OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 31 December 1991 *

Mr President,
Members of the Court,

1. In these proceedings the Court is once again called upon to give a ruling on the validity of the Community system of collecting, at the time when sheep are exported from the United Kingdom, an amount equal to that of the variable slaughter premium for sheep, hereinafter to as the 'clawback'. In particular, the questions submitted for a preliminary ruling by the Crown Court at Maidstone (Case C-38/90) and the Crown Court at Leeds (Case C-151/90) concern the validity of Article 4(1) and (2) of Commission Regulation (EEC) No 1633/84 of 8 June 1984 laying down detailed rules for applying the variable slaughter premium for sheep. [1]

2. The background to the dispute in the main proceedings can be described in a few lines. Mr Lomas, as well as Mr Fletcher and Mr Pritchard, respectively director and operations manager of North Riding Lamb Ltd, all of whom are sheepmeat exporters, have been prosecuted for making false statements as to the weight of the animals exported, or the type of meat exported, or both.

However, whether or not fraudulent use was made of Community finances is not relevant for the purposes of this case. As is clear from the orders for reference, the criminal proceedings brought against the defendants cannot succeed unless the Crown can establish that there was an 'assigned matter' in relation to which the customs authorities were obliged to require statements which, in the circumstances, proved to be false. The defendants maintained before their respective national courts that the Community provisions laying down detailed rules for collecting the 'clawback' were invalid, and consequently that the national authorities were not entitled to require the statements in question, whilst the — seemingly undisputed — fact that those statements were false is immaterial.

That is the factual background to the national courts' request for a preliminary ruling from the Court of Justice.

3. For a detailed description of the relevant Community legislation I refer to the Report for the Hearing, whilst confining myself here to those provisions which are more directly relevant for the purposes of this case.

Council Regulation (EEC) No 1837/80 [2] ('the basic regulation'), which established a common organization of the market in sheepmeat and goatmeat, provided, amongst the other kinds of intervention designed to regulate the market, for the grant of a 'variable slaughter premium'. According to

* Original language: Italian.

1 — OJ 1984 L 154, p. 27.

2 — OJ 1980 L 183, p. 1.

Article 9 of that regulation, as amended by Regulation (EEC) No 871/84,[3] the United Kingdom, which is the only Member State which has this possibility, may grant the premium in question where the prices recorded on its representative market are below a 'guide level' corresponding to 85% of the basic price, always provided that intervention measures in the form of purchases by the intervention agencies are not applied (Article 9(1].

In order to prevent the grant of the variable slaughter premium from giving rise to distortions of competition when the carcasses or the animals to be slaughtered, or both, are exported outside the United Kingdom, Article 9(3) provides that 'should the (slaughter) premium ... be paid ..., the Commission shall take the necessary measures to ensure that *an amount equivalent to the premium actually granted* is charged on all products (which qualified for the premium) ..., when they leave the region concerned'.[4]

The detailed rules for applying the premium, adopted on the basis of Article 9(4), were laid down by the Commission in Regulation No 1633/84. In particular, so far as the collection of the clawback is concerned, Article 4(1) provides that 'for the United Kingdom, the amount to be charged on departure of the products ... from region 5 ... shall be fixed each week by the Commission. It shall be equal to the amount of the premium fixed in accordance with Article 3(1), for the week during which departure of the products in question took place'. Under Article 3(1) of the regulation, '... the level of the premium shall be fixed each week by the Commission in respect of the week commencing 21 days before the week of fixing'.

To put it briefly, and simply, the machinery established by the Commission provides that (a) the slaughter premium is to be granted at the rate fixed for the week in which the sheep are first placed on the market with a view to slaughter, or the day of slaughter; (b) the sheep (live animals) in respect of which the premium has been granted must be exported within 21 days; (c) the clawback is to be collected at the rate of premium fixed for the week in which export takes place.

Article 4(2) of the regulation provides for the lodging of a security in order to cover the amount due pursuant to paragraph (1); that security, which is to be fixed by the competent authorities in the United Kingdom, must not be less than the forecast amount of the premium for the week preceding that during which export from the United Kingdom takes place.

