

In Case 169/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de Cassation, Chambre Commerciale, [Court of Cassation, Commercial Chamber] of the French Republic for a preliminary ruling in the action pending before that court between

ADMINISTRATION DES DOUANES [Customs authorities]

and

1. SOCIÉTÉ ANONYME GONDRAND FRÈRES, having its registered office in Paris,
2. SOCIÉTÉ ANONYME GARANCINI, having its registered office in Aix-les-Bains,

on the interpretation of certain tariff headings of the Common Customs Tariff concerning the classification of French Emmentaler cheese and of certain regulations on the common organization of the market in milk and milk products,

THE COURT (Third chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, A. Touffait and U. Everling, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

1. Acting as customs agent for Garancini SA, a company having its

registered office in Aix-les-Bains, Gondrand Frères SA, a company having its registered office in Paris, made 64 export declarations relating to French Emmentaler cheese exported to Belgium and Italy during the periods from 12 August to 24 September 1974, 20 January to 28 April 1975 and 27 March to 24 September 1976. The declarations referred to tariff subheading 04.04 A I of the Common Customs Tariff which, during the periods in question, was not subject to the application of monetary compensatory amounts.

On 8 April 1977 the customs authorities in Lyon made an order, which was immediately enforceable, against Gondrand Frères SA for recovery of the sum of FF 307 551.98 due by way of monetary compensatory amounts on the exports in question. In effect, the customs authorities considered that exports of French Emmentaler to other countries in the Community did not fall within tariff subheading 04.04 A I, which according to the customs authorities covered only cheese imported from non-member countries, but within tariff subheading 04.04 A II. In contrast to the former tariff subheading, the latter was subject to the application of monetary compensatory amounts during the periods in question.

Gondrand Frères SA contested this order by the customs authorities and sought indemnity from Garancini SA. By judgment of 9 February 1978 the Tribunal d'Instance [District Court], Nantua, declared the objection to be well-founded, held the order to be null and void and dismissed Garancini SA from the action. On appeal brought by the customs authorities, the Cour d'Appel [Court of Appeal], Lyon, upheld that judgment by decision of 28 June 1978 on the ground that it followed from Community rules and the notices to

importers and notices to exporters published in the Official Journal of the French Republic that there may be only one tariff heading for the import and the export of a specified, classified product and that, on the other hand, tariff heading 04.04 A I applies to Emmentaler cheese whether or not the cheese was originally imported from non-member countries.

On 11 September 1978 the customs authorities instituted an appeal in cassation against the judgment of the Cour d'Appel, Lyon, on the particular ground of infringement of Community rules by virtue of which tariff subheading 04.04 A I, which had been declared by Gondrand Frères SA, applied only on importation.

By judgment of 1 July 1980 the Chambre Commerciale of the Cour de Cassation decided to stay the proceedings and to request the Court of Justice to give a preliminary ruling under Article 177 of the EEC Treaty on:

“the application of Community Regulations Nos 804/68, 823/68, 1053/68 and 1054/68 to the classification of French Emmentaler cheese exported to Italy and Belgium during the periods from 12 August to 24 October 1974, 20 January 1975 to 28 April 1975 and 27 March 1976 to 24 September 1976 under either tariff heading 04.04 A I or tariff heading 04.04 A II”.

2. (a) The monetary compensatory amounts which are to be levied or granted either on importation from Member States or non-member countries or on exportation to Member States or non-member countries are fixed for each Member State concerned by Commission regulations adopted in implementation of Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in

agriculture following the temporary widening of the margins of fluctuations for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257).

Those regulations refer to the numbering in the Common Customs Tariff, adding in certain instances a specific description of the goods. In the present case reference is merely made to tariff subheading 04.04 A II (without any specific description). Tariff subheading 04.04 A I of the Common Customs Tariff is however nowhere mentioned amongst the headings subject to the application of monetary compensatory amounts.

