Regu-

1 — So the importance of the Court's answer as regards other cases is confined to other actions relating to the period, to the question whether Member States have the power or the duty to recover any excessive amounts of refunds paid in that period and to the possible repercussions of the Court's answer on the clearance by the Commission of Member States' accounts for that period. On this last point I refer to the last sentence of the answer which the Commission gave to the Court's written questions and the explanations it provided at the hearing. The two last points, which may be affected by the Court's answer to the second question, raise other legal issues, however, which are not directly related to the questions raised in this case.

lation (EEC) No 2787/81 (Official Journal 1981, L 271, p. 44) entered into force and the annex to that regulation provides (on page 47, under 4. ex (bb)) the Community legislature's answer, which requires further interpretation, to the second question as regards the period after 1 October 1981. It is clear from that text that since 1 October 1981 only "boned or boneless" pieces "excluding the thin flank, the shin, and the shank, each piece individually wrapped" falling under subheading 02.01 A II have been eligible for export refunds. The argument between the plaintiff in the main proceedings and the Government of the Federal Republic of Germany, on the one hand, and the defendant in the main proceedings and the Commission, on the other, mainly revolves around the question whether the Court, by way of an interpretation anticipating the later legislation (Regulation No 2773/82 of 13 October 1982, Official Journal 1982, L 292, p. 20), can infer from the purpose of Commission Regulation No 2787/81, upon which the outcome of the main proceedings turns, the same view as that which is clearly laid down in the 1982 regulation. The note which the European Agricultural Guidance and Guarantee Fund sent to all the Member States on 29 October 1981 has some relevance to the Court's answer in this regard. That note, which was produced to the Court, relates to the period prior to 1 October 1981; it notified all the Member States of the Commission's telexed reply of 22 July 1981 to a question raised by Ireland on 5 June 1981. The answer given was as follows: "With reference to your telex message No 90267 of 5 June 1981 I beg to inform you that no export refunds may be granted if boned or boneless meat also contains shin or shank and/or thin flank." [1] In their last question the Irish authorities had also referred in this regard to the Court's judgment in Case 803/79 *(Roudolff* [1980] ECR 2015) and inferred from it the same answer. That case however concerned a quite different question of interpretation, namely whether insides of cheeks, thin flanks and shin qualified for refunds only if packaged separately. The question how separately packaged cuts of meat which in principle qualify for refunds are to be treated if they also contain pieces of thin flank was not considered. That judgment cannot therefore provide a decisive answer to the question now before the Court.

1.3. Having thus set out the legal facts most relevant to the questions before the Court, in the next two parts of my opinion I shall consider the two questions in turn.

1 — In a later telex message of 7 September 1981 that answer was clarified as follows: "No export refunds within the meaning of the annex to Regulation (EEC) No 1928/81 may be granted on any carton of boned or boneless meat that contains thin flank and/or shin or shank or on any consignment of boned or boneless meat that contains thin flank and/or shin or shank." In a still later written answer to a question the following further clarification was given: "Where the consignments consist of different cuts, export refunds may be paid on ... the cuts in cartons which do not contain any cuts comprising shin or shank." I should point out, however, that those official interpretations, which the Irish authorities (wrongly, according to the Court's decisions) assumed to be "instructions", related to a question about a cut containing a *whole* shin. Even from a pure linguistic point of view, the answer concerns only cuts containing the (whole) shin or shank and/or the (whole) thin flank. The legal question therefore remains open where a cut contains only a small piece of thin flank.