Finally, Article 5 provides that the United Kingdom is to take all necessary steps to ensure compliance with the provisions of the regulation (paragraph (1] including, where necessary, steps 'to ensure recovery of an amount equal to the premium which has been paid' (paragraph (2].

4. In their first question, the national courts wish to ascertain whether paragraphs (1) and (2) of Article 4 of Regulation No 1633/84 are invalid in that the Commission

3 — OJ 1984 L 90, p. 35.

4 — Emphasis added.

overstepped the bounds of the powers conferred on it by Article 9 of the basic regulation.

To begin with, it is undisputed that the system established by the Commission in Regulation No 1633/84 inevitably leads to the consequence that the amount of the slaughter premium is different, or may differ, from that of the clawback. That is precisely because, as is apparent from the legislation described above, whilst the slaughter premium is granted at the rate in force during the week in which the animals are placed on the market or at the rate in force on the day of slaughter, the clawback is geared instead to the rate of premium in force during the week in which export takes place. In other words, in the case of an animal (x) the clawback collected on export is equal to the amount of the premium which would be granted in that week to the producer, but not to the premium actually granted in respect of the same animal (x). The two amounts are therefore identical only when the animal is placed on the market with a view to slaughter and is exported during the same week.

According to the defendants in the main proceedings, the fact that the clawback which is collected is frequently higher than the amount of the premium actually granted, and is different in any case, is contrary to Article 9(3) of the basic regulation, inasmuch as it provides that the amount of the clawback must be 'equivalent to the premium actually granted'.

5. In order to answer the question referred to the Court, therefore, it is necessary to ascertain whether the phrase '*amount equivalent to the premium actually granted*' is to be interpreted as meaning that the two amounts in question must be identical or, as the United Kingdom and the Commission maintain, that the two amounts may also differ, provided the difference is negligible and is in any event offset over a longer period.

Let me say at once that I am not swayed by the argument that the phrase set out in Article 9(3) in no way implies that the two amounts (the amount of the premium and the amount of the clawback) must be identical but only 'equivalent' without further qualification. Leaving other matters aside, I am obliged to point out that two amounts which are equivalent, that is to say have the same value, are by definition identical. Furthermore, the word 'actually' strengthens the notion that the two amounts in question must be the same.

In addition, quite apart from its literal wording, it follows from the very purpose of the provision in question, also in view of the context in which it is set, that it must be interpreted restrictively. Moreover, the Court has already expressed itself along those lines, precisely in connection with the legislative provision now under consideration.

Starting from the premise that 'any charging of a sum of money, on exportation to another Member State, constitutes in principle, no matter how the charge is described, an obstacle to the free movement

of products within the common market',[5] the Court stated that 'Article 9(3) amounts to a derogation from the fundamental principles of any common organization of the market and must therefore be interpreted narrowly'.[6]

More particularly, the Court laid down in *Commission* v *United Kingdom* that the collection of the clawback 'was not to be regarded as a charge having an effect equivalent to a customs duty in so far as it was inseparable from the intervention system which was constituted by payment of the variable slaughter premium and which was *intended to offset exactly the effects of the slaughter premium* and thereby to enable products from the Member States or regions in which the premium was paid to be exported to other Member States without disturbing their markets'.[7] It follows, as the Court stated in the same judgment, that Article 9(3) 'must be understood as *prescribing solely the recovery of the amount of premium actually paid* in respect of an animal when it leaves the region in which the premium was granted'.[8]

6. It is clear, therefore, from the Court's interpretation of Article 9(3) of the basic regulation, that that provision provides solely for the recovery of the amount corresponding to that granted by way of the slaughter premium. That is so precisely because the clawback is closely connected with the nature of the slaughter premium, which is intended to contribute to balanced prices on a specified market. It follows that the aim of preventing it from taking effect outside that market as well can be achieved only by recovering the amount which had already been granted when the animal or its carcass leaves the State in question.