(b) During the periods in question the tariff subheadings of the Common Customs Tariff which are at issue were worded as follows:

“04.04 Cheese and curd

A. Emmentaler, Gruyère,
Sbrinz, Bergkäse and
Appenzell, not grated or
powdered:

I. Of a minimum fat
content of 45% by
weight, referred to dry
matter, matured for at
least three months ...

II. Others ...”

The tariff description in subheading 04.04 A I is followed by a reference to a footnote which states:

“Entry under this subheading is subject to conditions to be determined by the competent authorities”:

(c) For the periods in question the wording of the relevant subheadings of the Common Customs Tariff is identical to that of the subheadings with the same

numbers contained in Annex II to Regulation No 823/68 of the Council of 28 June 1968 determining the groups of products and the special provisions for calculating levies on milk and milk products (Official Journal, English Special Edition 1968 (I), p. 199).

The tariff description in subheading 04.04 A I is also followed by a footnote which states that:

“Inclusion under this tariff subheading is subject to conditions to be laid down by the competent authorities”.

Regulation No 823/68, which was adopted in implementation of Article 14 (6) of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products, (Official Journal, English Special Edition 1968 (I), p. 176) gives in Annex II the tariff description of the milk products which are divided into groups in Annex I.

Regulation No 1053/68 of the Commission of 23 July 1968 defining the conditions for the admission of certain milk products to certain tariff headings (Official Journal, English Special Edition 1968 (II), p. 332), which was adopted in implementation of Article 14 (7) of Regulation No 804/68, provides, in Article 1 thereof, that:

“the admission of products from third countries to subheadings ... 04.04 A I ... listed in Annex II to Regulation (EEC) No 823/68 shall be subject to the production of a certificate which satisfies at least the requirements laid down in this regulation”.

Article 6 (1) of the same regulation provides that

“a certificate shall be valid only if duly authenticated by an agency appearing on a list to be determined”.

Regulation No 1054/68 of the Commission of 23 July 1968 determining the list of agencies certifying the admissibility to certain tariff headings of certain milk products from third countries (Official Journal, English Special Edition 1968 (II), p. 338), also adopted in implementation of Article 14 (7) of Regulation No 804/68, contains in the annex thereto the list of the issuing agencies in certain non-member countries which are referred to in Article 6 (1) of Regulation No 1053/68.

3. The judgment making the reference was received at the Court Registry on 23 July 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Gondrand Frères SA, the defendant in the cassation proceedings, represented by J. Budin, G. Descorps-Declère and F. Girard, Advocates at the Cour d'Appel, Paris, and by the Commission of the European Communities, represented by F. Lamoureux, a member of its Legal Department, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, by order of 3 December 1980, to assign the case to the Third Chamber in accordance with Article 95 of the Rules of Procedure and to open the oral procedure without any preparatory enquiry.

II — Written observations

1. *Gondrand Frères SA*, the respondent in the cassation proceedings, submits in

its written observations that it does not appear from any Community legislation, in particular from Regulations Nos 804/68, 823/68, 1053/68 and 1054/68, that during the periods in issue the cheese in question was subject to monetary compensatory amounts on exportation from France to Belgium or Italy.

Regulation No 804/68 is concerned essentially with the system of trade with non-member countries and does not deal with monetary compensatory amounts. The same also applies to Regulation No 823/68, which was adopted in implementation of Regulation No 804/68 and which has as its purpose the calculation of levies in the sector in question. So far as tariff heading 04.04 is concerned, Annex II to that regulation repeats the definitions in the Common Customs Tariff. Thus both Regulation No 804/68 and Regulation No 823/68 fix the levies, that is to say, the amount which shall be charged by each country in the Community importing milk or milk products from non-member countries on the entry of the goods into Community territory. They are not, however, concerned with intra-Community exports such as the export of Emmentaler cheese to Belgium or Italy.

Regulation No 1053/68 provides that the admission of certain products, including amongst others those falling within sub-heading 04.04 A I, from non-member countries is subject to the production of a certificate. Those certificates, a pro-forma of which is to be found in the annex to that regulation, must accompany the goods when they enter the Community. The regulation does not, however, govern intra-Community exports such as those in the present case. Finally, Regulation No 1054/68 specifies

the agencies in non-member countries only which issue or authenticate the certificates accompanying goods intended for entry into the Community. It is not concerned with French agencies. As with the Community rules, French legislation in this matter has always provided for a zero monetary compensatory amount for tariff subheading 04.04 A I.