2. The first question

As far as the first question is concerned, it is first necessary to point out, as the Government of the Federal Republic of Germany and the Commission have done, that it does not concern the interpretation of the heading of the Common Customs Tariff referred to in the question but the interpretation of the corresponding heading contained in the annex to Commission Regulation No 2787/81 of 25 September 1981. The Commission clarifies this point in its observations by explaining that in many cases the regulation adds special conditions to the nomenclature of the Common Customs Tariff, for example where it restricts the grant of refunds to a part of the products falling under a subheading of the Common Customs Tariff (headings designated "ex"). According to the Commission's written observations, since it involves a system having its own legal basis and its own aims, that special nomenclature must indeed be interpreted in accordance with the rules for the interpretation of the Common Customs Tariff but also in accordance with the provisions and objectives of the agricultural regulation by which it was introduced. Later, in particular at the hearing, the Commission — citing my opinion in Case 145/81 *Wünsche* [1982] ECR 2507 (right-hand column), in which I referred to the opinion of Mr Advocate General Mayras in Case 80/72, [1973] ECR 660 (left-hand column) — clarified that approach as follows. In the first place an attempt must be made to answer the questions of interpretation with reference to the provisions and aims of the relevant agricultural regulation; only if a clear answer cannot be reached in that way may guidance be sought from the Common Customs Tariff and the principles governing its interpretation. I have no hesitation in agreeing with that approach, so far as it goes. As regards the first question, however, it leads little further than the finding that, in view of the aims of the relevant regulation, "thin flank", as an inexpensive cut of relatively poor quality, should not qualify for export refunds.

The Commission then points out that a comparison of the terms used in the various Community languages to describe a certain kind of meat is not sufficient to guarantee a uniform interpretation. The manner in which slaughtered animals are boned and cut, and the presentation of the cuts, varies from one country to another and even from region to region, so that even within the same linguistic area the same term is not always used to designate precisely the same part of an animal's anatomy. There is no precise definition of "thin flank" in Community law; the Commission submitted a publication of the European Productivity Agency of the Organization for European Economic Cooperation, dating from 1960, which shows that owing to the different customary methods of cutting meat the term is interpreted differently in the various Member States.

However, in its written observations the Commission, after referring to the relevant diagrams and to the terms used in the various languages and after giving its reasons for rejecting the answer suggested by the plaintiff in the main

proceedings, eventually arrives at the view that the term "thin flank" can nevertheless be interpreted uniformly as "the portion of flank lying between the hindquarter and the breast or brisket of the carcase". In its view, certain differences of interpretation still remain, mainly as regards the precise demarcation between the thin flank and the breast or brisket. As I pointed out earlier, those differences are due to traditionally divergent cutting methods.

In answer to written questions asked by the Court the Commission has suggested in this regard that in its answer the Court should also refer to the different practices, varying from country to country and often even from region to region, and to the aim of the Community provision.

I am able to endorse that view eventually arrived at by the Commission. At most, the Community legislature could *itself* attempt to try to standardize local cutting methods by providing a detailed definition on which experts from the Member States could agree, although this would presumably not be easy. Such standardization is certainly *not* a matter for the Court. Besides, reference to long-standing local practices would normally exclude *ab initio* abuses aimed at obtaining export refunds which the regulation is not intended to provide. Nevertheless, in its answer the Court could, as the Commission has suggested, pay heed to that risk of abuse.

I therefore suggest that the Court should answer the first question as follows:

The term "thin flank" used in Commission Regulation No 2787/81 of 25 September 1981 (Official Journal 1981, L 271, p. 44) in subheading ex 02.01 A II must be understood as meaning that portion of flank lying beween the hindquarters and the breast or brisket of the carcase which, according to the practices prevailling in the various Member States — whether codified or not — must be regarded as thin flank. However, in order to prevent abuse of the opportunity to obtain refunds consideration must also be given, when that definition is applied, to the aims of that regulation.

3. The second question

The second question is more important and more difficult to answer. As I have already pointed out, the annex to the regulation in question makes an exception only in the case of "thin flank" and " the shin or shank". From a purely linguistic point of view, those expressions can hardly be taken to include "parts of the thin flank" (or of the shin or shank). Linguistically it is certainly not possible to infer from that annex that the presence of pieces of thin flank, large or small, attached to a

separately wrapped piece of high-quality meat completely disqualifies the high-quality meat from a refund.

