

JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 21 FEBRUARY 1979¹

N. G. J. Schouten B.V.
v Hoofdproduktschap voor Akkerbouwprodukten
(preliminary ruling requested by the
College van Beroep voor het Bedrijfsleven)

“Day of importation”

Case 113/78

Agriculture — Common organization of the market — Cereals — Levy applicable on the day of importation — Concept of “day of importation” — Interpretation — Objective criteria — Events not attributable to importer — Effect — None

The “day of importation” within the meaning of Article 15 (1) of Regulation No 120/67 of the Council of 13 June 1967 cannot be earlier than that on which the goods were brought to a place designated by the competent national authorities to enable them to make a real and effective customs inspection.

A delay in the dispatch of goods due to events not attributable to the importer cannot affect the interpretation to be given to “day of importation” within the meaning of the above-mentioned provision.

In Case 113/78

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven (an administrative court of last instance in matters of trade and industry) for a preliminary ruling in the proceedings pending before that court between

N. G. J. SCHOUTEN B.V., Giessen,

¹ — Language of the Case: Dutch

and

HOOFDPRODUKTSCHAP VOOR AKKERBOUWPRODUCTEN (Central Board for Agricultural Products),

on the interpretation of Article 15 (1) of Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals (Official Journal, English Special Edition 1967, p. 33)

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, P. Pescatore and A. Touffait, Judges,

Advocate General: G. Reischl
Deputy Registrar: J. A. Pompe

gives the following

JUDGMENT

Facts and Issues

The facts, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

I — Facts and procedure

Under Article 15 (1) of Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals (Official Journal, English Special Edition 1967, p. 33) the import levy to be charged "shall be that applicable on the day of importation".

In 1975 the appellant in the main action, N. G. J. Schouten B.V., imported into

the territory of the Community a consignment of maize and a consignment of maize gluten feed pellets (hereinafter both referred to as "the consignments of maize") from the United States of America.

The consignments of maize were shipped from New Orleans in the M.S. Rona Star chartered for the purpose by the appellant. The captain of that ship had received instructions from the appellant to leave at 6 a.m. on 14 February 1975 at the latest so that the consignments would

be imported into Rotterdam on 28 February 1975 at the latest.

Because of various unfortunate incidents the ship could not pass through the South West Pass until 15 February 1975.

The appellant's shipbroker Spedico B.V. was informed by the captain of the Rona Star 72 hours in advance that the ship would arrive on 28 February 1975 at approximately 4 a.m. Immediately after receiving that information Spedico sought a berth for the ship. Only the Europoort Buoy No 3 was available. At that time the M.S. Mobil Daylight was still berthed at that buoy but it was due to depart in the morning of 28 February 1975. As long as that ship had not left the harbour the harbour authorities would not allow the Rona Star to enter the harbour. The Rona Star anchored outside the harbour entrance to await the departure of the Mobil Daylight which was repeatedly postponed because of engine trouble.

Gebroeders van Es, the cornfactors and shipping agents of Rotterdam who were to carry out the customs formalities on behalf of the appellant, submitted five of the import forms referred to in Article 7 of the Beschikking Landbouweffingen -restitutieregime 1968 II (Decree of 1968 relating to agricultural charges and refunds) with regard to the consignments of maize on 27 February 1975 according to the stamps on the form and on 28 February 1975 submitted to the customs the import declarations which were stamped on that same date. On all those documents 28 February 1975 is given as the expected date of importation.

The Mobil Daylight was unable to set sail until approximately 9 p.m.; at 9.15 p.m. it left the harbour and only then could the Rona Star enter the harbour. At approximately 11.30 p.m. a customs official came on board. Before midnight the official accepted *inter alia* the so-called "general declaration" and affixed the words "inspected for entry" with the date stamped as 28 February 1975. The

customs official did so only after he had compared the specification of the goods notified for entry clearance on the so-called supplementary list with the specifications in the bill of lading on board the Rona Star.

The Rona Star was finally berthed at Europoort Buoy No 3 only on 1 March at around 1.15 a.m. In the morning of 1 March 1975 an employee of Gebroeders van Es was authorized by Customs Section 5 to unload the goods in question and in the course of the day that employee received from the customs section notification that the Rona Star, as it appeared from the log book of the ship, was finally berthed not on 28 February but only on 1 March 1975.

