JUDGMENT OF THE COURT (FIRST CHAMBER) OF 2 MAY 1979 [1]

Henningsen Food Inc. and Others v Produktschap voor Pluimvee en Eieren (preliminary ruling requested by the College van Beroep voor het Bedrijfsleven)

Case 137/78

1. *Common Customs Tariff — Tariff headings — Eggs, not in shell, and egg yolks suitable for human consumption as in subheading 04.05 B I — Concept*

2. *Common Customs Tariff — Tariff headings — Food preparations under subheading 21.07 G I (a) 1 — Specific case*

1. It is clear from the wording of subheading 04.05 B I of the Common Customs Tariff and from the Explanatory Notes to the tariff that the products to which the subheading refers are essentially birds' eggs, not in shell, and egg yolks, without further processing, to which any chemical components are added in small quantities only, in order to preserve them.

2. A product composed of 52% whole hen-egg powder, 25% soya meal, 22% glucose syrup and 1% salt and lecithin does not come under heading 04.05 B I of the Common Customs Tariff but constitutes a "food preparation" coming under subheading 21.07 G I (a) 1 of the tariff.

In Case 137/78

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

HENNINGSEN FOOD INC., Nebraska, United States of America,

VAN DEN BURG EIERPRODUKTEN BV., Waalwijk, The Netherlands,

1 — Language of the Case: Dutch.

both in their capacity as managing partners of the partnership trading as HENNINGSEN VAN DEN BURG, Waalwijk,

on the one hand,

and

PRODUKTSCHAP VOOR PLUIMVEE EN EIEREN (Poultry and Eggs Board), Zeist, The Netherlands,

on the other,

on the interpretation of certain provisions of the Common Customs Tariff with regard to the tariff classification of products known as "Hentex 76" and "Hentex 10" and of certain provisions of Regulation (EEC) No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the written 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. The undertaking Henningsen Van den Burg manufactures products bearing the marks "Hentex 76" and "Hentex 10" which it has exported for some two years to the United Kingdom and to which it refers in its export declarations as "whole hen-egg powder" stating the tariff heading as 04.05 B I of the Common Customs Tariff.

The Produktschap voor Pluimvee en Eieren (hereinafter referred to as "the Produktschap") has always paid in respect of those exports the monetary

compensatory amounts applicable on the export from the Netherlands of products coming under that tariff heading.

At the same time the Produktschap, exercising the option made available by Article 2 a of Regulation (EEC) No 974/71 of the Council, as amended by Regulation (EEC) No 1112/73 of the Council of 30 April 1973 (Official Journal 1973, L 114, p. 4), undertook to pay the compensatory amounts applicable on importation into the United Kingdom on the conditions laid down in Article 10 of Regulation No 1463/73 of the Commission, now re-enacted in Article 11 of Regulation (EEC) No 1380/75 of the Commission of 29 May 1975 (Official Journal 1975, L 139, p. 37).

The above-mentioned Article 2 a of Regulation No 974/71 reads as follows:

"Where a product exported from one Member State has been imported into a Member State which has to grant a compensatory amount upon importation, the exporting Member State may, by agreement with the importing Member State, pay the compensatory amount which should be granted by the said importing Member State. In this case no compensatory amount shall be granted by the importing Member State for products originating in the Member State concerned. The compensatory amount shall be converted on the basis of the spot market rate of the relevant currencies as recorded over a period to be determined. Exporting Member States which exercise this option shall inform the Commission accordingly."

Article 11 of Regulation No 1380/75, supplemented as regards paragraph (5) by Commission Regulation (EEC) No 1498/76 of 25 June 1976 (Official Journal 1976, L 167, p. 28) provides *inter alia:*

"(1) Where an exporting Member State wishes to exercise the option provided for in Article 2a of Regulation (EEC) No 974/71, it shall inform the Commission of its intention after it has obtained the agreement of the importing Member State. The Commission in turn shall inform the other Member States.

