OPINION OF ADVOCATE GENERAL GULMANN
delivered on 29 October 1992 *

Mr President,
Members of the Court,

1. The present case stems from a dispute between a German firm (hereinafter referred to as 'Krohn') and the German customs authorities regarding the tariff classification of goods imported by Krohn from the United States of America in 1986. In its customs declaration Krohn stated that the goods were residues resulting from the extraction of maize germ oil falling under tariff subheading 23.04 B. Goods under that subheading were free of duty.

Samples taken by the customs authorities revealed that the goods were not 'pure residues resulting from the extraction of maize germ oil' but contained maize stalk fragments, soya, wheat and other fragments; the customs authorities thereupon classified the goods under tariff heading No 23.07 as animal feed. The import duties for that heading were between 6% and 15%.

2. Heading No 23.04 applying for 1986 covers 'Oil-cake and other residues (except dregs) resulting from the extraction of vegetable oils'. Within that heading, subheading 23.04 A covers 'Oil-cake and other residues resulting from the extraction of olive oil' and subheading 23.04 B covers 'Other'. Heading No 23.07 covers 'Sweetened forage; other preparations of a kind used in animal feeding'. [1]

Regulation (EEC) No 482/74 of the Commission of 27 February 1974 [2] contains detailed rules on the tariff classification of residues resulting from the extraction of maize germ oil under subheading 23.04 B. The last sentence of Article 1 provides:

'Moreover, such residues shall not contain ingredients which are not obtained from maize grains.'

3. The Finanzgericht Hamburg has referred the following questions to the Court of Justice:

'1. Is the last sentence of Article 1 of Regulation (EEC) No 482/74 of the Commission of 27 February 1974 to be interpreted as meaning that goods still fall under tariff subheading 23.04 B even when they contain, in

* Original language: Danish.

1 — See Council Regulation (EEC) No 3331/85 of 5 December 1985 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1985 L 331, p. 1).

2 — OJ 1974 L 57, p. 23.

addition to the maize-grain residues mentioned therein, other matter such as maize stalks or other types of cereal, or traces thereof?

2. If so, how high may the level of foreign matter be, and of what may it consist?'

Question 1

4. Maize germ oil is produced from maize germ either by pressing or by use of solvents. The maize germ is part of the maize grain and the basic materials for the production of maize germ oil are therefore often products made up of maize germs and of fragments of the endosperm and the pericarp of maize grains. [3]

5. It is apparent from the order for reference that in Question 1 the Finanzgericht is first seeking clarification whether the term 'maize grains' in the last sentence of Article 1 of Regulation No 482/74 covers the whole maize plant or only the maize grain itself. The wording of that provision in all the language versions shows that it is only elements originating from the maize grain itself and not from other parts of the maize plant that are covered by the term 'Residues resulting from the extraction ... of maize germ oil'. [4] That is, moreover, the natural understanding of the provision in view of the fact that it is only the maize germ in the maize grain that constitutes the basic material for oil extraction.

6. But I also consider it plain that, notwithstanding its wording, the last sentence of Article 1 of Regulation No 482/74, under which residues must 'not contain ingredients which are not obtained from maize grains', does not entail an absolute purity requirement for such products.

That is the view taken by the national court and Krohn and the Commission have cogently argued that a certain degree of impurity should not preclude classification of the product in tariff subheading 23.04 B.

That view is supported in particular by the fact that it is in practice not feasible to produce totally pure residues from the extraction of maize germ oil. The Commission has explained that under the methods that are used to process maize, it is not possible to rule out a certain low level of impurities from other parts of the maize plant, and that the production of fodder pellets, transshipment, transport and storage of residues will

3 — See the fourth recital in the preamble to Regulation No 482/74.

4 — Reference may be made in particular to the English version which uses the term 'maize grains'. The interpretation advocated by Krohn in the main proceedings whereby the word 'Maiskorn' used in the German version is to be construed in the same way as the English word 'corn', which includes the whole of the maize plant, is therefore precluded.

in practice always lead to the inclusion of impurities from other types of cereal or from soya. That is borne out by information obtained by the court making the reference in the course of its inquiry and from information furnished by Krohn.

Regulation No 482/74 cannot be interpreted in a manner that in practice would exclude the application of the customs heading whose scope is defined in the regulation.