The College van Beroep voor het Bedrijfsleven, the Netherlands court before which the main proceedings are being heard, accepts it as established that on the basis of the last-mentioned circumstance the customs department in Rotterdam, when dispatching the import forms in question, informed the Hoofdproduktschap voor Akkerbouwprodukten, the respondent in the main action, by a note on the forms that 28 February 1975 was not to be taken as the day of importation as might have been understood from the stamp previously placed on the forms but 1 March 1975. The College finds that this view is quite

acceptable despite the arguments brought by the appellant on the basis of comparison with the import certificates and advance-fixing certificates relating to the same consignments.

The respondent in the main action accepted the date fixed by the customs authorities and on 1 May 1975 sent to the appellant a revised assessment imposing on it, pursuant to Regulation No 120/67, a levy calculated on the basis of the threshold price ruling on 1 March 1975 which was Hfl. 3.79 per kg higher than the price ruling on 28 February 1975.

By decision of 2 May 1978, the College van Beroep voor het Bedrijfsleven, to which the appellant had appealed against a decision by the respondent rejecting the appellant's request that 28 February 1975 should be considered the "day of importation" of the consignments of maize, stayed proceedings and asked the Court of Justice to give a preliminary ruling on the following questions:

1. Does it follow from a proper interpretation of Article 15 of Regulation No 120/67 that in no circumstances can a day before the date on which the products in question are brought to a place which is accepted by the customs department charged with receiving the import declarations and the other import documents be regarded as the "day of importation" within the meaning of Article 15 (1)?
2. If that question must be answered in the negative does it follow from a proper interpretation of Article 15 (1) of Regulation No 120/67 that the day of importation is to be or can be taken to be the day on which, in respect of goods transported by ship, both a general declaration is issued by the customs by virtue of which the products are classified as goods which have entered the country and are subject to customs supervision and on which the customs declarations and other import documents have also

been accepted by the customs in a situation in which the products were not brought to the place referred to in Question 1 exclusively and solely because that place was not available for extraneous reasons which cannot be ascribed to the importer or its agents?

The order of the Netherlands court was received at the Court Registry on 10 May 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the appellant, the Netherlands Government and by the Commission of the European Communities.

As by letter received at the Court Registry on 10 October 1978 the Netherlands Government stated its agreement to the assignment of the case to a chamber and as the Commission has not expressly requested that the case be decided in plenary session, the Court, by order of 10 October 1978, assigned the case to the Second Chamber.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

The *appellant in the main action* recalls, with regard to the first question, that in its judgment in Case 113/75 (*Frecassetti v Amministrazione delle Finanze dello Stato* [1976] ECR 983) the Court ruled that the day of importation referred to in particular in Article 15 of Regulation No

120/67 is the day on which the import declaration for the goods is accepted by the customs authorities (paragraph 7 of the decision and paragraph (1) of the operative part) after stating (paragraph 4 of the decision) that this acceptance may not take place until the goods have reached the place prescribed by the customs for the process of customs clearance and until the necessary documents have been submitted.

In the present case it is established that the declaration was accepted by the customs authorities on 27 February 1975 and stamped on 28 February 1975, that the *Rona Star*, which was carrying the goods in question, entered Netherlands territorial waters and subsequently the port zone of Rotterdam on 28 February 1975 and that on the same date the customs authorities boarded the ship and customs declarations were made for the ship and its cargo.

In the view of the appellant there exists no Netherlands or Community provision having the force of law which at that time provided that only the place where a ship is berthed can be considered or accepted or designated as the place for the customs declaration with regard to its cargo.

In addition it is common ground that it was by reason only of circumstances which cannot be ascribed to the *Rona Star* that the ship could not berth at buoy No 3 in Europoort on 28 February 1975.

In the light of the structure of the Community agricultural rules, the logic of the customs procedure itself, the practical requirements of the customs administration, the interests of an importer of maize from non-member countries, the Netherlands legal provisions, the events relating to the *Rona Star* which occurred both before and on 27 and 28 February 1975, the reasonableness of the present case and the legal principle of equality of treatment in all the Member States, while

in this respect and at the time there existed *inequality*, and finally the legal principle that any mistakes made by the (customs) administration must not detrimentally affect the person subject to a tax or a levy, the national court could or should have been led, in the view of the appellant, to regard 28 February 1975 as the day of importation.