(2) Payment by the exporting Member State of the monetary compensatory amount which should be granted by the importing Member State shall be conditional upon the production of proof that customs import formalities have been completed and that the duties and charges having equivalent effect payable in the importing Member State have been charged.

This proof shall be furnished by production of the control copy provided for in Article 1 of Regulation (EEC) No 2315/69. [1] In the additional information section, the following shall be completed:

1. Sections 101 and 103;

2. Section 104 by deleting what does not apply and adding one of the following:

— 'Intended for entry for home use (importing Member State)';

— 'Destiné a être mis à la consommation en/au(x) (État membre importateur)';

— 'Bestemt til forbrug i (den indførende medlemsstat)';

— 'Zum freien Verkehr in (einführender Mitgliedstaat) bestimmt';

1 — From 1 July 1977 Article 1 of Regulation No 2315/69 has been replaced by Article 10 of Regulation (EEC) No 223/77 (Official Journal 1977, L 38, p. 20).

— 'Destinato ad essere immesso in consumo in (Stato membro importatore)';

— 'Bestemd om in het vrije verkeer te worden gebracht in (invoerende Lid-Staat)';

The competent customs office in the importing Member State shall complete the section headed 'control as to use and/or destination' and add one of the following:

— 'Monetary compensatory amount applicable on (date of entry for home use) not granted in (importing Member State)';

— 'Montant compensatoire monétaire applicable le (date de mise à la consommation) non octroyé en/au(x) (État Membre importateur)';

— 'Monetært udligningsbeløb, gældende den (datoen for overgang til forbrug) ikke ydet i (den importerende medlemsstat)';

— 'Währungsausgleichsbetrag, gültig am (Tag der Überführung in den freien Verkehr) in (einführender Mitgliedstaat) nicht gewährt';

— 'Importo compensativo monetario applicabile il (data d'immissione al consumo) non concesso in (Stato membro importatore)';

— 'Monetair compenserend bedrag von toepassing op (datum van invoer tot verbruik) niet toegekend in (invoerende Lid-Staat)'.

(3) Where Article 3 of Regulation (EEC) No 974/71 is applied the Commission shall alter the exchange rate to be used for the purpose of applying Article 2a of that regulation.

(4) If, after having had recourse to the provisions of Article 2a of Regulation (EEC) No 974/71, an exporting or importing Member State wishes to abandon its exercise of the option provided for therein it shall first inform the other Member State concerned and the Commission, which shall inform the other Member States.

In such a case, products in respect of which customs export formalities have been completed before the date on which such abandonment takes effect shall remain subject to the provisions of the said article.

(5) Where the control copy referred to in paragraph (2) is not returned to the office of departure or relevant central body within three months of its issue owing to circumstances beyond the control of the person concerned, the latter may make application to the competent agency for other documents to be accepted as equivalent, stating the grounds for such application and furnishing supporting documents. Such supporting documents shall include the transport document and the document whereby the product concerned is entered with the customs authorities for home use in the Member State of destination or a copy or photocopy thereof certified by the competent authorities.

In such a case the competent office of the Member State of destination shall, on the document whereby the product concerned is entered with the customs authorities for home use, include the same information as that specified in respect of the section of the control copy headed 'control as to use and/or destination'. This endorsement shall

be authenticated by the stamp of the customs office placed directly on the supporting document.

Member States shall each 1 March and 1 September send returns to the Commission showing for each product sector the number of applications made under the preceding subparagraph, the reasons where known for the failure to return the control copy, the quantities and the compensatory amount claimed."

2. With regard to the exportations concerned in this case the British customs authorities refused to accept their tariff classification under heading 04.05 B I given in the export forms and classified the goods under tariff heading 21.07 F subsequently renumbered in Council Regulation (EEC) No 2500/77 of 7 November 1977 amending Regulation (EEC) No 950/68 on the Common Customs Tariff as tariff heading 21.07 G. This heading does not make provision for the application of monetary compensatory amounts to the products concerned.