7. Support for that interpretation is also to be found in the preamble to Regulation No 482/74. The third recital in the preamble states:

'the heading does not cover, under the term "residues", products from which oil can still economically be extracted, nor products containing substances (except in negligible quantities) which have not undergone an oil-extraction process and have been added to the residues themselves.'

Since the addition of substances in negligible quantities does not affect classification in tariff subheading 23.04 B, there can *a fortiori* be no objection to impurities (in the sense of non-intentional additions) in negligible quantities.

8. Finally it may be inferred from the case-law of the Court of Justice that in adopting the regulation it was not intended to establish an absolute purity requirement.

In its judgment of 30 November 1972 in Case 18/72 *Granaria*, the Court held that tariff subheading 23.04 B covers only what results from an oil-extraction process. [5] It would appear appropriate to interpret Regulation No 482/74 in the light of that judgment which was given before the regulation was adopted. The object of laying down the condition in question for classification under tariff subheading 23.04 B was presumably merely to distinguish between residues produced on the basis of maize grain from products which, apart from actual residues, also contain substances which have not undergone an oil extraction process. [6] But conversely that teleological interpretation would precisely not preclude products containing certain unavoidable impurities from being classified as the actual result of an oil-extraction process. [7]

It is also apparent from the Court's case-law that for a product to be classified under subheading 23.04 B, it is not sufficient for it to be found that the product contains only

5 — Case 18/72 *Granaria* [1972] ECR 1163, in particular paras 11 and 12.

6 — See in this connection the third and sixth recitals in the preamble to Regulation No 482/74.

7 — It should be noted that the Court has also held in judgments after the adoption of Regulation No 482/74 that it follows from the wording of tariff subheading 23.04 B that products are covered by that heading only in so far as they are 'products which result directly from the operation of oil extraction and not products which were already to be found in the basic product and did not undergo any change in the course of the oil-extraction process' (see, judgment in Case 268/87 *Cargill* [1988] ECR 5151 para. 11). See also the judgment in Case 129/81 *Fancon* [1982] ECR 967.

unintentional impurities. It is clear from the Court's judgment in Case 36/71 *Henck*, [8] that a product is to be classified under tariff heading No 23.07 and not No 23.04 if it consists of a mixture of different substances and it is immaterial whether that mixture was intentional or fortuitous. If the so-called unintentional impurities therefore reach a level which signifies that on the basis of an objective assessment of the composition of the product it must be regarded as a mixture, the product falls under tariff heading No 23.07.

Question 2

9. In its second question the Finanzgericht is seeking the Court's view on, first, how high the level of matter not resulting from maize grain may be and, second, what type of substances it may consist of.

The central problem in answering that question is whether the Court of Justice can and should fix a certain percentage for the quantity of acceptable impurities in the residues in question.

On the one hand the aspects of legal certainty and uniform application of the Common Customs Tariff throughout the Community militate in favour of the fixing of a given percentage. In this respect Krohn and the Commission agree that a fixed percentage is desirable.

On the other hand it appears doubtful whether such a percentage should be fixed in the Court's case-law. So far as I am aware, the Court has not hitherto fixed percentages in similar situations. In its judgment in *Henck* concerning inter alia the classification of products in tariff heading No 23.07, the Court held: 'With regard to the percentages, it is for the national courts to apply the law to the present case'. [9]

10. Krohn has claimed that the level of negligible [10] and thus acceptable quantities of impurities should be set at 5% and that acceptable impurities are natural, harmless forms of impurity such as the stalks and parts of the cobs of the maize but also seeds from other cultivated plants such as seed grain, and other oil seeds and the seeds of weeds. In support of that contention Krohn has pointed to trade usage, to the technical and economic conditions and to other Community rules.

In so far as concerns other Community rules, Krohn has referred to Council Directive 77/101/EEC of 23 November 1976 on the marketing of straight feedingstuffs. [11] Under Article 4 of that directive, the general provisions laid down in Part A of the Annex to that directive are to apply to the

8 — Case 36/71 *Henck* [1972] ECR 187.

9 — Case 36/71, cited above, at para. 12.

10 — Krohn supports its view that the issue is one of determining what can be described as negligible levels on the preamble to Regulation No 482/74. In this respect, see in particular the third recital in that preamble.