Consequently, the French authorities are mistaken in considering that tariff subheading 04.04 A I applies only to imports of the cheese in question. In fact, in customs law any given goods may only be of one kind, that being the legal definition of their true nature. The Communities adopted the nomenclature of the 1950 Brussels Convention for all provisions of Community law and not merely for the application of the Common Customs Tariff. More particularly, for the agricultural sphere, the specifications are always the same whether levies, refunds or monetary compensatory amounts are involved.

Contrariwise, there is no identity of character between levies and refunds on the one hand and monetary compensatory amounts on the other, the latter being governed by Regulation No 974/71 and the regulations adopted in implementation thereof.

Since tariff subheading 04.04 A I is not mentioned in those rules it must be regarded as not entailing monetary compensatory amounts on either imports or exports.

2. The *Commission of the European Communities* first emphasizes that the

application or non-application of compensatory amounts in this case depends on the answer to be given since only products falling within tariff subheading 04.04 A II and not those falling within tariff subheading 04.04 A I are subject to monetary compensatory amounts. The Commission considers that the exports in question fall within subheading 04.04 A II and are therefore subject to the application of compensatory amounts. That is the result of the provisions relating to the organization of the market in milk.

Entry under tariff subheading 04.04 A I, the tariff description of which appears in Annex II to Regulation No 823/68, is linked to compliance with a Community minimum free-at-frontier price, to a specific levy and, by virtue of the footnote, to production of the certificate required by Regulation No 1053/68. That certificate, which is to be issued by the exporting country, must confirm that the exported product conforms to the description of the goods in question and that the free-at-frontier price has been complied with. It appears from the provisions on the matter that subheading 04.04 A I is confined to Emmentaler cheese imported subject to certain conditions whereas both imports of Emmentaler cheese which do not satisfy those conditions and exports of Emmentaler cheese, irrespective of whether the country of destination is a Member State or a non-member country, fall within subheading 04.04 A II.

The Commission adds that the Common Customs Tariff, which repeats the tariff description of products referred to in Annex II to Regulation No 823/68, also makes entry to subheading 04.04 A I subject to certain conditions. In regard to those conditions the Explanatory Notes to the Customs Tariff of the European Communities state that:

“This subheading covers only Emmentaler, Gruyère, Sbrinz, Bergkäse and Appenzell accompanied by a certificate recognized by the competent authorities. If this condition is not fulfilled, they are classified in subheading 04.04 A II.”

The special rule on entry to certain tariff positions, which in this case results in the exceptional situation whereby Emmentaler cheese falls within different headings depending upon whether it is imported or exported, is justified, as appears from the last recital in the preamble to Regulation No 823/68, by the need to observe the Community's international commitments in the matter, since the products in question have been bound under GATT, which results particularly in the application of a reduced levy.

Moreover, the answer suggested is in accordance with the logic of the system of monetary compensatory amounts. Emmentaler cheese, the price of which is dependent on the price of butter and powdered milk, is subject to the application of monetary compensatory amounts in implementation of Regulation No 974/71. The explanation for not applying monetary compensatory amounts to products within tariff subheading 04.04 A I is the fact that in trade with non-member countries in products falling within that subheading, the objective of correcting fluctuations in exchange rates, which is the aim of the system of monetary compensatory amounts, has already been achieved since the products in question already conform to the minimum price converted into national currency with the use of the

“green rate”. In fact, the free-at-frontier price to which cheese imported under tariff heading 04.04 A I must conform and the specific levy are expressed in European Currency Units. As the sum of the free-at-frontier price and the levy converted into national currency with the use of the green rate already allows the price of cheese imported from certain non-member countries to be balanced with the threshold price calculated in national currency, the application of monetary compensatory amounts in such cases would have no effect on the level of the Community price.

In conclusion, the Commission suggests that the following answer be given to the question asked:

“French Emmentaler cheese exported to Italy and Belgium during the periods from 12 August to 24 September 1974, 20 January to 28 April 1975, and 27 March to 24 September 1976 falls within tariff subheading 04.04 A II.”

III — Oral procedure

At the hearing on 2 April 1981 Gondrand Frères SA, the respondent in the cassation proceedings, represented by François Girard, of the Paris Bar, and the Commission, represented by François Lamoureux acting as Agent, presented oral argument and answered questions put by the Court.

The Advocate General delivered his opinion at the sitting on 4 June 1981.

