OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 6 DECEMBER 1972[1]

Mr President,
Members of the Court,

Between 11 May and 21 June 1965, the German undertaking Arend van de Poll, which trades in cereals, imported, subject to advance fixing of the levy, fourteen consignments of a product described in the import certificates as 'unsweetened forage; other preparations of a kind used in animal feeding, containing more than 50% by weight of starch and containing no milk products', intended more specifically, by the incorporation of additives, for use as feed for poultry.

The invoices of its French supplier, Maison Sommer, R. Robinet, successor, of Moulin de Ham-sous-Varsberg (Moselle), bearing the explanatory inscription: 'All animal fodder, grains, flour, sharps', do not indicate in all cases the composition of the goods delivered. However, those which do so mention varying percentages: sometimes 87% rolled *denatured* wheat, 10% rolled barley and 3% cod liver oil—sometimes the same proportions for wheat and oil but 5% rolled barley and 5% trimmed oats, or even 7% rolled barley and 3% trimmed oats, in other words the proportions of denatured wheat (87%), of cereals other than wheat (10%) and of fish oil (3%) were in all cases constant.

On the evidence of those declarations and on the basis of the characteristic smell of those consignments, the customs at Trier classified the goods under heading 23.07 B, I(d)(1) of the Common Customs Tariff ('animal food preparations ...') and imposed the corresponding levy. At the same time, however, it sent several samples taken from those consignments to the 'Zolltechnische Prüfungs- und Lehranstalt' of Frankfurt am Main for examination.

The inspection office found that the samples in question were made up of 77% common wheat, 7% trimmed oats and 16% barley—of 92% wheat and 8% barley—finally of 96% wheat and 4% barley respectively. Subsequently, it was more explicit in its results and indicated that it had discovered in the samples the existence of from 0.76 to 0.87% cod liver oil. In consequence, the German customs office changed the classification and required the payment of an additional levy corresponding to the difference between headings 23.07 and 10.01 B ('simple mixture of cereal grains'), amounting in total to DM 5 433.70.

The complaint submitted by Arend van de Poll against the report altering the duty was rejected by decision of 20 April 1967. The undertaking then appealed against the decision to the Finanzgericht Rheinland-Pfalz which, by order of 3 May 1972, stayed the proceedings until this Court has given a ruling on the following preliminary questions:

(1) Are the Annex to Regulation No 19/62 of the Council concerning tariff heading 23.07 and Article 12 of Regulation No 55/62 of the Council to be interpreted as meaning that a mixture of common wheat and barley or of common wheat, barley, oats and maize is sufficient to constitute an animal food preparation within the meaning of those provisions?

(2) If the answer is in the affirmative, is it necessary that the different cereals used in the composition of the product should be in a certain (minimum) proportion? If so, what is that proportion?

(3) If the answer to the first question is in the negative: must the Annex to Regulation No 19/62 and Article 12 of Regulation No 55/62 be interpreted as meaning that for mixtures of cereals to constitute animal food 'preparations' or for it to be possible to consider feed as having been 'prepared' for animals

1 — Translated from the French.

it is necessary that substances other than cereals which are themselves used in the composition of forage should have been added to those mixtures of cereals?

(4) If this is so, can the addition of 0.87 or 0.76% of cod liver oil or fish oil be considered for this purpose?

(5) If the reply to question (3) is in the negative, can one also speak of an 'animal food preparation' or of a preparation of a kind used in animal feeding when a denaturing agent has been added?
Can cod liver oil or fish oil be regarded as denaturing agents within the meaning of Regulation No 178/64?

(6) If the answer is in the affirmative, can there, in general, only be denaturing by this means when the denaturing agents have been added in a certain proportion or is it enough that after the addition of them the goods should be made unfit for human consumption?

(7) If the denaturing agents mentioned have to be added in a certain proportion, does it suffice that they have been added in the proportions in question to the common wheat contained in a mixture of common wheat, barley and possibly also oats?