The British authorities accordingly refused to fill in with regard to the products in question the section in the control copy certifying that those products had been "entered for home use".

Through the Ministerie van Landbouw en Visserij [Ministry for Agriculture and Fisheries], the Produktschap reported the British customs authorities' decision on the tariff classification to the competent officers of the Commission. In a telex received by the above-mentioned Ministry the Produktschap was informed that having regard to their composition, the products in question must be classified under tariff heading 21.07 G (a) 1.

The Produktschap, whilst reserving the right to inform the competent authorities of its objections to that decision, refused to pay the compensatory amounts in respect of the export to the United Kingdom of the products in question.

The persons concerned instituted proceedings before the College van Beroep voor het Bedrijfsleven against that refusal and the College decided, by a judgment of 9 June 1978, to stay the proceedings and to refer the following questions to the Court pursuant to Article 177 of the EEC Treaty:

"1. Is Article 1 (2) of Regulation (EEC) No 974/71 of the Council, read in conjunction with the content of the Annex to Council Regulation (EEC) No 2500/77, in particular with the content of tariff subheadings 04.05 B I and 21.07 G I (a) 1 as set out in that annex, to be interpreted as meaning that a product such as 'Hentex' which is composed of:

52% whole hen-egg powder
25% soya meal
22% glucose syrup
1% salt and lecithin

must be classified under tariff subheading 04.05 B I or under tariff subheading 21.07 G I (a) 1?

2. Is the second sentence of Article 11 (2) of Regulation (EEC) No 1380/75 of the Commission to be interpreted as meaning that, even if the product 'Hentex' does fall under tariff subheading 04.05 B I and the customs import formalities for the United Kingdom have been completed and the duties and charges having equivalent effect payable in that Member State have been levied but the control copy within the meaning of that provision has not been furnished by the United

Kingdom, on that ground alone the respondent is not empowered and *a fortiori* is not obliged to grant and pay the monetary compensatory amount to the exporter/importer concerned?"

3. A copy of the judgment making the reference was received at the Court on 14 June 1978.

The applicants in the main action, represented by B. H. ter Kuile, the Government of the United Kingdom, represented by R. D. Munrow, Treasury Solicitor's Office, and the Commission of the European Communities, represented by its Legal Adviser, J. H. J. Bourgeois, submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

By an order of the Court of 3 November 1978 this case was assigned to the First Chamber in accordance with Article 95 (1) of the Rules of Procedure.

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

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

(1) The *applicants* in the main action submit in particular the following observations:

(a) First question

The products in question correspond to the definitions of the products referred to in Article 1 (2) (c) and (d) of Regulation (EEC) No 2771/75 on the common organization of the market in eggs (Official Journal 1975, L 282, p. 49) and monetary compensatory amounts are applicable to them. Even if this were not so those definitions are not decisive in this case since the sphere of application of Regulation No 2771/75, as defined in Article 2 (1), covers a number of headings of the Common Customs Tariff including heading 04.05 B I.

Neither the notes at the beginning of Chapter 4 of the Common Customs Tariff nor those at the beginning of Chapter 21 refer to headings 04.05 B I or 21.07 G I (a) 1. According to the general rules of classification for tariff purposes the classification of products is decided principally on the basis of the wording of the headings and of the notes thereto and, where there is doubt, in accordance with the criteria mentioned in Rules 2 (b) or 3 (a) and (b) of the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, in so far as they are not contrary to the above-mentioned wording or notes.

Egg products, such as the Hentex products, correspond directly to the wording of heading 04.05 B I since it refers specifically to "Eggs, not in shell; egg yolks: ... Dried ...". Classification under heading 21.07, "Food preparations not elsewhere specified or included", is ruled out because of the subsidiary nature of that heading.

