OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 2 March 1993 *

Mr President,
Members of the Court,

1. This case concerns reference made to the Court by a German court, the Finanzgericht (Finance Court) Hamburg, for a preliminary ruling on Commission Regulation (EEC) No 2773/82 of 13 October 1982 and Commission Regulation (EEC) No 1315/84 of 11 May 1984 respectively, fixing the export refunds on beef and veal. [1] These questions were raised in proceedings between GruSa Fleisch ('GruSa') and the Hauptzollamt (Principal Customs Office) Hamburg-Jonas ('the Hauptzollamt').

Background

2. In May and June 1984, GruSa applied to the competent customs authorities to have seven consignments of beef stored in a warehouse for goods eligible for refunds on account of their subsequent exportation. In its declarations to the relevant customs office, GruSa described these consignments in the following terms: 'Boned or boneless portions of domestic bovine animals, chilled, each piece individually wrapped, excluding the thin flanks, the shin and the shank' (in German: 'mit Ausnahme von Fleisch-und Knochendünnung und der Hesse'). The customs office approved the declarations. The goods were stored in a warehouse for goods eligible for export refunds, from where they were exported to Egypt. The Hauptzollamt granted GruSa the export refunds requested.

3. Inquiries carried out by the Customs Inspection Office, Nürnberg, subsequently revealed that, contrary to GruSa's declaration, the consignments of exported beef contained 'Knochendünnung'. In criminal proceedings before the Landgericht (District Court) Nürnberg, the managers of GruSa and one of its suppliers were convicted of fraud. This conviction, which related not only to 'Knochendünnung' but also to 'Fleischdünnung', was upheld by a judgment of 5 September 1989 of the Bundesgerichtshof (Federal Supreme Court). Neither the Landgericht Nürnberg nor the Bundesgerichtshof acceded to GruSa's request for questions to be referred to this Court for a preliminary ruling. The two courts considered that this Court's judgment of 18 January 1984 in *Ekro* [2] provided a convincing reply to the legal questions raised in the present case.

4. At the close of the criminal proceedings, the Hauptzollamt, by amending decisions of 19 October 1987, demanded repayment of the export refunds previously granted, increased by 20%. GruSa lodged a complaint against the amending decisions, following

* Original language: Dutch.

1 — OJ 1982 L 292, p. 20 and OJ 1984 L 125, p. 38.

2 — Case 327/82 *Ekro* [1984] ECR 107.

which the Hauptzollamt withdrew its claim to the 20% supplement. For the rest, the Hauptzollamt rejected GruSa's complaint. GruSa appealed against that decision to the Finanzgericht Hamburg which referred three questions to the Court for a preliminary ruling. I refer to the Report for the Hearing for the complete text of these questions, as well as for a fuller account of the facts.

Legislative framework

5. The payment of export refunds for beef and veal is governed by Article 18 of Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organization of the market in beef and veal, [3] as amended by Article 3 of Council Regulation (EEC) No 425/77 of 14 February 1977. [4] Article 18 contains, amongst others, the following provisions:

'1. To the extent necessary to enable the products listed in Article 1 to be exported on the basis of quotations or prices for those products on the world market, the difference between those quotations or prices and prices within the Community may be covered by an export refund.

...

4. The Council, acting by a qualified majority on a proposal from the Commission, shall adopt general rules for the granting and advance fixing of export refunds and lay down criteria for fixing the amount of such refunds.

5. Refunds shall be fixed at regular intervals in accordance with the procedure laid down in Article 27. [5] Where necessary, the Commission may, at the request of a Member State or on its own initiative, alter the refunds in the intervening period.'

6. It was on the basis of the first sentence of Article 18(5) that the Commission adopted Regulation (EEC) No 2773/82 and — to replace this regulation — Regulation (EEC) No 1315/84. Those two regulations were in force at the material time (the amending decisions of the Hauptzollamt relate to the period from 1 November 1982 to 27 July 1984). [6] However, in the meantime, the regulations have been replaced by Commission Regulation (EEC) No 2891/84 of 15 October 1984 fixing the export refunds on beef and veal. [7] As in the case of the preceding regulations, this one has an annex specifying the beef and veal products for which export refunds are granted and the amount of those refunds.