It follows from the above factors at the very least that a teleological and objective and reasonable interpretation of Article 15 of Regulation No 120/67 would in the circumstances of the case lead to the finding, in answer to the first question, that the day of importation within the meaning of Article 15 of Regulation No 120/67 may be before the day on which a ship coming from outside the EEC berths in a Member State.

The first question should at least be answered in the negative and the second question, which would then fall to be answered, should be, taking account of the factors set out above, that in a situation such as the present, the day of importation is or may be the day on which the so-called general customs declaration and the import declarations and other import documents are submitted to the customs authorities in respect of the goods to be imported.

The *Netherlands Government* takes the view that with regard to goods transported by ship the final berthing of the vessel is the only time that can objectively be taken as the time of arrival of the goods. It is on that criterion that the national provisions relating to customs are based.

In the present case the ship in question was finally berthed only on 1 March 1975 at 1.15 a.m., so that it was only from that time that the customs were able actually to carry out their check on the goods on board. It was therefore necessary to apply automatically the increased levy which entered into force on 1 March 1975 as was correctly stated in the import licence. This may appear to be harsh and even to have an excessive regard for formalities in the present case but, by definition, the application of an objective rule in order to assess whether goods have arrived before or after midnight is of neutral effect, sometimes to the advantage and sometimes to the disadvantage of the person concerned.

The Netherlands Government therefore states in reply to the first question that in no case can a day before the date on which the goods arrived be taken as the "day of importation".

Turning nevertheless to the second question, the Netherlands Government states that the acceptance by the customs of the import declaration, which is decisive for determining the "day of importation", has permanent legal consequences only after the goods have reached the place of unloading, that is to say the place where the import formalities are completed. The acceptance of the general declaration at an earlier time, which is done by different officials from those responsible for checking, is quite independent of the other operation. Moreover that acceptance serves a completely different purpose namely that of placing the goods under a general customs procedure under which they are brought to the place of unloading so that customs examination of the goods may be carried out. In any event it cannot be concluded from that that the checking has already started or could have already started at that time. Thus the general declaration is irrelevant for the purpose of determining the day of importation.

The Netherlands Government observes furthermore that the Community regulations applicable in this regard contain no provision concerning *force majeure* as regards determination of the day of importation and from that it concludes that the second question should be answered to the effect that circumstances of *force majeure* of the type found by the national court cannot alter the fundamental principle whereby the day of arrival of the goods is to be regarded as the "day of importation".

The Commission is of the opinion with regard to the first question that in order to interpret Article 15 (1) of Regulation No 120/67 it is necessary first to establish that a Community concept is involved which must be interpreted in accordance with Community law and not by reference to national legislation.

It emphasizes first the close link, which was moreover confirmed by the Court of Justice in the *Frecassetti* judgment, between the aforesaid provision and the customs legislation which was harmonized at Community level by the Council Directive of 30 July 1968 (Official Journal, English Special Edition 1968 (II), p. 416) on harmonization of the provisions laid down by law, regulation or administrative action relating to: 1. Customs treatment of goods entering the customs territory of the Community; 2. Temporary storage of such goods. The Commission refers in particular to Article 2 of that directive which provides that:

- “1. All goods entering the customs territory of the Community or coming from a free zone situated in the territory of the Community shall be subject to customs control.
2. They shall immediately be conveyed, by the route designated by the competent national authorities, to a customs office or other place designated by those authorities and under the supervision of the customs authorities”.

It is clear from those provisions that the goods to be imported must necessarily be physically present in order to be imported into the customs territory of the Community. Customs supervision in accordance with those provisions can be effective only if the customs authorities are in a position to inspect the goods. Similarly the submission of the declaration in order to make goods which are not or have not immediately been placed under a customs procedure subject to the responsibility of the customs presupposes the presence of those goods. It must therefore be concluded that in no case can the “day of importation” be understood as being a day before that when the goods are in fact present.

In the *Frecassetti* judgment the Court of Justice also took as its basis the physical presence of the goods as a condition for the possibility of importing them.

If the purpose of Article 15 (1) of the regulation is sought it would appear, on the one hand, that the supervision by the customs authorities of the goods in question and their responsibility in that regard require the physical presence of the goods. On the other hand that provision seeks to ensure the more or less precise determination, on the basis of objective criteria, of the time delimiting the day of importation which is the decisive factor in fixing the levy. The precise fixing of that time and the possibility of determining it in an

objective manner are indispensable to ensure adequate legal certainty.