It seems to me that the conclusion which I have reached cannot be invalidated by the Commission's argument that during a given period (which is not more closely identified), the differences between the amounts of premium and the amounts of clawback offset one another with the result that, over that period, the amounts of clawback which are collected — viewed in aggregate terms — are equivalent to the amounts of premium actually granted. All I have to say in that respect is that the Commission has not produced any supporting evidence which demonstrates that the amounts in question actually offset one another. On the other hand, I am compelled to point out that the variations in the rate at which the premium is fixed are frequently substantial, even over a short period.[9]

Finally, some brief observations are called for with regard to the argument put forward

5 — See the judgments of 2 February 1988 in Case 61/86 United Kingdom v Commission, [1988] ECR 431, at paragraph 10, and in Case 162/86 Livestock Sales Transport v Intervention Board for Agricultural Produce [1988] ECR 489, at paragraph 9.

6 — Judgment in Livestock Sales Transport, cited above, at paragraph 9; along the same lines, see the judgment in United Kingdom v Commission, cited above, at paragraph 15.

7 — Judgment in United Kingdom v Commission, cited above, at paragraph 11 (emphasis added); along the same lines, see the judgment of 15 September 1982 in Case 106/81 Kind v Commission [1982] ECR 2885 at paragraph 21.

8 — Judgment in Commission v United Kingdom, cited above, at paragraph 15 (emphasis added).

9 — A typical example which clearly represents a borderline case, but which is a good illustration of the imbalance which can result from the method applied: in the week from 1 to 7 August 1988 the rate in question was equal to . . . zero; two weeks later (from 16 to 21 August) the rate was 56.326; this means, evidently, that a trader who exported in the week from 16 to 21 August an animal placed on the market in the week from 1 to 7 August would have paid the clawback for an animal in respect of which no premium had been granted! Evidently the exact opposite can also occur.

by both the Commission and the United Kingdom that a system of collecting the clawback which provides for the amount of the premium and the amount of the clawback to be exactly the same would be impractical or would in any event give rise to very serious technical and administrative difficulties and to excessive costs. In that regard, whilst acknowledging that the difficulties in question are in fact enormous and that the method at present in force has the merit of being practical and of facilitating checks, I do not believe there are insurmountable obstacles to the implementation of a method which is in conformity with Article 9(3) of the basic regulation. A possible solution, for instance, would be to establish a system of issuing certificates to accompany each animal or batch of animals from the time they are first placed on the market until such time as they are exported, if at all, in such a way as to enable the producer, and therefore the amount of premium actually granted, to be traced.

Admittedly, that is a method which could lead to an increase in the fraudulent use of Community finances, as it would be more difficult to carry out systematic checks. However, that consideration is not such as to redefine the terms of the problem: the fact remains that the validity of a provision cannot be assessed exclusively by reference to considerations of expediency. Moreover, there is no bar to amending the basic provision should the difficulties prove to be insurmountable in practice.

In conclusion, by establishing machinery for collecting the clawback which does not permit the recovery of an amount corresponding to that of the slaughter premium, as provided for in Article 9(3) of the basic regulation, the Commission overstepped the bounds of the powers conferred on it by the Council regulation.

Accordingly, Article 4(1) of Commission Regulation No 1633/84 must be declared invalid in so far as it provides that the amount of the clawback does not have to be exactly the same as the amount of the slaughter premium actually paid. Similarly, Article 4(2) must be declared invalid in so far as it provides for the lodging of a security in order to cover the amount due pursuant to paragraph (1).

7. In their second question, the national courts ask the Court to specify the effects of a declaration that the regulation is invalid.

To begin with, let me point out that, on the basis of its consistent case-law, the Court avails itself of the possibility of limiting the effects of a declaration of invalidity, also in proceedings under Article 177, where that course is dictated by overriding requirements, and in particular by considerations of legal certainty. [10]

10 — See, for instance, the judgment of 15 January 1986 in Case 41/84 Pinna v Caisse d'Allocations Familiales de la Savoie [1986] ECR 1, at paragraphs 28 and 29, and the judgment of 27 February 1985 in Case 112/83 Produits de Maïs v Administration des Douanes et Droits Indirects [1985] ECR 719, at paragraphs 17 and 18.

