

2. The effect of Regulation No 84/66/EEC was not to alter the scope of Regulation No 85/63/EEC, and consequently its effect was merely declaratory of the pre-existing situation.

Kutscher

Donner

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Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte

H. Kutscher

Registrar

President

OPINION OF MR ADVOCATE-GENERAL MAYRAS  
DELIVERED ON 1 DECEMBER 1976<sup>1</sup>

*Mr President  
Members of the Court,*

The two cases referred to this Court by the Corte Suprema di Cassazione of Italy for a preliminary ruling both present the same questions of interpretation of regulations adopted by the Council in the context of the common organization of the market in pigmeat during the transitional period of the progressive introduction of that organization.

As the Court is aware, the provisions brought into effect at that time provided for the imposition of levies on imports of agricultural products not only from non-Member countries but also from other Member States.

The point in question here is whether the levy and, where necessary, the supplementary amount applicable to

imports of sausages in a preserving liquid were to be calculated on the overall weight of the product and the liquid, or whether on the contrary the weight of such liquid was to be deducted.

Apart from the provisions set out in Article 1 of Regulation No 20/62, the nomenclature of the products coming under the common organization of the market in question was laid down by Annex II B to Council Regulation No 85/63 of 18 July 1963.

Among those products are 'sausages and the like, of meat, meat offal or pig blood,' classified under heading ex 16.01 B of the Common Customs Tariff.

The regulations which from time to time fixed the amount and the method of calculation of the levies refer to this nomenclature. This is the case in

<sup>1</sup> — Translated from the French.

particular of Regulations Nos 88 and 89/63 which determine these levies respectively for imports from non-Member countries and for intra-Community trade. The amount of the levies is fixed therein per '100 kg of net weight' of the product.

In the case of sausages imported in containers with preserving liquid, the Italian customs authorities considered that the levy was to be calculated on the total net weight of the goods including the weight of that liquid.

Thus it was that between October 1963 and June 1966 the tinned sausages imported by the limited liability company Foral and the limited company D. & C. were subject to the levy on the aggregate weight of the product and of the liquid in which it was preserved.

However, by Regulation No 84/66, the Council amended the nomenclature of certain products derived from pigmeat, as laid down in the annexes to Regulation No 85/63, and added the following provision in regard to the description of the products under tariff heading ex 16.01 B appearing in Annex II B to Regulation No 85/63: 'the levy on sausages put up in containers with preserving liquid shall be charged on the net weight after deducting the weight of such liquid.'

On the basis of this provision, Foral and D. & C. successfully disputed the amount of the levies which had been imposed on them. They won their case at first instance before the Tribunale di Bologna; and these decisions were confirmed by the Corte d'Appello of the same city.

But the Amministrazione delle Finanze dello Stato (State Finance Administration) appealed to the Corte Suprema di Cassazione, and that supreme court took the view that it was obliged under Article 177 of the EEC Treaty to refer for a preliminary ruling two questions to this Court concerning the interpretation of

Council Regulations Nos 85/63 and 84/66.

By the first of these questions, it asks this Court whether the provision of Article 2 of the 1966 regulation, applying to products classified under tariff heading ex 16.01 B, in so far as it expressly excludes the preserving liquid pertaining to the sausages for the purposes of calculating the levy, constitutes an interpretation of the earlier legislation and, if so, has retroactive effect; or whether, on the contrary, it is a new provision which has the effect only from the coming into force of the said regulation.

If this Court decides that the latter is the case, the Corte di Cassazione then asks it whether, under the 1963 regulation, the weight of the preserving liquid had to be taken into account in calculating the levy or whether each State might act in accordance with its own customs legislation in order to decide the question.

I — My Lords, it is my view that I should invert the order in which these two questions were referred to you and, as the Commission suggests, first of all consider the interpretation of Regulation No 85/63, and also of the texts fixing the amount of the levies, excluding the subsequent effect of Regulation No 84/66.

In this respect, it should be noted that the classification adopted by the nomenclature annexed to the first of these regulations as regards sausages and the like corresponds in fact with the wording of the Common Customs Tariff. It should further be noted that the explanatory notes to the nomenclature of the Customs Cooperation Council specify that these products must be classified under that same heading, even if they are put up in hermetically-sealed containers.

Therefore the levy on products under that tariff heading is directed at sausages,

independently of the way in which they are put up and irrespective of whether they are immersed in a liquid intended to ensure their preservation.

Since the levy must be calculated as a function of the *net* weight of the products coming under tariff heading 16.01 B would this not seem to be a first indication that the weight of the preserving liquid must be excluded?

Let me point out first of all that no definition of net weight can be extracted with any degree of precision from the Community legislation applicable to levies. A definition of dutiable weight is to be found, and the distinction between 'gross weight' and 'net weight' is made clear, only in a recommendation of the Commission dated 13 March 1961. But, apart from the fact that the concept of net weight, which is considered as the weight of the goods themselves without packing, does not of itself provide an answer to the question which is referred to you, it seems impossible to me to find any argument upon the said recommendation which, relating only to customs duties, was not applicable to the levies provided for by the legislation on the common organization of the agricultural markets.

On the other hand, I am of the opinion that three considerations put forward by the Commission should be accepted.