The Commission therefore takes the view that the reply should be given to the first question that in no case can the day of importation within the meaning of Article 15 (1) of Regulation No 120/67 be taken to be a day before that on which the products in question are brought to a customs office or to any other place designated by and under the supervision of the customs authorities.

The presence of the goods in such a place is intended to enable the customs authorities to carry out certain checks on the products. It is not a question of law but a question of fact. The Commission can accept the point of view advocated by the Netherlands Government whereby, as regards goods which are brought in by ship, the customs authorities must require the ship to be fully berthed. The ship can of course be moored to a dock or to a buoy away from the dock while waiting to obtain a place to unload.

The Commission observes that the first part of the second question suggests that in the present case the goods in question were nevertheless subject to a certain customs supervision. While the acceptance by the customs of the general declaration which, according to the Netherlands rules, serves for making a declaration for clearance into circulation, has the effect of placing the goods under a customs procedure, such acceptance by

no means implies that the goods have in fact been placed under the supervision of the customs.

As regards a possible recourse to the arguments based on *force majeure* the Commission takes the view that even in the circumstances described by the national court, an external reason which is not attributable to the importer and his agents cannot have the effect of displacing the day of importation. The Community should not have to bear the risk of a possible delay in the arrival of goods for importation. Indeed Community legislation has made provision for a means for importers to obtain financial cover against the risk of belated importation. Article 15 (2) of Regulation No 120/67 (now Regulation No 2727/75) provides for the possibility of obtaining advance fixing of the levy. In that case the levy applicable is that obtaining on the day when the application is submitted.

The Community is therefore not in an identical situation to the one established by the Court in its judgment of 11 July 1978 in Case 6/78 *Union Française de Céréales v Hauptzollamt Hamburg-Jonas* ([1978] ECR 1675).

In conclusion the Commission proposes that the following answers should be given to the questions raised by the *College van Beroep voor het Bedrijfsleven*:

The day of importation within the meaning of Article 15 (1) of Regulation No 120/67 cannot be taken to be a day prior to that on which the goods in question are conveyed to a place designated by the customs authorities. That place must be such that the customs authorities can exercise supervision over the goods in question.

Extraneous reasons which cannot be ascribed to the importer cannot justify derogation from the above-mentioned rule.

III — Oral procedure

The appellant in the main action, represented by R. H. Hooghoudt, and the Commission of the European Communities, represented by its Agent, H. Bronkhorst, presented oral argument. The Advocate General delivered his opinion at the hearing on 25 January 1979.

Decision

- 1 By decision of 2 May 1978 the *College van Beroep voor het Bedrijfsleven* referred to the Court in pursuance of Article 177 of the EEC Treaty two questions relating to the interpretation of Article 15 (1) of Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals (Official Journal, English Special Edition 1967, p. 33) under which the import levy to be charged “shall be that applicable on the day of importation”.
- 2 These questions were raised in the context of an action relating to the fixing of the rate of levy charged on a consignment of maize and a consignment of

gluten feed pellets from the United States of America imported into the port of Rotterdam in a ship chartered by the applicant in the main action.

- 3 It appears from the file that this ship, for which a berth at Buoy No 3 at Europoort, Rotterdam, had been reserved, was in the harbour district of Rotterdam on 28 February 1975 awaiting the departure, which had been deferred on several occasions, of another ship from the berth which had been reserved.

Although the vessel chartered was able to enter the port of Rotterdam before midnight on 28 February it was not entirely berthed at Buoy No 3 in Europoort until 1 March 1975 at about 1.15 a.m.

- 4 However, it is established that during the night of 28 February an officer of customs had come aboard the ship and had drawn up before midnight a "general declaration" of import by affixing to the document the words "inspected for entry" with a date stamp for 28 February 1975 after checking that the nature of the goods presented for the purposes of customs declaration as indicated on the list of goods shipped, was in conformity with the information on the bill of lading which was on board the vessel.

According to the explanations of the Netherlands Government, which are not challenged, this "general declaration" has the purpose only of placing the goods under a general customs procedure under which they are brought to the place where the actual customs examination may be carried out.

- 5 The Rotterdam customs authorities, having regard to the fact that the vessel had not been entirely moored until 1 March 1975, informed the appellant that that was the date which must be regarded as the day of importation.