If any doubts are nevertheless harboured concerning the classification of the products in question under heading 04.05 B I they may be dispelled by General Rule 2 (b) which, with regard to "mixtures", refers to the classification criteria set out in Rule 3 (a) and (b) which state:

"3. When, for any reason, goods are, *prima facie*, classifiable under two or

more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable."

Consequently the products in question must be classified under heading 04.05 B I:

— First, because they correspond specifically to the description contained in that heading and because that heading can thus be considered as the "heading which provides the most specific description" within the meaning of the above Rule 3 (a);

— Secondly, because eggs are the component which gives them their essential character and heading 04.05 B I is thus applicable to them pursuant to the above-mentioned Rule 3 (b).

(b) Second question

It is clear from the decision of the Produktschap of 14 February 1978 that the dispute does not concern the "grant" of the monetary compensatory amounts but rather their "payment". In accordance with Article 11 (2) of Regulation No 1380/75 such amounts must be paid when the "proof" referred to in that provision has been provided. The fact to be proved is the date on which the products in question were put to the intended use or reached their destination, that is to say in this case the date on which they were imported into the United Kingdom. As to form, the "proof" must be produced by a special kind of Community transit document known as a "control copy" with the section headed "Control as to use and/or destination" in which the specific information required must be inserted.

In the present case the Produktschap refused to pay the amounts in dispute on the sole ground that the information required had not been expressly inserted in the appropriate section on the control copy. A control copy concerning 40 boxes of Hentex, produced as an annex to the written observations, and the accompanying letter from the British customs authorities of 8 November 1977 show that:

— The section "Control as to use and/or destination" contains the hand-written statement: "Duty-free, levy exempt, satisfied", and a stamp indicating "Exempt II, 02. 11. 77, Hull";

— The accompanying letter from the British customs states that the goods were admitted for domestic consumption in the United Kingdom under tariff heading 21.07 F I (a) 1 (now heading 21.07 G I (a) 1).

That information is equivalent to the requirements mentioned in Article 11 (2) of Regulation No 1380/75, namely that the goods exported to the Netherlands which, it is provided, qualify for the monetary compensatory amounts, were in fact imported into the United Kingdom. The above-mentioned Article 11 (2) is capable of being interpreted in this way by the Netherlands, which, as the exporting State is responsible for the

grant and payment of such amounts, is bound to pay them.

Furthermore, it is to be observed that the "proof" in question does not depend on a check by means of a second sample effected by the customs authorities of the importing State (the United Kingdom) with regard to the tariff classification accepted by the customs authorities of the exporting State (the Netherlands). The Produktschap cannot rely in the present case on any evidence other than the control copy (cf. judgment of 22 October 1970, *Craeynest*, [1970] ECR 912).

Henningsen accordingly suggests that the reply to the questions submitted should be as it has suggested above in its observations.

(2) The *United Kingdom* states explicitly that its observations refer to the first question submitted by the Netherlands court, and recalls that, although the Common Customs Tariff was not fully applicable by the United Kingdom at the time when the transactions in dispute took place, it nevertheless applied the nomenclature contained in the tariff in accordance with Article 39 (4) of the Act of Accession.

In the opinion of the United Kingdom a mixture containing only 50% of egg powder and including in addition substantial quantities of soya meal, glucose syrup and a smaller proportion of lecithin cannot be considered as coming under heading 04.05 or subheading 04.05 B I (a) 1.

According to the United Kingdom the products in question are goods referred to in subheading 21.07 G and, having regard to the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, should be classified under that subheading.

This view is furthermore supported by the Explanatory Notes of the Customs Co-operation Council on heading 21.07 which, in accordance with the judgment of the Court of 8 December 1970 in Case 14/70 *(Deutsche Bakels GmbH* [1970] ECR 1001) must be applied in interpreting the nomenclature of the Common Customs Tariff, in particular, where the tariff does not itself contain any explanatory note with regard to a specific heading.