(8) If the replies to questions (6) and (7) are in the affirmative, does the existence of slightly smaller proportions have, an effect on the classification? If so within what limits?

Let me say immediately that it does not seem to me possible for the Court to reply to the second and fourth questions, at least in the terms in which they are put, namely: What is the minimum percentage of each of the following ingredients of a cereal mixture: common wheat, barley, and possibly oats and maize, which must be present before such a mixture can be classified as an 'animal food preparation'? Does the addition of 0.87% and 0.76% of cod liver oil or fish oil necessarily make such a mixture a forage material?

Replies to these questions would amount to applying the customs tariff to a particular instance in that the percentages or components of the mixture are those which appear in the export reports or the invoices and with regard to which the parties to the main action are in disagreement. The Court has always resolutely refused, in the context of Article 177, to apply the Treaty to an actual case.
On the other hand, the Court has striven to extract from the terms of questions, which the national court has imporperly drawn up, only those points of law which concern the interpretation of the Treaty. That principle having been restated it seems to me that the first two questions put to the Court must be considered together. The third, fourth, fifth and sixth questions must also be examined together. The seventh question is only one of detail relating to the procedure to be followed. Lastly, the eighth question raises a problem which you dealt with in Case 26/72, *Oliefabriken.*

I — In the first two questions the German court asks what were, at that time, the different cereals which had to be included in a mixture before it could be classified as a forage preparation and, if those materials were common wheat, barley, oats and maize, in what proportions they had to be present.
As to the first point, it must be remembered that a mixture of cereals of the type in dispute is not necessarily, in the absence of any additional material, an 'animal food preparation'; it may constitute only a 'simple mixture of cereals' under Chapter 10 and, on this basis, should be classified according to the material which gives it its essential character, in accordance with the general rules of interpretation of the nomenclature of the Common Customs Tariff (JO of 20.12.1960, p. 1543, paragraph (2), last sentence, and paragraph (3)(b); Regulation No 139 of the Council of 14 November 1962 on the levies applicable to mixtures of cereals). Secondly, a product of that type could be classified as an animal food preparation under Chapter 23, even without the addition of fish oil, provided that the

proportions of the mixture suited it for that specific use. But, if it contained whole grains of wheat it could be classified under heading 23.07 only if the proportion of grains of cereals other than wheat exceeded a certain percentage.

Nevertheless, as I have said, it is not for the Court to indicate the proportions in which the different cereals must be present in the product. It is worthy of note, as an example, that in France, prior to 1 April 1967, for a preparation to be considered as falling within Chapter 23, the product had to contain not more than 90% of whole wheat grains, the remaining 10% being made up of whole grains of barley or rye, after 0.3% of fish oil had been added to the mixture.

II — In the second group of questions (third, fourth, fifth, sixth) the German court next asks what additional conditions must be fulfilled for a product of the kind mentioned in the first two questions to be classified as an animal food preparation. But these questions introduce (as from the fifth) a new idea by raising as an issue the effect of the denaturing of the wheat.

Where the mere presence of different cereals in a product, even in certain specified proportions, is not enough to make that product a forage preparation intended as feed for animals, it is necessary that one or more denaturing agents should be added to the mixture in question. It is also necessary that the added quantity of that or those agents should reach a certain minimum.

However, since at the time in question the common organization of the market in cereals was still incomplete, a distinction must here be made.

If the product was to remain in the Member State where it was produced it would suffice, for the product to be considered as an 'animal food preparation' within the meaning of the domestic regulations, that it had itself been denatured or that its wheat content had been denatured.

On the other hand, if the product was exported to another Member State such denaturing might not suffice, under the rules of that State, for it to be considered in terms of the tariff as an 'animal food preparation'. It was necessary that the denaturing agent should be present in a proportion greater than that required for denaturing in the exporting State, in other words that the substance thereby added should itself constitute a typical forage material.