11 — OJ 1977 L 32, p. 1.

marketing of straight feedingstuffs. Point 2.3 in Part A in that annex states:

'In so far as other values have not been laid down regarding certain straight feedingstuffs, the botanical purity of the products and by-products listed in Part B, under 1 and 2, must not be less than 95%.'

Points 1 and 2 of Part B of the Annex to that directive include maize germ expeller and extracted maize germ which are defined as by-products of oil manufacture obtained by pressing from maize germ to which parts of the endosperm and testa still adhere. [12]

11. The Commission has contended that products can be classified under subheading 23.04 B only in so far as the impurities therein consist of 'negligible parts of maize stalks or other cereal types' in respect of which it is established 'that their presence ... in conjunction with the production of the residues or under the usual storage or transport conditions can either technically not be avoided or can be avoided only at disproportionate cost'. At the hearing, the Commission pointed out that it is not possible on the basis of the expert opinions available to fix a percentage of acceptable impurities that could be applied throughout the Community. In so far as concerns impurities consisting of parts of cereals other than maize or soya, the Commission has pointed out in its written observations that it should generally be required that the content of such substances should not be quantifiable.

12. I consider it most appropriate to propose to the Court that it attach decisive importance to Directive 77/101/EEC. [13] That is because the degree of purity specified in the directive must be viewed in conjunction with the general requirement laid down in Article 3 of the directive for straight feedingstuffs which must be 'wholesome, unadulterated and of merchantable quality', 'must not represent a danger to animal or human health and must not be presented or marketed in a manner liable to mislead'.

Since under the applicable rules of Community law residues from maize germ oil extraction containing up to 5% impurities are regarded as being of merchantable quality and can be marketed in the Community under that description without it being misleading, it appears altogether logical that such products should also be classified under the tariff heading for 'residues resulting from maize germ oil extraction'. The position would of course be different if the Commission in a tariff classification regulation had

12 — It follows from the Explanatory Notes to the Customs Cooperation Council Nomenclature that residues falling under subheading 23.04 B may 'be in the form of slabs (cakes) or meal. They may also be pelletised either directly by compression or by the addition of a binder (molasses, starchy substances, etc.). The proportion of added binder does not generally exceed 3% by weight.'

13 — That directive had not been adopted at the time when the Court gave its judgment in Case 36/71 *Henck*, referred to in point 9.

explicitly laid down another degree of purity for such residues.

At the hearing the Commission submitted that in interpreting the Common Customs Tariff no weight can be attached to Directive 77/101/EEC because that directive serves a quite different purpose. The Commission has pointed out that the object of that directive is to differentiate between straight feedingstuffs and compound feedingstuffs. But since the object of Regulation No 482/74, as mentioned above, must be to differentiate residues which are to be classified under tariff subheading 23.04 B from compound feedingstuffs that fall to be classified in tariff heading No 23.07, it is hard to see where the fundamental difference lies. The Commission has further contended that it would have been logical for Regulation No 482/74 to have set an explicit percentage if it had been intended for such a percentage to apply and this factor must be regarded as signifying that the intention was to allow other criteria to be conclusive. But as Directive 77/101/EEC was adopted after Regulation No 482/74 I do not consider that argument convincing.

13. If I am none the less going to propose that the Court refrain from setting a fixed percentage and instead rely on the criterion proposed by the Commission in so far as it implies that only levels of impurities which are in technical and economic terms unavoidable under ordinary conditions are acceptable [14] that is because in my view rules of that kind should be laid down only in legal acts adopted by the Council or the Commission. They are rules whose adoption presupposes technical expertise and a well-documented scientific basis and may possibly have to be adjusted in line with refinements to technical production methods. Although in the interests of legal certainty it is desirable that such rules should be laid down, it is not appropriate for the Court of Justice to take this task upon itself.

14. The proposed criterion presupposes that the national courts seek assistance from experts in order to lay down precisely what in normal circumstances may be regarded as impurities that are technically or economically unavoidable.

