In Case 38/76

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Düsseldorf for a preliminary ruling in the action pending before that court between

INDUSTRIEMETALL LUMA GMBH, a limited liability company having its registered office in Düsseldorf,

and

HAUPTZOLLAMT DUISBURG (Principal Customs Office, Duisburg),

on the interpretation of heading 73.02 G read in conjuntion with Note 1 (c) (No 73.02) of the Common Customs Tariff

THE COURT (Second Chamber)

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

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Facts

The facts of the case, the course of the procedure and the observations submitted under 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

Industriemetall LUMA GmbH, a limited liability company having its registered office in Düsseldorf (hereinafter referred to as LUMA), has for some years imported into the Federal Republic of Germany waste and scrap metal of iron coming from the United Kingdom. The materials are re-melted in the United Kingdom, cast and transported in the form of notched plates kown as 'lumps'. The proportions of their metal content vary with the quality and composition of the basic materials; they are distinguished by a relatively high

tungsten content (from 30 to 40 %), a cobalt content of 5 to 10 % and a carbon content of less than 1·9 %.

On 23 March 1972 LUMA obtained customs clearance from the Zollamt (Customs Office) Duisburg-Ruhrort for a consignment of ferrous scrap coming from the United Kingdom, having a total net weight of 20 379 kg and described by the British supplier as 're-melted scrap containing tungsten'. LUMA declared the goods to the customs as 'waste and scrap metal of iron and steel from alloy steel'; without carrying out a check on the goods the customs office classified them under subheading 73.15 B I (b) 1 (aa) 'alloy steel: waste or scrap in ingot form' of the Common Customs Tariff, which is duty free.

A subsequent check by the customs technical department established that the goods, which had a tungsten content of 30 to 33 %, also had a cobalt content of more than 10 %. On the opinion of the Zolltechnische Prüfungs- und Lehranstalt Köln (Customs Inspection and Training Department), the Zollamt Duisburg-Ruhrort, by a decision of amendment of 15 February 1973, classified the goods imported by LUMA, on the ground that they contained more than 10 % of alloy elements, under tariff heading 73.02 G ('ferro-alloys: other') for which the Common Customs Tariff prescribes a rate of autonomous and conventional duties of 7 %; as a result it requested Luma to pay duty amounting in all to DM 7 807·37.

On 18 March 1973 LUMA submitted a complaint against this decision of amendment to the Hauptzollamt Duisburg.

That complaint was rejected on 27 July 1973.

On 10 August 1973 LUMA commenced proceedings before the Finanzgericht Düsseldorf.

Before the Finanzgericht LUMA maintained in essence that the goods which it had imported consisted of scrap from alloy steel containing tungsten and from time to time cobalt, that they do not come under any tariff heading and that they must therefore be classified, in accordance with Rule 4 of the Rules for the interpretation of the nomenclature of the Common Customs Tariff, under tariff heading 73.15 B I (b) 1 (aa). This view was said to be confirmed by the Classification Opinion of the Committee on Common Customs Tariff Nomenclature of 20 October 1970. The applicant furthermore maintained that, owing to the nature, use and description of the imported goods, they could not be classified as ferro-alloys in the form of 'alloys of iron' within the meaning of Note 1 (c) to Chapter 73.

On the other hand, the Hauptzollamt Duisburg considered that the material conditions laid down in Note 1 (c) to Chapter 73 of the Common Customs Tariff were fulfilled, namely that alloys of iron which contain a total of more than 10 % by weight of alloy elements are deemed to be ferro-alloys. As the goods could clearly be classified under heading 73.02 G, General Rule No 4 was said to be inapplicable, this conclusion being confirmed by the Notes Explicatives du Tarif Douanier Commun concerning heading 73.15. The Opinion of the Committee on Common Customs Tariff Nomenclature of 20 October 1970 was irrelevant, since it related to a re-melted product having a cobalt content of less than 10 %.