Subheading ex 02.01 A II a) 4 ex bb) of the list annexed to Regulations (EEC) No 2773/82 and (EEC) No 1315/84 provides

3 — OJ 1968 L 148, p. 24. This regulation was last amended by Council Regulation (EEC) No 125/93 of 18 June 1993 amending Regulation (EEC) No 805/68 on the common organization of the market in beef and veal, OJ 1993 L 18, p. 1.

4 — OJ 1977 L 61, p. 1.

5 — The essential part of the 'procedure laid down in Article 27' is a matter for the Commission.

6 — Regulation (EEC) No 2773/82 entered into force on 1 November 1982, Regulation (EEC) No 1315/84 on 12 May 1984 (Article 2 of the two regulations).

7 — OJ 1984 L 273, p. 5.

that 'Boned or boneless (cuts), ... each piece individually wrapped' (in German: 'Teilstücke ohne Knochen, jedes Stück einzeln verpackt') are capable of qualifying for the refund. The subheading also provides, however, that this is to the exclusion of 'the thin flanks, the shin and the shank', which are not capable of qualifying for the refund. Furthermore, this exclusion is expressly confirmed by Note 7 to the Annex, which is worded as follows:

'Boned cuts which consist, entirely or partially, of thin flanks, shin or shank are ineligible for the refund'.

7. According to GruSa, the wording of this exclusion is wider in the German version alone and, as a result, German exporters were at a disadvantage compared with exporters from other Member States. The German version of the Annex to Regulations (EEC) No 2773/82 and (EEC) No 1315/84 excludes 'Fleisch-und Knochendünnung und (die) Hesse' from the refund, and this is confirmed by the German version of Note 7 to the Annex.

According to GruSa, the German term 'Knochendünnung' does not correspond to 'thin flanks', the term used in the other language versions. GruSa considers that this opinion is confirmed by the new list annexed to Regulation (EEC) No 2891/84 which sets out the cuts capable of qualifying for the refund. According to the German version of this new list, which, as already indicated, was not applicable when the export transactions took place, subheading ex 02.01 A II a) 4 ex bb) excludes only 'Fleischdünnung und [die] Hesse' from the refund. There has been no amendment to the other language versions.

The first and third preliminary questions

8. By its first question, the Finanzgericht would like to know whether Article 1 of Regulations (EEC) No 2773/82 and Article 1 of Regulation (EEC) No 1315/84, read in conjunction with subheading ex 02.01 A II a) 4 ex bb), as set out in the accompanying annexes, must be interpreted as meaning that, in the Federal Republic of Germany, 'Knochendünnung' is one of the parts of the beef or veal which qualify for the refund. By its third question, the national court seeks to ascertain whether these regulations are invalid in so far as they exclude 'Knochendünnung' from the refund. It appears from the grounds of the order for reference that these questions relate to GruSa's argument that the German version of the regulations should not be applied since it is based on an incorrect translation of the original French text.

9. In its written observations submitted to the Court, GruSa attempts to show that the different language versions of the regulations in question diverge. It seems to me that, far more important than the actual existence of such differences is the question whether any such differences between the language versions can be justified on the basis of underlying and acceptable differences of fact. This can be inferred from the judgment in *Ekro*, cited above. Given its particular relevance to

the present case, I wish to consider that judgment in detail.

10. In *Ekro*, too, the Court had to rule on the anatomical definition of the concept of 'thin flanks', as it appeared in subheading ex 02.01 A II a) ex bb) of the Annex to Regulation (EEC) No 2787/81, also concerned in the present case. [8] Moreover, the concept of 'thin flanks' was also to be found in the Annexes to Regulations (EEC) No 2773/82, (EEC) No 1315/84 and (EEC) No 2891/84.

11. The Court began its analysis by formulating the following general rule of interpretation:

'(paragraph 11) The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations.'

This rule of interpretation is entirely consistent with the case-law cited by GruSa in its written observations and in particular with the judgment in *Moksel*. [9] That judgment confirms the judgment of 12 November 1969 in *Stauder* [10] which contains the following passage:

'(at paragraph 3) When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages.'

12. On the subject of the aim pursued by the legislature, the Court, in *Ekro*, espouses the Commission's view that the provision in question aims 'to prevent the payment of refunds on low-value cuts of meat, for which there is sufficient demand in the Community meat-processing industry' (paragraph 12).