In practice, the Court has availed itself of that possibility, referring to the specific circumstances of the cases brought before it, where there is a risk of serious economic repercussions arising from the recovery of sums paid under legislation declared invalid. [11]

With regard to the case under consideration, let me point out in the first place that the declaration of invalidity of Article 4(1) of Regulation No 1633/84 affects, from the financial point of view, only the amounts of 'clawback' in excess of the corresponding premiums and that, in any event, the recovery of those amounts is not at issue in the main proceedings. I would remind the Court that the defendants have challenged the validity of the system of collecting the clawback only in order to escape the consequences of the offence with which they are charged.

Having said that, however, allow me to point out that the invalidity of the legislation in question, whilst not affecting the clawback principle as such, does affect the system of collection as a whole.

A declaration of invalidity with effect *ex tunc* might therefore disrupt the legal relationships established as a result of that legislation, and could call in question the amount of the difference between the premium actually granted in respect of an animal and the clawback collected in respect of the same animal, which — having regard to the machinery employed to date — would be virtually impossible to determine.

Hence I consider that in accordance with the aforesaid case-law of the Court, in this case as well, by way of exception, a declaration that the system of collecting the clawback referred to in Regulation No 1633/84 is invalid must not permit the amount of the difference between the premium actually granted in respect of an animal and the clawback collected in respect of that animal to be called in question.

However, in order to ensure observance of proper judicial safeguards, I suggest that the declaration of invalidity should be capable of being relied upon by those who, prior to the date of the judgment, have instituted proceedings (or lodged an equivalent complaint) against measures adopted on the basis of the provisions declared invalid.

8. In their third question, the national courts ask whether, notwithstanding a declaration of invalidity, the United Kingdom can be said to be authorized or obliged under Community law to require the production of documentation in relation to export transactions subject to charges under Article 4 of Regulation No 1633/84, and to prosecute for false statements in such documentation in a case such as this where the national enactment under which the prosecution is brought depends upon the existence of Community rights or obligations.

11 — Judgment of 15 October 1980 in Case 4/79 Providence Agricole de la Champagne v ONIC [1980] ECR 2823, at paragraph 45; judgment in Pinna, cited above, at paragraph 30.

That question raises the issue whether, even in the absence of detailed rules of application adopted by the Commission, the clawback system can continue to operate, that is to say whether, on the basis of another Community provision, the United Kingdom is obliged (or at least authorized), pending the adoption of new legislation, to continue to collect the clawback, with all the consequences which that entails, namely requiring the production of documentation and the possibility of instituting criminal proceedings for infringements.

I must confess that the temptation to answer that question in the affirmative is very strong indeed, but that is perhaps because I am repelled by the idea that it is possible precisely in the name of Community law to escape the consequences of an attempt to make fraudulent use of Community finances.

Having said that, let me point out that although Article 9(3) of the basic regulation provides for the collection of the clawback — in substance, the amount thereof — the fact remains that that provision confers on the Commission the power to lay down the relevant detailed rules of application. In the absence of such rules, therefore, the United Kingdom is not in principle obliged under Community law to require production of the documentation in question or to institute criminal proceedings on account of any false statements in such documentation.

9. In the light of the foregoing considerations, therefore, I propose that the Court answer the questions submitted by the Crown Courts at Maidstone and Leeds for a preliminary ruling as follows:

1. Article 4(1) of Commission Regulation No 1633/84 is invalid in so far as it provides that the amount of the clawback is not exactly the same as the amount of the slaughter premium actually granted. Article 4(2) is invalid in so far as it requires a security to be lodged in order to cover the amount due pursuant to paragraph (1);

2. The declaration of invalidity of those provisions cannot be relied upon in respect of a date prior to that of this judgment, other than by persons who have instituted proceedings or lodged an equivalent complaint against measures adopted on the basis of the provisions declared invalid;

3. Under Community law the United Kingdom is not obliged to require the production of documentation relating to charges based on provisions declared invalid, or to institute criminal proceedings on that basis.