The Hoofdproduktschap voor Akkerbouwprodukten, the respondent in the main action, in its turn accepted the date fixed by the customs authorities and sent to the appellant on 1 May 1975 a revised assessment imposing on it, pursuant to Regulation No 120/67, a levy calculated on the basis on the threshold price ruling on 1 March 1975, which was Hfl 3.79 per kg higher than the price ruling on 28 February 1975.

6 The national court, to which the appellant appealed against a decision by the respondent rejecting its request that 28 February 1975 should be considered for the purposes of the levy as being the “day of importation”, within the meaning of Article 15 (1) of Regulation No 120/67, referred to the Court of Justice for a preliminary ruling the following questions:

“1. Does it follow from a proper interpretation of Article 15 of Regulation No 120/67 that in no circumstances can a day before the date on which the products in question are brought to a place which is accepted by the customs department charged with receiving the import declarations and the other import documents be regarded as the ‘day of importation’ within the meaning of Article 15 (1)?

2. If that question must be answered in the negative does it follow from a proper interpretation of Article 15 (1) of Regulation No 120/67 that the ‘day of importation’ is to be or can be taken to be the day on which, in respect of goods transported by ship, both a general declaration is issued by the customs by virtue of which the products are classified as goods which have entered the country and are subject to customs supervision and on which the customs declarations and other import documents have also been accepted by the customs in a situation in which the products were not brought to the place referred to in Question 1 exclusively and solely because that place was not available for extraneous reasons which cannot be ascribed to the importer or its agents?”

7 As the Court has stated in its judgment of 15 June 1976 in Case 113/75 (*Frecassetti v Amministrazione delle Finanze dello Stato*, [1976] ECR 983) the aim of the agricultural levy is to compensate for the difference between the price on the world market and the higher Community price.

The levy is primarily intended to protect and stabilize the Community market, in particular by preventing price fluctuations on the world market from affecting prices within the Community.

Hence, the authority responsible for the application of the levies, whether this be the customs administration or the competent intervention body, cannot advance or delay the determination of the rate of levy beyond the date prescribed by the Community provisions.

8 In the words of Article 15 (1) of Regulation No 120/67, the import levy to be charged shall be “that applicable on the day of importation”.

That date is the date on which the import declaration for the goods is accepted by the customs authorities.

However, that acceptance cannot take place as long as the goods, even if they have already been subjected to a general customs procedure, have not arrived at the place prescribed by the customs for the process of checking and clearance.

9 It was in this sense that Article 2 of Council Directive No 68/312/EEC of 30 July 1968 on harmonization of the provisions laid down by law, regulation or administrative action relating to: 1. Customs treatment of goods entering the customs territory of the Community; 2. Temporary storage of such goods, (Official Journal, English Special Edition 1968 (II) p. 416) prescribed in paragraph (1) that "all goods entering the customs territory of the Community . . . shall be subject to customs control", and in paragraph (2) that "they shall immediately be conveyed, by the route designated by the competent national authorities, to a customs office or other place designated by those authorities and under the supervision of the customs authorities".

10 Thus the answer to be given to the first question must be that the "day of importation" within the meaning of Article 15 (1) of Regulation No 120/67 cannot be earlier than that on which the goods were brought to a place designated by the competent national authorities to enable them to make a real and effective customs inspection.

11 The second question asks whether "the day of importation" within the meaning of the above-mentioned article may be interpreted as being the date of the general declaration if the goods, for reasons which cannot be ascribed to the importer or its agents, could not be brought to the place prescribed by the customs authorities.

12 The interpretation given to the "day of importation" in the answer to the first question is based on objective criteria.

Events such as those which occurred in this case, whether or not independent of the will of the importer, cannot affect the existence of objectively determined facts.

- 13 Hence the answer to the second question must be that events not attributable to the importer cannot affect the interpretation to be given to “day of importation” within the meaning of Article 15 (1) of Regulation No 120/67.

Costs

- 14 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by decision of 2 May 1978, hereby rules:

1. The “day of importation” within the meaning of Article 15 (1) of Regulation No 120/67 of the Council of 13 June 1967 cannot be earlier than that on which the goods were brought to a place designated by the competent national authorities to enable them to make a real and effective customs inspection of the goods.
2. Events not attributable to the importer cannot affect the interpretation to be given to “day of importation” within the meaning of that provision.

Mackenzie Stuart

Pescatore

Touffait

Delivered in open court in Luxembourg on 21 February 1979.

A. Van Houtte

Registrar

A. J. Mackenzie Stuart

President of the Second Chamber