13. The Court then states, however, that so far as, specifically, export refunds on beef and veal are concerned, the general principle of interpretation mentioned above is inadequate for the purpose of giving a satisfactory reply to the question put to it:

'(paragraph 12) ... like the various methods for cutting and boning bovine carcases, the determination of the shape and exact size of the part of the abdominal wall which should be regarded as having a lower value depends on consumer habits and trade practices, which vary from one Member State or region to another. It is therefore impossible to deduce a precise anatomical definition of that part of the carcase from the purpose of the relevant Community provision.

8 — Commission Regulation (EEC) No 2787/81 of 25 September 1981 fixing the export refunds on beef and veal, OJ 1981 L 271, p. 44.

9 — Case 55/87 [1988] ECR 3845.

10 — Case 29/69 [1969] ECR 419.

(paragraph 13) In the absence of any such indication in Regulation No 2787/81, it cannot be assumed that the Community legislature intended, in a regulation governing refunds on exports of meat, to harmonize or standardize the cutting and boning methods used in the various Member States. On the contrary, it is clear from the Commission's reply to a question put by the Court that when Regulation No 2787/81 was adopted the Commission was aware of the differences in the exact meaning of the terms used in the regulation but considered that they were of minor importance and did not justify modifying the existing practices and methods.

(paragraph 14) By thus accepting that those terms might have different meanings the Commission incorporated into its regulation an implied reference to the cutting and boning methods used in the various Member States and regions. Therefore, notwithstanding the aforementioned principle that provisions of Community law should be interpreted uniformly, it is not for the Court to give a uniform Community definition of those terms.

(paragraph 15) For the precise anatomical definition of the cut of meat called "thin flank" reference must therefore be made to the method normally used in the Member State or region concerned for cutting and boning bovine carcases. It is for the national court to establish what that definition is.'

14. Like the Landgericht Nürnberg and the Bundesgerichtshof, I too consider that the judgment in *Ekro* contains, in itself, the necessary factors for assessing the present case.

I think it is possible to deduce from the documents submitted by the parties that the concept of 'thin flanks', which appears in all the language versions — save the German — of Regulations (EEC) No 2773/82 and (EEC) No 1315/84, corresponds broadly to the German 'Fleischdünnung' together with part of what is called in German 'Knochendünnung'. Moreover, GruSa seems to acknowledge this. It describes the English term 'thin flanks' as part of the bovine animal which corresponds 'exclusively *or essentially* to "Fleischdünnung" and not including the "Knochendünnung"' (my emphasis). Furthermore, it indicates that '*more than 90%* of the cut taken from the ninth to the thirteenth ribs is considered and treated in other Member States as a cut eligible for the refunds' (my emphasis). [11]

15. It cannot be denied that the inclusion of 'Knochendünnung' in the German version of subheading ex 02.01 A II a) 4 ex bb) resulted in a disadvantage for German beef and veal exporters and therefore led to the unequal treatment of German exporters *vis-à-vis* exporters from other Member States. However, neither can it be denied that this unequal treatment is a necessary consequence of the differences in national cutting and boning methods and that, moreover, it remains very limited. The Commission

11 — Written observations, paragraphs 19 and 20. The cut taken from the first and eighth ribs includes neither 'Fleischdünnung' nor 'Knochendünnung'. It is divided into cuts which are not relevant to the present proceedings.

maintained before the Court, without being contradicted, that 'Knochendünnung' can, at most, represent 4% of all beef or veal production. The fact that 'thin flanks' in language versions other than the German usually include part of the German 'Knochendünnung' as well (above, at paragraph 14) seems to have limited the actual discrimination still further.

16. Furthermore, the exclusion of 'Knochendünnung' reflects, in my opinion, the purpose of the regulations in question. In accordance with the Court's judgment in *Ekro*, the objective of those regulations is to 'prevent the payment of refunds on low-value cuts of meat, for which there is sufficient demand in the Community meat-processing industry' (above, at paragraph 12).

On this subject, GruSa maintains that 'Knochendünnung', a cut of beef or veal taken from the ninth to the thirteenth ribs, is of the same quality as that taken from the first to the eighth ribs, which are eligible for the refund.

It turns out that:

'The cut of a bovine carcase taken from the ninth to the thirteenth ribs is in all respects of equal value to that taken from the first to the eighth ribs'. [12]

12 — Written observations, paragraph 23.