Decision

- 1 By judgment of 1 July 1980, which was received at the Court on 23 July 1980, the Chambre Commerciale of the French Cour de Cassation referred for a preliminary ruling under Article 177 of the EEC Treaty a question on the tariff classification of French Emmentaler cheese for the purpose of calculating the monetary compensatory amounts.
- 2 That question was raised in proceedings between Gondrand Frères SA and Garancini SA on the one hand and the French customs authorities on the other. The latter had made an order against Godrand Frères for the recovery of a certain sum as monetary compensatory amounts on the export of French Emmentaler cheese to Belgium and Italy during the periods from 12 August to 24 October 1974, 20 January to 28 April 1975 and 27 March to 24 September 1976.
- 3 It is apparent from the file that Gondrand, acting as customs agent on behalf of the cheesemongers Garancini, made in respect of the said periods a number of export declarations referring to subheading 04.04 A I of the Common Customs Tariff which did not attract monetary compensatory amounts for the relevant periods. Since they at first took the view that the cheese did in fact fall within that subheading the customs authorities in accordance with the customs opinions published in the Official Journal of the French Republic did not claim monetary compensatory amounts on export. On 8 April 1977 the customs authorities made an order, which was immediately enforceable, against Gondrand for what was then alleged to be due as monetary compensatory amounts on the exports, since the authorities then took the view that exports of French Emmentaler cheese to other countries of the Community fell within subheading 04.04 A II under which monetary compensatory amounts were payable for the relevant periods.
- 4 The Chambre Commerciale of the Cour de Cassation took the view that the proceedings depended upon the classification of the goods in question and referred the following question to the Court for a preliminary ruling on "the application of Community Regulations Nos 804/68, 823/68, 1053/68 and 1054/68 to the classification of French Emmentaler cheese exported to Italy

and Belgium during the periods from 12 August to 24 October 1974, 20 January 1975 to 28 April 1975 and 27 March 1976 to 24 September 1976 under either tariff heading 04.04 A I or tariff heading 04.04 A II”.

- 5 As appears from the grounds of the judgment of the national court the purpose of that question is to ascertain how, under the said regulations, the product in question must be classified under the Common Customs Tariff for the purposes of monetary compensatory amounts.

- 6 The monetary compensatory amounts which are to be charged or granted either on importation from Member States and non-member countries or on exportation to Member States and non-member countries are fixed for each Member State concerned by Commission regulations adopted in implementation of Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257).

- 7 As regards the products in question those regulations refer to the headings in the Common Customs Tariff, in this case subheading 04.04 A II, whereas subheading 04.04 A I is not mentioned. The subheadings are worded for the relevant periods as follows:

“04.04 Cheese and curd

A. Emmentaler, Gruyère, Sbrinz, Bergkäse and Appenzell, not grated or powdered:

I. Of a minimum fat content of 45 % by weight, referred to dry matter, matured for at least three months . . .

II. Others . . .”

- 8 The tariff description in subheading 04.04 A I is followed by a reference to a footnote which states:

“Entry under this subheading is subject to conditions to be determined by the competent authorities”.

- 9 It is not denied that the cheeses in question satisfy the characteristics referred to in subheading 04.04 A I but no condition as mentioned in the footnote has been specifically determined either in the Common Customs Tariff or in the rules relating to monetary compensatory amounts.
- 10 Nevertheless Regulations Nos 1053/68 and 1054/68 of the Commission of 23 July 1968 (Official Journal, English Special Edition 1968 (II), pp. 332 and 338)), adopted as part of the common organization of the market in milk and milk products, provide that the admission of products from non-member countries to subheading 04.04 A I for the purpose of the application of Regulation No 823/68 shall be subject to the production of a certificate issued by the agencies of certain non-member countries, a list of which is annexed thereto.
- 11 Those provisions refer to a footnote, very similar to that mentioned above in the Common Customs Tariff, which in turn refers to the tariff description of subheading 04.04 A I contained in Annex II to Regulation No 823/68 of the Council of 28 June 1968 determining the groups and the special provisions for calculating levies on milk and milk products (Official Journal, English Special Edition 1968 (I), p. 199). The wording of subheadings 04.04 A I and 04.04 A II, as reproduced therein, is identical for the periods in question to that of the same subheadings in the Common Customs Tariff.
- 12 The Commission maintained that having regard to the close connexion between the common organization of the markets and the Common Customs Tariff the substance of the subheadings in question should be held to be the same both as regards the calculation of the levies and the monetary compensatory amounts. As a result, in the Commission's view, in interpreting the Common Customs Tariff for the purpose of calculating the monetary compensatory amounts recourse must be had to the provisions in the common organization of markets so that the conditions determined for entry

under a particular subheading for the purpose of calculating the levies also apply for the purpose of calculating the monetary compensatory amounts. In view of the fact that the conditions laid down in the present case can be satisfied only on import from non-member countries, subheading 04.04 A I is not applicable.