Since the IVth Senate of the Finanzgericht Düsseldorf considered that in order to settle the dispute before it was necessary to know how tariff headings 73.02 and 73.15 B I (b) 1 (aa) of the Common Customs Tariff are to be defined and distinguished from one another it decided, by an order of 9 April 1976, under Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice has delivered a

preliminary ruling on the following question:

'Is the Common Customs Tariff to be interpreted to the effect that the expression "ferro-alloys" within the meaning of heading 73.02, read together with Note 1 (c) to Chapter 73, *only* means those products which were manufactured as such from *new* metals or ores and which are distinguished by reason of their intended use in the making of steel by an accurately predetermined, constant composition of specific alloy elements?
or
does heading 73.02 *also* include melted down scrap (material for re-melting) which satisfies the requirements as to *composition* laid down in Note 1 (c) to Chapter 73?'

The order of the Finanzgericht Düsseldorf was received at the Court Registry on 30 April 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC the Commission of the European Communities lodged written observations on 2 July 1976.

Upon hearing the report of the Judge-Rapporteur and the oral procedure without any preparatory inquiry.

The Court however requested the Commission to produce the complete Opinion of the Committee on Common Customs Tariff Nomenclature of 20 October 1970.

By an order of 15 September 1976 the Court decided, under Article 95 (1) of the Rules of Procedure, to assign the case to the Second Chamber.

## II — Written observations submitted to the Court

The *Commission of the European Communities* observes that the Court has been requested by the Finanzgericht Düsseldorf to establish the criteria whereby tariff subheadings 73.02 G and 73.15 B I (b) 1 (aa) may be distinguished; the second subheading relates to ECSC products, coming under the ECSC unified tariff, so that the question arises whether the Court's jurisdiction to give an interpretation is not thereby affected. It may however be considered that an interpretation of subheading 73.02 G, read together with Note 1 (c) to Chapter 73, which has particular regard to the specific subject-matter of the preliminary question, is sufficient to distinguish the two subheadings in question without its being necessary to add an authoritative interpretation of subheading 73.15 B I (b) 1 (aa).

The substance of the case turns on whether the fact that a consignment delivered to the plaintiff in the main action had a cobalt content of more than 10 % because a particularly large quantity of cobalt was unintentionally included in the basic material in itself justifies or requires an alteration in the duty payable on the goods and their classification under subheading 73.02 G instead of subheading 73.15 B I (b) 1 (aa), or whether the Common Customs Tariff lays down other criteria which rule out such an interpretation.

In replying to the question submitted one must proceed first on the basis of the wording, the aim and the nomenclature of the Common Customs Tariff; secondly, reference must be made, if appropriate, to the general explanatory notes on the Common Customs Tariff issued by the Commission, to the Classification Opinions of the Nomenclature Committee and the Explanatory Notes to the Brussels Nomenclature whilst those documents are not directly binding they constitute extremely important factors in the interpretation of the Common Customs Tariff.

Chapter 73 of the Common Customs Tariff ('Iron and steel and articles

thereof') sets out a series of criteria for the tariff classification of goods: the form and dimensions, the stage of processing, the type of manufacture, the use and the constituent elements. Special emphasis is given to the composition of the goods; it constitutes the general basis upon which subsequent subdivisions and classifications depend.

When the classification of goods under a tariff heading involves the use of several criteria at the same time, such criteria have identical status, as material conditions of classification. Nevertheless, certain criteria are decisive when goods do not come under any of the headings of the Common Customs Tariff; in this case General Rule No 4 provides that the goods shall be classified under the heading appropriate to the goods to which they are most akin, and ascertainment of this kinship implies an appraisal in terms of the essential criteria of classification.

The goods imported by LUMA with tungsten and cobalt contents coming within the 'normal' bracket could not be classified directly under a heading of the Common Customs Tariff: they do not conform to all the criteria of any one of the relevant headings. This finding induced the Committee on Common Customs Tariff Nomenclature to propose in its Classification Opinion of 20 October 1970 that the goods should be classified under subheading 73.15 B I (b) 1 (aa) since the goods under that heading were 'the most akin'.

Nevertheless, that opinion is only valid for goods whose decisive criteria from the point of view of tariff classification correspond to those of the goods in respect of which the opinion was issued. Differences, albeit in only one of those criteria, require it to be considered afresh whether there is a heading exactly covering those goods. Only when there is no such heading can General Rule No 4 be invoked since, even in such a case, consideration of a heading appropriate to goods to which they are akin must take account of the 'new' criterion; in this case automatic recourse to the Classification Opinion of 20 October 1970 is thus excluded.