The note sent to all the Member States on 20 October 1981, to which I referred in my introduction, does not provide the Court with much further assistance on this point. It is clear in particular from the exchange of telex messages and letters between the Commission and the Irish authorities which that note brought to the attention of all the Member States that the question answered applied solely to pieces of high-quality meat to which was attached a *whole* shin or shank. The answers I have cited also apply solely to boned or boneless meat which includes *the* shin or shank or *the* thin flank (emphasis added). Those answers may — especially against the background of the questions raised — be interpreted as applying solely to boned or boneless meat containig the *whole* "thin flank" or a *preponderant* portion of "thin flank". In any event they say nothing at all about relatively small pieces of "thin flank" which, in accordance with local customary cutting methods, are regularly attached to pieces of high-quality meat qualifying for refunds. I would remind the Court that the present case concerns cuts of breast to which were attached pieces of meat cut in the shape of a pistol on which the Produktschap voor Vee en Vlees refused to grant an export refund on the ground that the pistol-shaped pieces of meat were "thin flank".

In those circumstances the Government of the Federal Republic of Germany, in its written observations, pointed out, rightly in my view, that in principle the question submitted may be answered in three ways:

1. A boned or boneless cut including "thin flank" may not be eligible for any export refund;

2. A boned or boneless cut including "thin flank" may be eligible for an export refund only for that part which is not "thin flank";

3. A boned or boneless cut including "thin flank" may be eligible for an export refund for the whole cut, if the "thin flank" does not give the cut its essential character.

The Court will remember that at the hearing the plaintiff in the main proceedings suggested that the last criterion should be defined as meaning that the portion of "thin flank" must not constitute more than 20 % of the whole cut of meat.

The first solution was adopted in Commission Regulation (EEC) No 2773/82 of 13 October 1982 (Official Journal 1982, L 292, p. 20). In Note 7 of the annex to that regulation it is stated that boned cuts "which consist, entirely or partially, of thin flank are ineligible for the refund". However, as the German Government rightly points out, that regulation, which entered into force on 1 November 1982, was not applicable at the material time. As I pointed out earlier, the question then arises whether the same view may be inferred with sufficient certainty from the aims of Regulation No 2787/81, which was still in force at that time. In the view of the German Government, it cannot and reference should therefore be made, in accordance with the Court's judgment in the *Wünsche* case (cited above), to the

general rules for the interpretation of the Common Customs Tariff (Rule 3 (b) in Part A of Section I). This would necessarily lead to the third solution. In the view of the German Government, the second solution would be possible only by virtue of an express provision to that effect. I would add that in my view the second solution would, for administrative reasons, be impossible to apply in practice.

The Commission believes that the first solution does in fact follow from the language and purpose of the provision in question. As far as its language is concerned, I have already explained why I find it impossible to espouse that view of the Commission's, even bearing in mind the note of 29 October 1981. As far as its purpose is concerned, the Commission points out that the grant of the refund on cuts to which only a small quantity of thin flank was attached would nevertheless mean that a fairly high refund would be granted on meat of fairly low value, thereby indirectly encouraging exports of that meat, despite demand for it in the Community meat-processing industry.

However, in view of the Commission's own observations on the first question, I do not consider that last argument wholly convincing. For in those observations the Commission itself expressly stated that differences of opinion exist as to the precise demarcation between breast and thin flank. Partly for those reasons it eventually suggested that in its answer to the first question the Court should refer to local practices regarding cutting methods. At the hearing the further point was made that as soon as the absolutely clear 1982 regulation was enacted local cutting methods were adapted if meat was intended for export. The adoption of the Commission's suggestion would perhaps then lead in more cases than necessary to problems of the kind I indicated in my first footnote.

For all those reasons it would to my mind be more logical and more practical to refer to local practices in the answer to the second question also. In practice this will probably lead in most cases to approximately the same results as the solution suggested by the German Government but will go further towards avoiding abuses of the refund system.

In conclusion I therefore suggest that the Court should answer the second question as follows:

Taking into account the answer to the first question, Member States should not grant the refunds on exports to non-member countries specified in Regulation No 2787/81, in whole or in part, in respect of boned or boneless cuts to which is attached a portion of flank which in view of customary local cutting methods is not to be regarded as belonging to those cuts but as "thin flank".