JUDGMENT OF THE COURT (First Chamber)
5 October 1994 *

In Case C-151/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof, The Hague (Netherlands) for a preliminary ruling in the criminal proceedings before that court against

M. Voogd Vleesimport en -export BV,

on the interpretation of various tariff subheadings in the Annexes to Commission Regulations (EEC) Nos 267/87 of 28 January 1987 (OJ 1987 L 26, p. 33), 1151/87 of 27 April 1987 (OJ 1987 L 111, p. 21) and 2800/87 of 18 September 1987 (OJ 1987 L 268, p. 47), all of which fixed export refunds in the poultrymeat sector, and in the Annex to Commission Regulation (EEC) No 3846/87 of 17 December 1987 establishing an agricultural product nomenclature for export refunds (OJ 1987 L 366, p. 1),

THE COURT (First Chamber),

composed of: D. A. O. Edward, President of the Chamber, R. Joliet and G. C. Rodríguez Iglesias (Rapporteur), Judges,

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— the Commission of the European Communities by H. van Lier, Legal Adviser, and F. de Sousa Fialho, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of M. Voogd Vleesimport en -export BV, represented by G. A. J. Dolk, and of the Commission at the hearing on 24 February 1994,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1994,

gives the following

Judgment

By an interim judgment of 5 February 1993, received at the Court on 8 April 1993, the Gerechtshof (Regional Court of Appeal), The Hague (Netherlands), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of a number of tariff subheadings in the Annexes to Commission Regulations (EEC) Nos 267/87 of 28 January 1987 (OJ 1987 L 26, p. 33), 1151/87 of 27 April 1987 (OJ 1987 L 111, p. 21) and 2800/87 of 18 September 1987 (OJ 1987 L 268, p. 47), all of which fixed export refunds in the poultrymeat sector, and in the Annex to Commission Regulation (EEC) No 3846/87 of 17 December 1987 establishing an agricultural product nomenclature for export refunds (OJ 1987 L 366, p. 1).

2 The questions were referred in the context of criminal proceedings against M. Voogd Vleesimport en -export BV (hereinafter 'Voogd'), which was prosecuted for entering allegedly inaccurate headings of the agricultural product nomenclature for export refunds (hereinafter 'the refund nomenclature') on a number of export forms for agricultural products when exporting consignments of poultrymeat to non-member States.

3 The products in question were:

— chicken legs with (part of) the back (without the rump);

— front portions of the back with wings from (mainly) Italian suppliers, described by the latter (*inter alia*) as '*pipistrelli*'.

4 The file shows that those products were declared as 'legs' and 'wings' respectively.

5 At first instance, Voogd was fined HFL 100 000 by the Arrondissementsrechtbank (District Court) of Rotterdam in a judgment of 30 December 1991. The company had argued in its defence, citing the judgment in Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107, that a tolerance of 25% was accepted and that a chicken leg retained that definition provided the back portion did not exceed 25% of the total weight. It also argued, relying on the same judgment, that wings which were attached to a piece of back remained wings. It added that the rump (which weighed only a few grammes) was worthless.

6 Voogd appealed to the criminal division of the Gerechtshof of The Hague.

7 Before that court, the company maintained that the refund codes it had entered were correct. It added that the Community legislature had constantly adjusted the codes and descriptions in the light of the problems arising with the descriptions over the course of time, so that now all types of chicken leg and wing gave rise to refunds.

8 The Gerechtshof took the view that, in order to give a final judgment, it was necessary to refer the following questions to the Court for a preliminary ruling:

'1.1 On a correct interpretation of the Annexes to the Commission regulations referred to below, what meaning is to be given to the descriptions of poultrymeat products given at Points (a) to (f) below taken from the specified tariff headings used for the purposes of export refunds in the poultrymeat sector?

(a) Description:	"B. Poultry cuts (excluding offals): II. Unboned (bone-in): e) Legs and cuts of legs: 3. Of other poultry"
Tariff heading:	02.02. B. II e) 3
Regulations:	Commission Regulation (EEC) No 1151/87 of 27 April 1987 (OJ 1987 L 111, p. 21), which entered into force on 1 May 1987, and Commission Regulation (EEC) No 2800/87 of 18 September 1987 (OJ 1987 L 268, p. 47, which entered into force on 21 September 1987
(b) Description	"B. Poultry cuts (excluding offals): II. Unboned (bone-in): a) Halves or quarters: 1. Of fowls"
Tariff heading:	02.02. B. II a) 1