From the point of view of tariff classification there is an important difference between products with a cobalt content of less than 10 % and those with a cobalt content of more than 10 %: the latter comply with a specific criterion of Note 1 (c) to Chapter 73, as opposed to Note 1 (d), and fulfil the condition as to constituent elements justifying their classification as 'binary' ferro-alloys under heading 73.02 (ferro-alloys).

To be classified under heading 73.02 goods must also constitute alloys of iron which are not usefully malleable and which are principally used as a raw material in the manufacture of ferrous metals.

'Alloys of iron' are materials which are melted and subsequently cast into a certain shape; they are at the first stage of processing and have not yet taken on their final form; externally they have a rough shape, still very crude (ingots and plates) with an irregular, uneven surface. The Explanatory Notes to the Brussels Nomenclature and the Notes Explicatives du Tarif Douanier Commun are in accord with the wording, the aim and the nomenclature of the Common Customs Tariff: they lay down as a criterion for ferro-alloys the presence of 'large proportions of alloy elements' or 'a maximum content of non-ferrous alloy elements'. In the present case the proper interpretation of heading 73.02 read in conjunction with Note 1 (c) to Chapter 73 is provided by the Notes Explicatives du Tarif Douanier Commun; those Notes state that 'iron and steel waste, remelted and roughly cast into ingots having the composition of a ferro-alloy and used as addition materials in the manufacture of special steels shall be classified as appropriate under the various sub-

headings of heading 73.02' and that waste and scrap metal which has been re-melted and cast into ingots 'shall be considered' as ferro-alloys or ingots and 'shall be classified according to its composition under the various subheadings of heading 73.02 or under subheadings 73.06 B, 73.15 A I (b) 1 or 73.15 B I (b) 1 (aa)'. The words 'shall be classified' mean that products regarded as ferro-alloys within the meaning of the Common Customs Tariff must be classified under the same heading as the latter; those words in no way infer a contrast with 'real' ferro-alloys.

From the scientific and technical point of view the definition of a ferro-alloy is appreciably different from the definition adopted by the Common Customs Tariff; the customs aspect and the technical point of view are not identical. The criteria for tariff classification provided in the subheadings in the Common Customs Tariff are intended to enable it to be validly ascertained, by the use of the most objective criteria possible, under which heading goods should be classified when customs clearance is obtained. In this respect it is of little importance, from the point of view of tariff classification, to establish from what materials and by what special processes steel plates have been manufactured, if the goods themselves display the objective characteristics which constitute the necessary and sufficient condition for their classification under heading 73.02.

With regard to the two other characteristics (materials which are not usefully malleable and which are chiefly used as a raw material in the manufacture of ferrous metals), it is sufficient in the present case to state that, according to the plaintiff in the main action, the relevant products are in fact used as raw material in the manufacture of ferrous metals.

The question submitted by the Finanzgericht Düsseldorf thus calls for the following reply:

Lumps obtained by re-melting waste and scrap metal or iron which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals and which contain one or more of the alloy elements referred to in Note 1 (c) to Chapter 73 of the Common Customs Tariff in the proportions laid down in that note must be classified as ferro-alloys under heading 73.02.

### III — Oral procedure

The Commission of the European Communities, represented by its Legal Adviser, Manfred Beschel, submitted its oral observations at the hearing on 27 October 1976.

The Advocate-general delivered his opinion at the hearing on 1 December 1976.

## Law

1 By an order of 9 April 1976 which was received at the Court Registry on 30 April 1976 the Finanzgericht Düsseldorf submitted to the Court of Justice under Article 177 of the EEC Treaty a question on the interpretation of heading 73.02 of the Common Customs Tariff, 'ferro-alloys', in order to define that heading in relation to heading 73.15 B I (b) 1 (aa) 'waste or scrap in ingot form' of alloy steel (a heading which pertains to the ECSC Treaty).

2 It appears from the information supplied by the national court that the plaintiff in the main action has for some years imported from the United Kingdom re-melted ferrous scrap containing tungsten, in the form of 'lumps' having a tungsten content of approximately 30 % and a cobalt content of between 5 and 10 %.