It is apparent in this case that the Finanzgericht Hamburg has in fact already sought expert assistance in this instance. Krohn has submitted an expert's report of 27 December 1990 produced by Dr Ferdinand Kemme, Executive Secretary of the Cereal Traders Association on the Hamburg Exchange, at

14 — It should be noted in this context that at the hearing Krohn submitted in the alternative that the Court should lay down such a criterion, saying:
'The level of extraneous matter may not exceed the amount which under normal conditions of cultivation, oil production, transport and storage is technically unavoidable or could be avoided only at disproportionate economic cost.'
The Commission actually believes that Krohn's alternative criterion is to be regarded as a reference to trade usage. But I consider that Krohn is referring to trade usage only in so far as concerns types of impurities, not as regards the level of impurities. On the other hand, both the Commission and Krohn appear to agree that the assessment of what is 'technically unavoidable' is to be made on the basis of normal conditions of production, transport and storage.

the request of the Finanzgericht Hamburg. [15] From that report it may be taken that a limit of 5% on the level of impurities is hardly unreasonable. It should also be pointed out that Krohn has claimed and to a certain extent has documented that the German customs authorities and the German courts formerly applied a 5% limit for acceptable impurities.

The Commission has contended that any limit for impurities should be set considerably lower than 5% but it has not substantiated that contention.

15. I therefore conclude that the Court should confine itself to establishing a criterion according to which only impurities which in normal circumstances are technically unavoidable or are avoidable only at disproportionate cost are acceptable and that national law must be left to fix the necessary percentages on the basis of that criterion. That might have to be done on the basis of a fresh expert's report. [16] In my view, moreover, there have been no indications in the present case conclusively ruling out the possibility that the percentage in question may in fact be set at 5%.

16. Concerning the further question as to what types of substance should be regarded as acceptable impurities, Krohn and the Commission appear to be somewhat at odds in so far as Krohn — unlike the Commission — contends that 'other oil-seeds and seeds of weeds' should be regarded as acceptable impurities. It should also be pointed out here that the Commission has suggested that different tolerances should apply for the different types of impurity, depending on whether the impurities consist of parts of the maize plant other than the maize grains or of other substances, such as other cereals and soya. I consider that both those questions can and should be answered by reference to the criterion established above. It should thus be for the national courts on the basis of the

15 — The report drawn up by Dr Ferdinand Kemme includes the following conclusions:
'Maize germ groats are produced from maize grains. ... Maize is a bulk product which does not exist in an absolutely pure form. For that reason the international and national conditions for cereal trade permit levels of impurities which are mostly above 5% ... .
Further impurities arise in the course of the production of maize germ groats, on transshipment, storage, transport and pellet production ... .
Botanically pure maize germ residues do not exist. No account whatsoever is taken of impurities of less than 1% in international trade. Levels of impurity of over 1% are customary in international trade in feedingstuffs. ...
The expert considers that in 1986 levels of plant impurities in maize germ groats of up to 8% are to be regarded as altogether customary in the trade.
The German law on feedingstuffs and that of the European Communities with a level of 95% botanical purity ... may well have influenced international trade usage. ... Accordingly, in the expert's view, it is only when the 10% level is reached or exceeded that the critical point is to be taken to be reached ... because such goods can no longer be regarded as of merchantable quality.'

16 — An expert opinion would then have to be commissioned taking as its basis the criteria established by the Court of Justice. It should be noted that the report drawn up by Dr Ferdinand Kemme is based on 'the extent to which extraneous impurities ... were customary in the international cereal and feedingstuff trade in 1986 ...'. That approach is different from the question what in normal circumstances is technically unavoidable. On the other hand the report contains valuable information on what constitutes normal conditions of production, transport and storage.

necessary expert opinions to assess what types of impurities are in normal circumstances unavoidable in technical/economical terms, and whether in practice it is possible and reasonable to fix different tolerances for them.

Conclusion

I therefore propose that the Court of Justice answer the Finanzgericht's questions as follows:

The last sentence of Article 1 of Commission Regulation No 482/74 of 27 February 1974 is to be interpreted as meaning that the fact that a product contains, in addition to substances obtained from maize grains, certain impurities does not preclude classification under tariff subheading 23.04 B in the annex to Council Regulation (EEC) No 3331/85 of 5 December 1985 in so far as, under normal conditions of production, storage and transport, those impurities are to be regarded as technically unavoidable or avoidable only at disproportionate cost.