The Explanatory Notes to the Customs Tariff of the European Communities do not mention, with regard to the two subheadings in question, mixtures such as the products at issue but the note to subheading 04.05 B I states that that subheading applies to whole eggs or yolks not in shell if they are preserved by the addition of small quantities of specified chemicals. It does not state that all mixtures containing whole eggs or yolks should come under that subheading.

(3) The *Commission* first recalls the essential aspects of the system for monetary compensatory amounts and the detailed rules applicable thereto, in particular those based on the provisions of Article 2 a of Regulation No 974/71, as amended by Regulation No 509/73, and of Article 11 (2) of Regulation No 1380/75 and in particular makes the following observations:

(a) First question

Although the question is submitted as a choice between two tariff headings, 04.05 and 21.07 of the Common Customs Tariff, it cannot be ruled out in theory that a product with a composition such as that at issue in the present case might be classified under another tariff heading, in particular heading 23.07 ("... other preparations of a kind used in animal feeding") on the basis of the specific use of the product, of the part

played by its various components having regard to that use and of the result of a chemical analysis of its content in sucrose and starch.

With regard to the distinction between tariff headings 04.05 and 21.07 it may be inferred from the definition of the scope of the latter heading provided by the Explanatory Notes to the Nomenclature of the Customs Co-operation Council and of the definition of subheading 21.07 G I that the latter covers *inter alia* food preparations which do not contain milk-fats at all or contain less than 5%. A mixture of whole hen-egg powder, soya meal, glucose syrup, salt and lecithin would in fact result in a preparation which might be described as a "food preparation" within the meaning of that tariff heading.

With regard to heading 04.05 it is necessary to take account on the one hand of its wording which refers to "birds' eggs and egg yolks" and not of egg products in general, and on the other of the "Explanatory Notes to the Nomenclature of the Customs Co-operation Council" on that heading and on subheading 04.05 B I.

It is clear from the wording of the tariff heading that, whilst the addition of certain components is not *per se* excluded, it is nevertheless necessary to establish in all cases the essential character of the "birds' eggs and egg yolks" and that the product should not be an egg product in general.

Secondly it is clear from the above-mentioned Explanatory Notes that only certain components may be added, in accordance with their nature or function: such components must be for preserving the product.

Having regard to those factors it is clear that a product such as the one in question, having regard to its composition, in particular its content in soya meal (25%), precludes its classification under subheading 04.05 B I. The product is rather a "preparation" within the meaning of the nomenclature of the Common Customs Tariff. However, it is impossible to consider that "preparation" as a "preparation of flour" within the meaning of heading 19.02 since the addition of 25% of soya meal does not give it the character essential for such a preparation: it is impossible to classify it otherwise than under heading 21.07 as a "Food preparation not elsewhere specified or included".

(b) Second question

In accordance with Article 11 (2) of Regulation No 1380/75 the exporting Member State which wishes to exercise its option to pay the monetary compensatory amounts on importation into another Member State can do so only upon production of proof that customs import formalities have been completed and that the duties and charges having equivalent effect payable in the importing Member State have been charged. The formalities concerning such amounts must in principle be dealt with by the importing Member State whilst the exporting Member State's only rôle is to effect the actual payment. This means, *inter alia*, that it is for the importing Member State to decide

whether or not such amounts apply to a given operation.

That interpretation is confirmed not only by the wording of the relevant provisions, from which it is clear that a compensatory amount paid by the exporting Member State is that which must ("should") be paid by the importing Member State, but also by the system considered as a whole.

Regulation No 1112/73, which inserted Article 2 a in its present form, into Regulation No 974/71, has in fact abolished the granting of compensatory amounts by the exporting Member State alone, without affecting the rules on the addition and deduction of the amounts, and has returned to a system whereby each Member State charges and grants "its" compensatory amounts.