Regulations:	Commission Regulation (EEC) No 1151/87 of 27 April 1987 (OJ 1987 L 111, p. 21), which entered into force on 1 May 1987, and Commission Regulation (EEC) No 2800/87 of 18 September 1987 (OJ 1987 L 268, p. 47), which entered into force on 21 September 1987.
(c) Description	"B. Poultry cuts (excluding offals): II. Unboned (bone-in): ex g) Other"
Tariff heading:	02.02. B. II. ex g)
Regulations:	Commission Regulation (EEC) No 1151/87 of 27 April 1987 (OJ 1987 L 111, p. 21), which entered into force on 1 May 1987, and Commission Regulation (EEC) No 2800/87 of 18 September 1987 (OJ 1987 L 268, p. 47), which entered into force on 21 September 1987
(d) Description:	"Poultry cuts and offal other than livers, frozen: Of fowls of the species *Gallus domesticus*: Cuts: With bone in: Legs and cuts thereof"
Tariff heading:	0207.41.51.000
Regulation:	Commission Regulation (EEC) No 3846/87 of 17 December 1987 (OJ 1987 L 366, p. 1), which entered into force on 1 January 1988
(e) Description:	"Poultry cuts and offal other than livers, frozen: Of fowls of the species *Gallus domesticus*: Cuts: With bone in: Other: Halves or quarters, without rumps"

Tariff heading:	0207.41.71.100
Regulation:	Commission Regulation (EEC) No 3846/87 of 17 December 1987 (OJ 1987 L 366, p. 1), which entered into force on 1 January 1988
(f) Description:	"Poultry cuts and offal other than livers, frozen: Of fowls of the species *Gallus domesticus*: Cuts: With bone in: Other: Other"
Tariff heading:	0207.41.71.900
Regulation:	Commission Regulation (EEC) No 3846/87 of 17 December 1987 (OJ 1987 L 366, p. 1), which entered into force on 1 January 1988.

1.2. Under which tariff heading should chicken legs with (part of) the backbone (without the rump) be classified

— in the period from 1 May 1987 to 1 November 1987,

— in the period from 1 January 1988 to 1 October 1988?

1.3. If that question is too general, the answer depending on the size of the part of the backbone: how large must that part be or in what place or manner must it be cut in order for the chicken leg with (that part of) the backbone (without rump) to be classified under one of the tariff headings set out at 1.1(a) to (f) (applicable in the abovementioned periods)?

2.1. On a correct interpretation of the Annexes to the Commission regulations referred to below, what meaning is to be given to the descriptions of poultrymeat products given at points (a) and (b) taken from the specified tariff headings used for the purposes of export refunds in the poultrymeat sector?

(a) Description:	"B. Poultry cuts (excluding offals: II. Unboned (bone-in): b) Whole wings, with or without tips"
Tariff heading:	02.02B. II. b)
Regulations:	Commission Regulation (EEC) No 267/87 of 28 January 1987 (OJ 1987 L 26, p. 33), which entered into force on 1 February 1987, and Commission Regulation (EEC) No 1151/87 of 27 April 1987 (OJ 1987 L 111, p. 21), which entered into force on 1 May 1987
(b) Description:	"Poultry cuts and offal other than livers, frozen: Of fowls of the species *Gallus domesticus*: Cuts: With bone in: Whole wings, with or without tips"
Tariff heading:	0207.41.21.000
Regulation:	Commission Regulation (EEC) No 3846/87 of 17 December 1987 (OJ 1987 L 366, p. 1), which entered into force on 1 January 1988

2.2 Under which of the tariff headings referred to at point 2.1(a) or (b) or 1.1(c) should front portions of the back, with wings, of fowls of the species *Gallus domesticus* be classified:

— in the period from 1 February 1987 to 1 November 1987,

— in the period from 1 January 1988 to 1 September 1988?

2.3 If that question is too general, the answer depending on the manner in which the portion concerned is cut: how must the pieces be cut in order for wings with a piece of the back between them to be classified under one of the tariff headings referred to at points 2.1(a) and (b) and 1.1(c) (applicable in the above-mentioned periods)?'

9 As the Commission has pointed out, in the context of a reference for a preliminary ruling the Court may not deliver advisory opinions on general or hypothetical questions (see the judgment in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 17). The questions referred must therefore be understood as seeking to determine under which subheadings of the Annexes to Regulations Nos 267/87, 1151/87, 2800/87 and 3846/87 the two products referred to in paragraph 3 above are to be placed, and on what conditions.

10 As a preliminary, it should be noted that Regulations Nos 267/87, 1151/87 and 2800/87, cited above, use the same descriptions for subheadings potentially covering the products in question. By contrast, Regulation No 3846/87 introduced a new classification based on the Combined Nomenclature, which came into force on 1 January 1988 in accordance with Article 4 of that regulation.