In the first place, it is true that in Annex II B to Regulation No 85/63, the product classified under heading 16.01 B is described exclusively under the designation of 'sausages'. No mention at all is made of tinned or preserved sausages. Therefore it seems to me that the concept of the net weight of the goods applies to that product, considered in itself, independently not only of the way in which it is put up, but of the support constituted by a liquid intended solely to ensure its preservation.

In the second place, the water, albeit salt water, in which the sausages are

immersed serves only to maintain osmotic equilibrium. It is intended to prevent the product from drying up, but does not alter its organoleptic characteristics in any way. In other words, the addition of liquid does not add any qualitative factor to the goods.

Finally, it is true that in fixing the levy the Community legislature did not take into account the weight of any liquid having a purely preservative function. This emerges from the provisions of the basic Regulation No 20/62 Article 4 (2), concerning intra-Community levies, and Article 5 (3), concerning levies in respect of non-Member States. For those products referred to in Article 1 (1) (c) of that regulation, which include those under tariff heading 16.01, the amount of the levy is determined taking into account the weighted average of the levies applicable to pigmeat, to the basic products, meat offal and, on the other hand, to the other *products* used in the making of them.

The wording of both of these provisions is identical:

'The amount of the intra-Community levies (or levies in regard to non-Member countries) shall be determined, for each Member State, taking into account in particular:

- (a) for those (products) in the making of which there are used only products which are referred to in Article 1 (1) (b) (that is basic products), the weighted average of the levies fixed for those products;
- (b) for those (products) in making of which there are also used products *other than those referred to in Article 1 (1) (b)*: the weighted average of all the levies, taxes and duties of whatsoever nature charged on importation from Member States (or from non-Member countries) on the products used in the making of them.'

It cannot be said that the preserving liquid (as distinct perhaps from brine) is

a 'main' product used in the making of derived products.

Another aspect of the matter is that although at that time, that is before 1968, the Member States may have retained a degree of autonomy in the area of customs, the system of levies, in the common organization of agricultural markets, left them no discretion. The ideas defined in the Community regulations were to have a single meaning and were to be uniformly applied throughout the Common Market.

The problem of interpretation which is before the Court relates only to the field of the specific regulations governing the agricultural sector in question and not to the field of the Common Customs Tariff.

For their part, the Italian authorities took the view that the only legal basis for the Community levy applicable in this case lay in the national *customs* provisions, adopted pursuant to the Community regulations, namely the Decree-Law of 11 September 1963, No Article 6 of which provides that, for the purposes of applying the system of levies and refunds, the provisions laid down by the Italian customs law and refunds, the provisions laid down by the Italian customs law and regulations are to be complied with.

This line of argument has been condemned by the case-law of this Court, in particular in the judgments of 7 February 1973, Case 39/72, *Commission v Italy* [1973] ECR 101 at 113-114, and of 10 October 1973, Case 34/73, *Variola* [1973] ECR 981 at 990-991.

Your Lordships also, quite correctly, asked for information on the attitude taken by the competent authorities of the other Member States in regard to the calculation of the levy on imports of the product in question under the system in force in 1963. Although I regret that the explanations supplied by the Commission in the oral proceedings

have not provided complete certainty in this respect, it does seem that most of the national customs authorities excluded the weight of the preserving liquid from the basis of assessment to the levy. There is no doubt that this was true of the Netherlands, where instructions to this effect were given. An identical solution was adopted in the Federal Republic of Germany under a circular of 27 July 1964. Details supplied first of all verbally by the French authorities and only recently confirmed are to the same effect. Finally, in Belgium, the consultation of certain customs clearance files also leads to the conclusion that only the net weight of imported sausages was subject to the levy.

Thus, even allowing for the relatively imprecise state of certain of the answers supplied, it seems that on the whole a common attitude was adopted by all the national authorities except the Italian customs.

Clearly this information does not constitute a decisive factor for the purposes of solving the problem. But at least it constitutes an additional factual element in support of the argument maintained by the Commission.

However, what finally decides me to concur with the observations of the Commission is the irrational nature of the interpretation adopted by the Italian Government, which comes down to imposing upon sausages preserved in salt water a levy which, having regard to the rules for its calculation, would be approximately twice as heavy as that charged on sausages put up on their own, since the weight of the liquid is about equal to the weight of the product itself. Indeed, a preserving liquid cannot be equated with 'substances used in small quantities to improve the taste or appearance' of products — substances which do come into the dutiable weight.

II — This being so, I am of the opinion that the nature of Regulation No 84/66 was purely interpretative and that, on the

point which concerns the Italian Corte di Cassazione, its effect is merely declaratory. From this point of view, the 'inaccuracies' or the 'inexactitudes' referred to in the versions in the different languages of the statement of the reasons on which the regulation was based cannot be material. However, in order to

complete and amend the description of products appearing in Annex II B to Regulation No 85/63, it was necessary to employ a legal instrument, the regulation, and to set a date for entry into force: the effect of Regulation No 84/66 is restricted to the future only in this respect.

I am of the opinion that the Court should hold that:

- by virtue of Council Regulation No 85/63, the levy on sausages put up in containers with a liquid had to be charged on the net weight after deducting the weight of such liquid;
- the explanation on this latter point given in Regulation No 84/66 of the Council is purely declaratory in nature.