The formalities prescribed by Regulation No 1380/75 were clearly envisaged with a view to such a system. In transactions such as the one in question there are indubitably two distinct amounts, applied in accordance with separate provisions, namely:

(i) A compensatory amount on export, which is "determined" on the day of export (as defined in Article 8 (2)) the "payment" of which is conditional upon the production of proof that the product in respect of which the customs export formalities were completed has left the territory of the exporting Member State in which the formalities were completed (Article 10 (1)).

(ii) A compensatory amount on import which is "determined" on the day of import (as defined in Article 8 (5)), the "payment" of which is conditional on the production of proof that customs formalities have been completed and that the duties and charges having equivalent effect payable in the importing Member State have been charged (Article 10 (2)).

The option made available by the abovementioned Article 2 a — namely payment by the exporting Member State of the compensatory amounts on import — must and can be considered only in the context of this system. That option in no way constitutes a derogation from the rules on the "determination" of the compensatory amounts on import; it derogates from the rules on the "payment" of that amount only to enable the exporting Member State to make the payment. The provisions on proof remain the same under the general rules and the optional rules (cf. Article 10 (2) and the first subparagraph of Article 11 (2)); only the manner in which proof must be produced is altered (second subparagraph of Article 11 (2)).

The procedure prescribed in Article 11 (5) of Regulation No 1380/75, as inserted by Regulation No 1498/76, does not apply to this case. It authorizes the replacement of a lost control copy and was not intended to permit the exporting Member State to place itself in the position of the importing Member States in completing the formalities prescribed under the rules for the latter State.

Under this system a single tariff classification is adopted in the importing Member State for compensatory amounts on import whether the latter State or the exporting Member State makes itself

responsible for the payment of these amounts. There is indeed a risk that in the same transaction the tariff classification accepted for the amounts on import will differ from that applied in respect of the amounts on export. Such a risk is, however, inevitable in the present state of the rules, whereby the importing Member State is not obliged in applying "its" compensatory amounts to adopt the tariff classification accepted by the exporting Member State in applying "its" amounts.

In conclusion the Commission adds that, despite its efforts, the tariff classification adopted by one Member State is not at present binding on another. It notifies its classification opinion where the Member States concerned differ. Such an opinion does not, however, constitute a decision binding those States. The Commission explains, that on the other hand, it considers itself bound by its interpretation with regard to its interventions within the framework of the financing of the common agricultural policy and to the reimbursement of monetary compensatory amounts.

III — Oral procedure

At the hearing on 15 February 1979 (V.o.F. Henningsen Van den Burg and the Commission of the European Communities submitted their oral observations.

The Advocate General delivered his opinion at the hearing on 22 March 1979.

Decision

1 The College van Beroep voor het Bedrijfsleven, in its judgment of 9 June 1978 which was received at the Court Registry on 14 June 1978, referred to the Court pursuant to Article 177 of the EEC Treaty, questions on the interpretation of certain provisions of the Common Customs Tariff and on Regulation (EEC) No 1380/75 of the Commission of 29 May 1975 (Official Journal 1975, L 139, p. 37) laying down detailed rules for the application of monetary compensatory amounts.

2 Those questions were raised in the context of a case concerning the application of Article 2 a of Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257), as amended by Regulation No 1112/73 of the Council of 30 April 1973 (Official Journal 1973, L 114, p. 4). According to that provision, "where a product exported from one Member State has been imported into a Member State which has to grant a compensatory amount upon importation, the exporting Member State may, by agreement with the importing Member

State, pay the compensatory amount which should be granted by the said importing Member State".