11 Each of the two products needs to be examined in turn, for each of the subheadings, under the nomenclature used by Regulations Nos 267/87, 1151/87 and 2800/87 ('the old nomenclature') and under the nomenclature of Regulation No 3846/87 ('the new nomenclature').

The chicken legs with (part of) the back but without the rump

12 It appears that this product could be classified in three broad categories, to which the regulations cited above give various references: legs (02.02. B II e) 3 under the old nomenclature and 0207 41 51 000 under the new), quarters (02.02. B II a) 1 under the old nomenclature and 0207 41 11 000 or 0207 41 71 100 under the new), or the residual category (02.02. B II ex g) under the old nomenclature and 0207 41 71 900 under the new).

13 The Commission maintains that the product in question must be classified in the residual category.

14 In its opinion, it cannot be a leg because, in Article 1(2)(e) of Commission Regulation (EEC) No 1538/91 of 5 June 1991 introducing detailed rules for implementing Council Regulation (EEC) No 1906/90 on certain marketing standards for poultry (OJ 1991 L 143, p. 11), the Community legislature adopted the definition of the term 'leg' used by the poultrymeat standard of the United Nations' Economic Commission for Europe, namely:

'leg: the femur, tibia and fibula together with the surrounding musculature. The two cuts shall be made at the joints'.

15 That argument cannot be accepted. The regulation cited by the Commission did not exist at the time the events took place, and cannot therefore be invoked in support of an interpretation of the regulations cited in the reference.

16 The Commission argues that levies on cuts of poultry are derived from the levy on poultry carcases as a whole by reference to the ratio between the weight of the various products and the weight of the whole carcase, and also, if need be, by reference to the average ratio between the commercial values of those various products. Those ratios are expressed by coefficients. For derived products, export refunds are fixed by using the coefficients which are used for calculating the levies. The Commission therefore insists on the need to observe the weight ratios when interpreting the meaning of cuts such as legs and wings.

17 That argument cannot be accepted either.

18 Under Article 11(1) of Council Regulation (EEC) No 2777/75 of 29 October 1975 on the common organization of the market in poultrymeat (OJ 1975 L 282, p. 77), in implementation of which Regulations Nos 267/87, 1151/87 and 2800/87 were adopted, 'the general rules for the interpretation of the Common Customs Tariff and the special rules for its application shall apply to the tariff classification of products covered by this regulation ...'.

19 Under General Rule A 3 b) for the interpretation of the Combined Nomenclature, which is contained, first, in the Annex to Council Regulation (EEC) No 3618/86 of 24 November 1986 amending Regulation (EEC) No 3331/85 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1986 L 345, p. 1), applicable from 1 January 1987, and, secondly, in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), applicable from 1 January 1988, mixed products are to be classified by reference to the material or component which gives them their essential character.

20 A leg to which a piece of back remains attached must therefore be described as a leg, within the meaning of tariff subheadings 02.02 B II e) 3 of the old

nomenclature and 0207 41 51 000 of the new, if that piece of back is not sufficiently large to give the product its essential character.

21 To determine whether that is so, in the absence of Community rules at the material time, it is for the national court to take into account national commercial practices and traditional cutting methods.

22 As for the subheading 'quarters', the Explanatory Notes to the Common Customs Tariff define hindquarters as 'consisting of the drumstick, leg, rear part of the back and rump'.

23 Since the product in question does not include the rump, it cannot fall under subheading 02.02 B II a) 1 of the old nomenclature, which refers to halves or quarters without further definition. In answer to Voogd's argument that the rump has no economic value and its absence is insignificant, it should be pointed out that that has not been established and that the wording of the Explanatory Notes expressly requires that a 'hindquarter' should include a rump.

24 If the piece of back attached to the leg is of sufficient size to give the latter its essential character, the product must therefore be classified in the residual category 02.02 B II ex g) of the old nomenclature.

25 The new nomenclature distinguishes between subheading 0207 41 11 000, which refers to 'halves or quarters' without further definition, and subheading 0207 41 71 100, which covers 'halves or quarters, *without rumps*' (emphasis added).

26 The product in question may therefore be included in that latter category if the part of the back attached corresponds to the rear part of the chicken's back, allowing for the permitted tolerances in cutting.

27 If the piece of back is too large for the product to be described as a 'leg', but too small for it to be described as a 'quarter', it must be classified in the residual category 0207 41 71 900.

28 Accordingly, it should be stated in reply to the questions from the national court that:

— Regulations Nos 1151/87 and 2800/87 must be interpreted as meaning that a chicken leg with (part of) the back (without the rump) must be classified under subheading:

(a) 02.02 B II e) 3 ('legs and cuts of legs of other poultry') in the Annexes to those regulations if the size of the piece of back does not give the product its essential character;

(b) 02.02 B II ex g) ('Other') if the opposite applies.