Since the tariff classification of this product had long been in dispute it was classified by an Opinion of the Committee on Common Customs Tariff Nomenclature adopted on 20 October 1970 under Article 2 of Regulation No 97/69 of 16 January 1969 (OJ, English Special Edition 1969 (I), p. 12) in accordance with Rule No 4 of the General Rules for the interpretation of the nomenclature, appearing at Section I A of the preliminary provisions of the tariff, under tariff subheading 73.15 B I (b) 1 (aa), as being akin to the 'waste or scrap in ingot form' mentioned in that heading.

3 On 23 March 1972, the plaintiff obtained customs clearance for a consignment of re-melted scrap containing tungsten which the customs office undertaking clearance classified without carrying out a check under subheading 73.15 B I (b) 1 (aa), which is free from duty.

Since a subsequent examination showed that the goods contained in addition to approximately 30 % of tungsten more than 10 % of cobalt the customs office adopted a decision of amendment whereby the goods were classified as 'ferro-alloys' under tariff heading 73.02 G, bearing a duty of 7 %, and consequently claimed the customs duty appropriate to that classification.

When the plaintiff in the main action lodged a complaint this classification decision was confirmed by the Hauptzollamt Duisburg, the defendant in the main action.

4 The plaintiff in the main action founds its action in particular on the fact that the 'ferro-alloys' mentioned in heading 73.02 are manufactured from new metals or ores by technical processes ensuring that certain alloy elements are present in constant, precisely-determined proportions, whereas the product imported by the plaintiff, which was obtained through the unsophisticated process of melting together waste and scrap, is not very constant in its composition and the presence of cobalt in excess of the limit of 10 % in the consignment of goods whose tariff classification is in dispute thus constitutes a purely fortuitous circumstance.

The defendant customs office invokes in its defence of the contested decision Note 1 (c) to Chapter 73 of the Common Customs Tariff, from which it

follows that the presence of cobalt in excess of the limit of 10 % in the consignment in question means that the imported goods must be classified under heading 73.02.

In such a case it is said to be inappropriate to apply the procedure of classification by analogy adopted by the Committee on Common Customs Tariff Nomenclature in its Opinion of 20 October 1970 since it is a condition of that procedure that the goods in question do not come under any of the headings or subheadings of the Customs Tariff.

In order to settle this problem of interpretation the Finanzgericht submitted the following question:

'Is the Common Customs Tariff to be interpreted to the effect that the expression "ferro-alloys" within the meaning of heading 73.02 read together with Note 1 (c) to Chapter 73 *only* means those products which were manufactured as such from *new* metals or ores and which are distinguished by reason of their intended use in the making of steel by an accurately predetermined, constant composition of specific alloy elements?

or

does heading 73.02 *also* include melted down scrap (material for re-melting) which satisfies the requirements as to *composition* laid down in Note 1 (c) to chapter 73?'

5 Heading 73.02 merely bears the title 'ferro-alloys', followed by six subheadings (A to F) referring to alloys with a specific content, and a subheading G, entitled 'others'.

In the notes to Chapter 73, which have the same legal weight as the headings of the Tariff, the concept of 'ferro-alloys' is defined in Note 1 (c) as follows:

'Alloys of iron ... which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals and which contain, by weight, separately or together:

more than 8 % of silicon, or

more than 30 % of manganese, or

more than 30 % of chromiun, or

more than 40 % of tungsten, or

a total of more than 10 % of other alloy elements...'

In the 'Notes Explicatives du Tarif Douanier Commun des Communautés Européennes', published by the Commission, it is stated with regard to heading 73.02 that 'iron and steel waste, re-melted and roughly cast into ingots (waste or scrap in ingot form) having the composition of a ferro-alloy and used as addition materials in the manufacture of special steels shall be classified as appropriate under the various subheadings of heading 73.02.'

In the explanations to heading 73.03, relating to waste and scrap metal of iron or steel, the Notes state that waste and scrap metal, re-melted and simply cast into ingots and known as 'waste or scrap in ingot form', shall be considered for the purposes of the Tariff as ferro-alloys or as ingots and thus classified 'according to its composition' under the various subheadings of heading 73.02 or of headings 73.06 or 73.15.

In the explanations to subheading 73.15 the Notes state, concerning subheading B I (b) 1 (aa), that 'waste or scrap in ingot form having the composition of a ferro-alloy ... shall be classified as appropriate under the subheadings of heading 73.02.'