This requirement does not appear expressly in the Explanatory Notes to the customs tariff, but it does correspond to their spirit. Cod liver oil or fish oil are substances generally used for denaturing wheat, in consideration of which denaturing gives the right to payment of a Community premium. On the other hand, the addition of cod liver oil leads to a valued forage product, to the extent at least that a certain minimum percentage of that oil is included in animal food preparations and subject to the condition that such preparations are normally intended only for certain categories of animals. Too high a percentage of cod liver oil would give the flesh of poultry undesirable characteristics (odour, colour, etc.).

It can therefore be said, in reply to the court seised of the main action, that the substance thus added to the basic cereals could be cod liver oil or fish oil, but that although this product is ordinarily used to denature wheat within the meaning of Regulation No 178/64, when present in a mixture in a sufficient amount it constitutes a forage material for the feeding of only certain animals, its presence being inadmissable for the feeding of certain other animals.

The distinction implied by the sixth question put by the national court does not therefore exist. Denaturing is effected by the addition of fish oil (according to a minimum percentage) *and*, by reason of this very fact, the product is rendered unfit for human consumption since the object of denaturing is specifically to prevent the denatured cereal from being put back on the market for human consumption, provided, of course, that the method of denaturing is sufficiently effective.

In reality, the problem which is causing concern to the German court is the apparent contradiction in the statement that, on the one hand, there can be no

denaturing without the addition of a minimum percentage of cod liver oil, but that, on the other hand, there can be no animal food preparation without the addition of a greater percentage of cod liver oil than that present in the previous case. But of what use is a product which has been denatured if not for animal feeding?
The reply to that is that denaturing—correctly carried out—is intended above all to support the market in products which cannot find their natural outlets, in other words, in the case of cereals of bread-making quality (common wheat, rye), food for human consumption. It is therefore necessary that cereals of bread-making quality (common wheat, for example) should have been denatured under the supervision of the intervention agency, or, better still, that they should have been used, after denaturing, in feed for cattle.
But, for wheat denatured by the addition of cod liver oil to be considered as such, it is necessary that this latter substance should have been added in a certain minimum proportion, which, moreover, varied at the time in question according to the national laws and according to whether the wheat to which it was added was itself mixed with other cereals.
It is sufficient here to refer to the preamble to and to the operative part of Regulation No 172/67 of the Council of 27 June 1967 on general rules governing the denaturing of wheat and rye of bread-making quality:

'Whereas methods of denaturing should be effective enough ...'
Article 2: 'The methods employed ... must ensure that denatured wheat or rye can no longer be used for human consumption.'

to perceive that denaturing is not synonymous with unsuitability for human consumption, still less with specific and exclusive suitability as animal feed, particularly for poultry.
In other words, having regard to the differences still existing at that time between national rules, it is possible that the percentage of fish oil added to one of the cereals making up the mixture is sufficient for that cereal to be considered unfit for human consumption in the exporting Member State and thereby gives rise to the right to the denaturing premium without the product necessarily being considered as a typical animal food preparation in the importing Member State.
Thus the addition of 0.4% of fish oil to 100 kgs of whole wheat grains or the addition of 0.3% of fish oil to a mixture of 90 kgs of whole wheat grains and 10 kgs of whole barley or rye grains, although at the time it had the effect of denaturing wheat within the meaning of the French rules, was not sufficient to make that product an animal food preparation for the purposes of Community tariffication of imports. At the time, moreover, there was no difference in the import charge, whether the product had been denatured or not, just as there is no difference depending on whether the product has been damaged or not, as the Court ruled in its judgment of 15 December 1970 in Case 31/70.
The tariff classification of a product must be effected according to tariff criteria and not according to other criteria relating to hygiene or nutritive value. It is therefore of little importance that the German cereal importation and warehousing office, which had issued the import certificates fixing the levy in advance, considered, after an expert report by the Federal research office in Berlin concerned with the use of the cereals, the result of which had been communicated to it on 24 June 1965, that the product consisted of a 'mixture of grains' intended for use in animal feeding within the meaning of the German law on forage.
Furthermore, the percentages obtained by that laboratory on examination of the samples sent by the importer:

— 7.7% of unrolled barley (and not 10%) and
— 0.3% to 0.4% of fish oil,

are even less favourable to the importer and the fact that the laboratory nevertheless considered that the product was a 'mixture of grain for use in animal feeding' within the meaning of the German rules does not exclude the fact that it could have been a 'simple mixture'.
Finally, there is no need to consider the

additional complication raised in the seventh question of the German court. It seems that this question was put because in the invoices of the German supplier the product was described as including denatured wheat, to which 3% of cod liver oil had been added. It matters little whether the ingredient 'cod liver oil' was added to the common wheat itself, for the purpose of denaturing, or only to the whole, following admixture of the different cereal products, provided that it was added in a quantity sufficient to cause the final product to be classified as an animal food preparation.

It may be added that if, according to the French provisions in force at the time, it was sufficient that the common wheat alone had been denatured with 1% of cod liver oil for it to be exported as an animal food preparation, the mixture imported by the applicant, if it contained a maximum of 90% of denatured wheat, should have contained in total 0.9% of fish oil. It is clear from the expert's report from Frankfurt that this product contained, in the case of two samples, more than 90% of wheat but that the quantity of fish oil contained in it was at most 0.87%.

III — I now come to the last question put to the Court. The plaintiff in the main action has in fact alleged that if the percentage of cod liver oil was at maximum only 0.87% this was due to desiccation, to the absorption of the oil by the sacks in which the product was put up, to the unsatisfactory way in which the samples were taken, and even to the lack of homogeneity of the mixture. But that would require the Court to deal with considerations which, for my part, I have already excluded from my opinion in Case 26/72, *Oliefabriken*.

In the absence of any specific rules on the minimum percentage of substances such as fish oil or cod liver oil which determine the classification of a mixture, it is for the national court to determine this percentage and to decide, in addition, whether it can be affected by considerations relating, in particular, to the packaging of the product.

Let me finally give my personal feelings on a question which was raised only at the hearing and which concerned the actual intended use of the mixture which is the subject of the dispute. Was it, in the final analysis, intended only for use in animal feeding? If not, to what other use could it be put?

This question could not be resolved.

Thus although I am not in a position to say what was in fact the intended use of the imported product, I would suppose that it was a product having a relatively high value, one essential component of which, denatured common wheat, within the meaning of the French rules, could be used, if not for human consumption, at least, after sweetening, for the preparation of a greater volume of forage, in which case it could, in actual fact, be said to be a 'premix' within the meaning of the present version of the Explanatory Notes to the Brussels Nomenclature under heading 23.07, II, C. But, at the time which concerns us, heading 23.07 included only products having undergone final processing, as the Court ruled in its judgment of 23 March 1972 in Case 36/71, *Henck*.

In my opinion the Court should rule that in view of the state of the rules in force at the time of the facts with which the national court is dealing:

(1) For the purpose of classifying goods under heading 23.07 of the Common Customs Tariff, account must be taken of the essential components of a mixture of cereals, it being accepted that cereals other than common wheat must be present in a quantity judged to be sufficient by the national court.

(2) Where a mixture of cereals cannot, by reason solely of its cereal components, be classified as an 'animal food preparation' under heading 23.07 then the

mixture in question must have added to it other substances, such as cod liver oil or fish oil, which are materials used in preparations intended exclusively as feed for animals.

(3) The denaturing of one of the components of a cereal mixture, in particular by the addition of substances such as cod liver oil or fish oil, may render that mixture an 'animal food preparation' under heading 23.07, provided that the substance added, being of a kind typically used in animal feeding, is present in a quantity judged to be sufficient by the national court.

(4) It is immaterial whether the substance included for the purpose of denaturing has been added to one of the components of the mixture itself.