In my opinion, the value of 'Knochendünnung' falls to be inferred only from the price paid for that cut on the world market. This is confirmed by Article 18, cited above, of the basic Regulation (EEC) No 805/68, which introduces refunds for certain products '[t] o the extent necessary to enable [those] products ... to be exported on the basis of quotations or prices for those products on the world market'.

The cuts of beef or veal which correspond entirely or partially to the German 'Knochendünnung' are sold on the world market at prices several times lower than those of other cuts and particularly the cut taken from the first to the eighth ribs. This emerges very clearly from the Annex to Regulation (EEC) No 1354/92, [13] annexed by the Commission to its reply to a question from the Court, as well as from similar annexes to the regulations applicable at the material time. [14] 'Knochendünnung' therefore seems not to be 'in all respects of equal value' to the cut taken from the first to the eighth ribs, indeed quite the contrary. [15]

13 — Commission Regulation (EEC) No 1354/92 of 26 May 1992 on the sale by the procedure laid down in Regulation (EEC) No 2539/84, of boneless beef held by certain intervention agencies and intended for export, amending Regulation (EEC) No 569/88 and repealing Regulation (EEC) No 665/92, OJ 1992 L 145, p. 53.

14 — In principle, I agree with GruSa in considering that it is better not to interpret a 1982 regulation by using a 1992 regulation. However, the particulars which emerge from the Annex to Regulation (EEC) No 1354/92 are more than confirmed by, for example, the Annex to Commission Regulation (EEC) No 132/83 of 19 January 1983, OJ 1983 L 17, p. 15 as well as by the annexes to dozens of other regulations from the period in question (see the relevant tables in the first part of Official Journal, in the chapter on 'Agriculture', under the key-words 'beef and veal').

15 — From this point of view, the question should be asked why 'Knochendünnung' was removed from the Annex to Regulation (EEC) No 2891/84. However, this removal is not in question in these proceedings (see also paragraph 17 below).

17. GruSa further maintains that, by amending only the German version of subheading ex 02.01 A II a) 4 ex bb) in the Annex to Regulation (EEC) No 2891/84 and by doing so in the way recommended by GruSa, the Commission recognized that Regulations (EEC) No 2773/81 and (EEC) No 1315/84 were marred by a mistake in translation.

I consider that the Commission is right to challenge the relevance of this argument. The reason for my saying this is to be found in the Court's judgment of 27 January 1988 in *Denmark* v *Commission*, [16] which, remarkably, has many similarities to the present case. That case, too, concerned the interpretation of a heading in the annex to a regulation 'fixing export refunds on beef and veal'. [17] The Court rejected the Commission's interpretation and, in that case, stated, *inter alia*:

'[at paragraph 15] The fact that Commission Regulation No 2429/86 of 31 July 1986 ..., subsequently attributed a different sense to the subheading in point cannot influence the interpretation of the text in force at the material time (see the judgment of 18 January 1984 in Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 22)'.

18. Furthermore, I consider that GruSa's argument is substantively unfounded, since the removal of 'Knochendünnung' from the German version of subheading ex 02.01 A II a) 4 ex bb) in the Annex to Regulation (EEC) No 2891/84 is not considered a rectification, but merely an amendment. Furthermore, the removal of this term is also the cause of unequal treatment — also limited in effect — of German beef and veal exporters *vis-à-vis* with those of other Member States, but this time *to the advantage* of the German exporters. In fact, from now on the latter will receive refunds for all 'Knochendünnung', whilst — because of the differences in national cutting and boning methods (paragraph 13 above) — this will not always be the case for the exporters from other Member States. Does this give those exporters a good reason for challenging Regulation (EEC) No 2891/84? I do not think so. I consider that, in the absence of harmonization of national cutting and boning methods, both the disadvantage which the German exporters suffered during the period before Regulation (EEC) No 2891/84 entered into force and the advantage which will be theirs after that regulation was adopted are unavoidable.

19. For the reasons mentioned above (points 14 to 18), I consider the exclusion of 'Knochendünnung' in subheading ex 02.01 A II a) 4 ex bb) of the regulations in question to be justified on the terms of the Court's decision in *Ekro*. That means, in reply to the third preliminary question, that according to the Court, the exclusion challenged by GruSa does *not* render the regulations invalid.