- 13 Undoubtedly there is a close connexion between the Common Customs Tariff and the nomenclature of the common organization of the markets. That connexion is apparent *inter alia* from the fact that the headings and tariff descriptions are the same and all the particulars relating to levies are included in the columns of the Common Customs Tariff. It is therefore proper to take account of the conditions specified in the note on the nomenclature of the common organization of the markets for the purpose of interpreting the Common Customs Tariff.

- 14 Nevertheless, for the purpose of calculating the monetary compensatory amounts the conditions of entry laid down in the present case for the purpose of calculating levies are not in substance of such a nature as to concern intra-Community trade since their sole purpose is to limit the entry under subheading 04.04 A I of products imported into the Community from non-member countries. They can therefore reasonably be understood as excluding entry under that subheading of all products other than those imported into the Community and coming from non-member countries and in particular products originating in a Member State and exported to another Member State.

- 15 Further, it is to be observed that the intention of the said note, which refers to a subheading of the Common Customs Tariff, is only to ensure that the specific criteria of that subheading are satisfied. It cannot however be understood as giving the competent authorities the power to exclude application of that subheading by omitting to lay down the conditions of entry. As a result if the conditions of entry have not been laid down or, as in the present case, have been laid down only for the import from non-member countries, the subheading in question applies both on export to non-member countries and in intra-Community trade.

- 16 The Commission referred to the purport of the rules and the logic of the system of monetary compensatory amounts in support of its argument to the contrary. It claimed that the entry of the products in question under sub-heading 04.04 A I and consequently their exemption from monetary compensatory amounts in intra-Community trade would make the system ineffective and give rise to distortions in the market in milk. For that reason it is necessary to interpret the rules referring to the Common Customs Tariff for the purpose of calculating the monetary compensatory amounts as meaning that subheading 04.04 A I applies by reason of the note only to imports from certain non-member countries in respect of which international obligations require a specific treatment.
- 17 That argument must be rejected. Even assuming that the interpretation advocated by the Commission is in accord with the logic of the system of monetary compensatory amounts, nevertheless it is for the Community legislature to adopt the appropriate provisions. The principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly.
- 18 The rules in question are obviously unclear as is apparent *inter alia* from the fact that even the competent customs authorities originally interpreted them in the same way as the respondent in the main action and it was not until three years after the date of the first imports that they sought to recover the monetary compensatory amounts which would have been due in respect of the exports in question.
- 19 It follows from all those considerations that since no condition has been properly laid down for the entry of Emmentaler cheese under subheading 04.04 A I on export from one Member State to another Member State, the cheese in question falls within that subheading in so far as it satisfies characteristics thereof.
- 20 The question put by the Chambre Commerciale of the Cour de Cassation must therefore be answered to the effect that for the purposes of the application of monetary compensatory amounts Emmentaler cheese exported from France to Italy and Belgium during the periods from 12 August to

24 October 1974, 20 January to 28 April 1975 and 27 March to 24 September 1976 fell within tariff subheading 04.04 A I.

Costs

- 21 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since 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 on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber)

in answer to the question put to it by the Chambre Commerciale of the French Cour de Cassation by a judgment of 1 July 1980, hereby rules:

For the purposes of the application of monetary compensatory amounts Emmentaler cheese exported from France to Italy and Belgium during the periods from 12 August to 24 October 1974, 20 January to 28 April 1975 and 27 March to 24 September 1976 fell within tariff subheading 04.04 A I.

Mackenzie Stuart

Touffait

Everling

Delivered in open court in Luxembourg on 9 July 1981.

A. Van Houtte

Registrar

A. J. Mackenzie Stuart

President of the Third Chamber