6 Although heading 73.02, regarded in isolation, does not provide an explanation of the meaning of the expression 'ferro-alloys', Note 1 (c) to Chapter 73 shows that apart from certain other criteria which are irrelevant to the present case the classification of a product as a ferro-alloy is determined, other than by a minimum iron content, by the presence of certain non-ferrous metals in proportions exceeding those laid down by the note.

In particular, the presence of proportions of alloy elements other than those expressly mentioned (silicon, manganese, chromium and tungsten) in excess of 10 % by weight require a product, such as that in dispute, to be classified amongst the ferro-alloys of heading 73.02.

Fully in accord with this concept, the 'Notes Explicatives' of the Commission, quoted above, emphasize the criterion of the 'composition' of the products coming under a given heading in order to assist in distinguishing tariff headings whose subject-matters are particularly close and which could accordingly give rise to confusion.

On the other hand, the criteria for classification adopted by Note 1 (c) do not take account of factors which might be of use in defining the concept of 'ferro-alloys' from the technical or commercial point of view, such as the fact that the alloys are manufactured from new metals or ores and that they have a constant, accurately-determined composition.

7 Whilst the Customs Tariff does indeed in certain cases contain references to manufacturing processes and to the use for which goods are intended it is generally preferred, in the interests of legal certainty and ease of verification, to employ criteria for classification based on the objective characteristics and properties of products which can be ascertained when customs clearance is obtained.

The criterion drawn from the content of non-ferrous metals in iron and steel products, which constitutes the basis of the criteria adopted by Note 1 (c) to Chapter 73, performs that function in the present case with a view to facilitating the classification of products under the headings and subheadings of the relevant chapter.

In consequence, when a product can be classified under a specific tariff heading on the basis of its composition, there is no further possibility of classification by analogy within the meaning of Rule No 4 of the General Rules for the interpretation of the nomenclature, since such a classification can only be considered, in the words of Rule 4, in relation to goods 'not falling within any heading of the Tariff'.

8 The reply to the question submitted must therefore be that heading 73.02 of the Common Customs Tariff includes 'lumps' of melted ferrous scrap which satisfy the physical requirements laid down in Note 1 (c) to Chapter 73.

## Costs

9 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 Finanzgericht Düsseldorf, costs are a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the question submitted to it by the Finanzgericht Düsseldorf by an order of 9 April 1976, hereby rules:

**Heading 73.02 of the Common Customs Tariff also includes melted down scrap (material for re-melting) which satisfies the physical requirements laid down in Note 1 (c) to Chapter 73 of the Common Customs Tariff.**

Pescatore Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

## OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 1 DECEMBER 1976 [1]

*Mr President,*
*Members of the Court,*

1. The preliminary question submitted to the Court in these proceedings concerns the interpretation of the expression 'ferro-alloys' contained in heading 73.02 of the Common Customs Tariff. The Finanzgericht Düsseldorf requests the Court to define the scope of that expression so that it can settle a dispute between a Customs Office of the Federal Republic of Germany and the company LUMA, which has its registered office in Düsseldorf.

For a number of years that undertaking has imported from the United Kingdom ferrous scrap containing tungsten and cast in the form of slabs (known as 'lumps'). On 20 October 1970 the Committee on Common Customs Tariff Nomenclature (established by Regulation No 97/69 of the Council of 16 January 1969) considered, at the request of the German delegation, the problem of the classification of alloy steel scrap containing tungsten which had been melted and cast in the form of 'lumps' (notched plates): the Committee expressed the opinion that since no heading of the Tariff expressly covered this product it must be treated as equivalent to 'waste or scrap in ingot form' and accordingly classified under subheading 73.15 B I (b) 1 (aa). From October 1970 to March 1972 the goods imported by the LUMA company — lumps of ferrous scrap containing approximately 30 % of tungsten and less than 10 % of cobalt — were accordingly classified as 'waste or scrap in ingot form' by the German customs authorities. However, on 23 March 1972 the said company imported a consignment of lumps of melted scrap containing between 30 and 33 % of tungsten and more than 10 % of cobalt. In view of this

1 — Translated from the Italian.