The second preliminary question

20. By its second preliminary question, the Finanzgericht Hamburg would like to know

16 — Case 349/85 [1988] ECR 169.

17 — The case concerned subheading ex 16.02 B III b) 1 in the Annex to Commission Regulation (EEC) No 187/80 of 29 January 1980, OJ 1980 L 23, p. 11.

whether Regulation (EEC) No 2891/84 has retroactive effect.

21. I have previously indicated (point 18 above) that I consider the removal of 'Knochendünnung' from the German version of subheading ex 02.01 A II a) 4 ex bb) in the Annex to Regulation (EEC) No 2891/84 not to be a rectification but merely an amendment. For this reason alone, I can find no ground for that regulation to have retroactive effect. It is only if the removal of this term constituted a correction that it might have been possible to assert that ever since the corrected version entered into force subheading ex 02.01 A II a) 4 ex bb) should have been interpreted retroactively in accordance with the more recent version.

22. For the sake of completeness, I would nevertheless like to touch briefly on this preliminary question. In the case of substantive rules, as, for example, the regulations now at issue, the case-law of the Court states:

'... the latter [rules] are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them.

This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it'. [18]

23. It is clear that the wording of Regulation (EEC) No 2891/84 offers nothing to support its retroactive application, on the contrary. In fact, Article 2 expressly provides that the regulation is to enter into force only on 16 October 1984.

Neither can retroactivity be inferred, in my opinion, from the objectives or general scheme of the regulation. The objectives and general scheme of Regulation (EEC) No 2891/84 appear to me to be identical to the objectives and general scheme of all the previous regulations 'fixing the export refunds on beef and veal', including the regulations at issue (EEC) No 2773/82 and (EEC) No 1315/84. All these regulations were adopted on the basis of the same Article 18 of Regulation (EEC) No 805/68 and therefore aim to obtain the objective referred to by that article, namely to 'safeguard Community participation in international trade in beef and veal'. [19]

I therefore find it difficult to accept that the same objectives or the same general scheme have not, in the past, led obligatorily to the retroactivity of the regulations then in force, but now do so in the case of Regulation (EEC) No 2891/84.

18 — Judgment of 12 November 1981 *Salumi* (Joined Cases 212/80 and 217/80 [1981] ECR 2735), at paragraphs 9 and 10; implicitly also in the judgment of 3 October 1985, *FKF* (Case 154/84 [1985] ECR 3165), at paragraphs 17 to 22.

19 — Preamble to Regulation (EEC) No 805/68, tenth recital.

24. In its written observations to the Court, GruSa refers to the judgment of 3 June 1980 in *Gedelfi,* [20] to support its argument that:

'Until now, the Court of Justice has repeatedly stated in its case-law that the substantive rules of Community law in the field of external trade which contained an error in themselves or as a consequence, were nevertheless retroactive, by virtue of higher ranking principles (principles of equality, proportionality, objective of a regulation)'. [21]

I consider this reference to be irrelevant. In *Gedelfi* the Court was not asked about the possible retroactivity of Community law and the Court did not give a ruling on that matter in its judgment.

25. In line with the previous case-law, in which the Court has shown itself to be particularly restrained with respect to the retroactivity of Community law. [22] I therefore conclude that there is no reason for according retroactive effect to Regulation (EEC) No 2891/84.

Conclusion

26. In conclusion, I propose that the Court reply as follows to the questions submitted by the Finanzgericht Hamburg:

(1) Commission Regulations (EEC) No 2773/82 of 13 October 1982 and (EEC) No 1315/84 of 11 May 1984 fixing the export refunds on beef and veal, read in conjunction with subheading ex 02.01 A II a) 4 ex bb), as set out in the accompanying Annexes, must be interpreted as meaning that while those regulations were in force, 'Knochendünnung' was not one of the cuts of beef qualifying for export refunds in Germany. That interpretation does not in any way imply that those regulations were invalid.

(2) Commission Regulation (EEC) No 2891/84 of 15 October 1984 does not have retroactive effect.

20 — Case 135/79 [1980] ECR 1713.

21 — Written observations, paragraph 27.

22 — For a recent example, see Case C-368/89 *Crispoltoni* [1991] ECR I-3695.