— Regulation No 3846/87 must be interpreted as meaning that a chicken leg with (part of) the back (without the rump) must be classified under subheading:

(a) 0207 41 71 100 ('halves or quarters, without rumps') in the Annex to that regulation if the piece of the back corresponds to the rear part of the chicken's back, allowing for the permitted tolerances in cutting;

(b) 0207 41 51 000 ('legs and cuts thereof'), if the above is not the case and the size of the piece of back does not alter the essential character of the product;

(c) 0207 41 71 900 ('Other'), if it cannot be classified under either of the two preceding subheadings.

The front portions of the back with wings

29 It is apparent from the questions that two classifications might be used for this product: wings (subheadings 02.02 B II b) of the old nomenclature and 0207 41 21 000 of the new) or the residual category (subheadings 02.02 B II ex g) of the old nomenclature and 0207 41 71 900 of the new).

30 The Commission, which again bases its argument on Regulation No 1538/91, cited above, maintains that this product must also be classified under the residual category, because Article 1(2)(i) of that regulation defines a wing as follows:

'Wing: the humerus, radius and ulna, together with the surrounding musculature. ... The tip, including the carpal bones, may or may not have been removed. The cuts shall be made at the joints.'

31 The Commission contends that that definition of whole wings does not cover the front part of a chicken's back with wings.

32 That argument cannot be accepted. As stated above, that regulation did not exist at the time the events took place and cannot therefore be invoked in support of an interpretation of the regulations cited in the questions.

33 The reasoning given in paragraphs 17 to 21 above concerning the classification of chicken legs with (part of) the back but without the rump applies, *mutatis mutandis*, to front portions of the back with wings.

34 Accordingly, it should be stated in reply to the questions from the national court that:

— Regulations Nos 267/87 and 1151/87 must be interpreted as meaning that the front part of a chicken's back with wings must be classified under subheading:

(a) 02.02 B II b) ('Whole wings, with or without tips') in the Annexes to those regulations if the size of the piece of back does not give the product its essential character;

(b) 02.02 B II ex g) ('Other') if the opposite applies.

— Regulation No 3846/87 must be interpreted as meaning that the front part of a chicken's back with wings must be classified under subheading:

(a) 0207 41 21 000 ('Whole wings, with or without tips') in the Annex to that regulation if the size of the piece of back does not give the product its essential character;

(b) 0207 41 71 900 ('Other') if the opposite applies.

Costs

35 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Gerechtshof, The Hague, by an interim judgment of 5 February 1993, hereby rules:

1. Commission Regulations (EEC) Nos 1151/87 of 27 April 1987 and 2800/87 of 18 September 1987, both of which fix export refunds in the poultrymeat sector, must be interpreted as meaning that a chicken leg with (part of) the back (without the rump) must be classified under subheading:

(a) 02.02 B II e) 3 ('Legs and cuts of legs of other poultry') of the Annexes to those regulations if the size of the piece of back does not give the product its essential character;

(b) 02.02 B II ex g) ('Other') if the opposite applies.

2. Commission Regulation (EEC) No 3846/87 of 17 December 1987 establishing an agricultural product nomenclature for export refunds must be interpreted as meaning that a chicken leg with (part of) the back (without the rump) must be classified under subheading:

(a) 0207 41 71 100 ('Halves or quarters, without rumps') of the Annex to that regulation if the piece of back corresponds to the rear part of the back, allowing for the permitted tolerances in cutting;

(b) 0207 41 51 000 ('Legs and cuts thereof') if the above is not the case and the size of the piece of back does not alter the essential character of the product;

(c) 0207 41 71 900 ('Other') if it cannot be classified under either of the two preceding subheadings.

3. Commission Regulation (EEC) No 267/87 of 28 January 1987 fixing the export refunds on poultrymeat and Regulation No 1151/87, cited above,

must be interpreted as meaning that the front part of a chicken's back with wings must be classified under subheading:

(a) 02.02 B II b) ('Whole wings, with or without tips') in the Annexes to those regulations if the size of the piece of back does not give the product its essential character;

(b) 02.02 B II ex g) ('Other') if the opposite applies.

4. Regulation No 3846/87, cited above, must be interpreted as meaning that the front part of a chicken's back with wings must be classified under subheading:

(a) 0207 41 21 000 ('Whole wings, with or without tips') in the Annex to that regulation if the size of the piece of back does not give the product its essential character;

(b) 0207 41 71 900 ('Other') if the opposite applies.

Edward Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 5 October 1994.

R. Grass

Registrar

D. A. O. Edward

President of the First Chamber