3 At the time at which the events in question took place that provision was applied to exports from the Netherlands to the United Kingdom. Pursuant to the said provision the applicants in the main action claimed from the Produktschap voor Pluimvee en Eieren (hereinafter referred to as "the Produktschap") payment, on the importation into the United Kingdom of certain products having a content in whole hen-egg powder of 52%, of the compensatory amounts payable by the United Kingdom on the importation of goods under subheading 04.05 B I of the Common Customs Tariff. The Netherlands authorities accepted the classification of the said products under subheading 04.05 B I ("Eggs, not in shell; egg yolks: Suitable for human consumption") which entails the application of compensatory amounts, whilst the British authorities considered, when the products were imported into the United Kingdom, that they came under subheading 21.07 G I (a) 1 ("Food preparations not elsewhere specified or included: Other: ... Containing no starch or containing less than 5% by weight of starch") to which on the other hand compensatory amounts are not applicable.

4 Following the tariff classification adopted by the British authorities the Produktschap took the view that, with regard to the products in question, it was unable to pay the compensatory amounts on importation into the United Kingdom since the British authorities had not completed the formalities laid down by Article 11 of the said Regulation No 1380/75 as conditions for the grant by the exporting Member State of the compensatory amount payable by the importing Member State. The applicants in the main action thus complain that the Netherlands authorities have interpreted and applied wrongly the provisions of Article 11 of Regulation No 1380/75 laying down detailed rules for the application of the above-mentioned Article 2 a of Regulation No 974/71 and contest the tariff classification adopted by the British authorities.

5 In order to settle this dispute the College van Beroep voor het Bedrijfsleven has submitted the following questions to the Court:

"1. Is Article 1 (2) of Regulation (EEC) No 974/71 of the Council, read in conjunction with the content of the Annex to Council Regulation (EEC) No 2500/77, in particular with the content of tariff subheadings 04.05 B I and 21.07 G I (a) 1 as set out in that annex, to be interpreted as meaning that a product such as 'Hentex' which is composed of:

52% whole hen-egg powder

25% soya meal

22% glucose syrup

1% salt and lecithin

must be classified under tariff subheading 04.05 B I or under tariff subheading 21.07 G I (a) 1?

2. Is the second sentence of Article 11 (2) of Regulation (EEC) No 1380/75 of the Commission to be interpreted as meaning that, even if the product 'Hentex' does fall under tariff subheading 04.05 B I and the customs import formalities for the United Kingdom have been completed and the duties and charges having equivalent effect payable in that Member State have been levied but the control copy within the meaning of that provision has not been furnished by the United Kingdom, on that ground alone the respondent is not empowered and *a fortiori* is not obliged to grant and pay the monetary compensatory amount to the exporter/importer concerned?"

6 With regard to the first question subheading 04.05 B I refers to the products to which it applies as "Eggs, not in shell; Egg yolks ... Suitable for human consumption". It is clear from the Explanatory Notes to the Customs Tariff of the European Communities that that subheading applies to such products "even if they have undergone a particular treatment with a view to removing pathogenic germs ..." and to eggs, not in shell, and egg yolks "preserved by adding small quantities of chemicals ...". It is clear from the wording of the said subheading and of the above-mentioned Explanatory Notes that the products to which the subheading refers are essentially birds' eggs, not in shell, and egg yolks, without further processing, to which any chemical components are added in small quantities only, in order to preserve them.

7 On the other hand heading 21.07 relates to "Food preparations not elsewhere classified or included". The Explanatory Notes to the Brussels Nomenclatures state with regard to that heading, at (A) and (B), that, provided that such preparations are not covered by any other heading of the Nomenclature, that heading covers *inter alia* "preparations consisting wholly or partly of foodstuffs, used in the making of ... food preparations for human consumption". Furthermore, subheading 21.07 G I (a) 1 has a residuary character in relation to food preparations as a whole inasmuch as it refers to the "other" food preparations not elsewhere specified or included "containing no starch or containing less than 5% by weight of starch".

8 Although the product in question has a significant content of whole hen-egg powder it contains appreciable quantities of other components, in particular soya meal and glucose syrup which are not in the nature of chemical additives whose sole purpose is to preserve the product. Although the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff provide at 3 (b) that mixtures of products which are not referred to in a specific heading must be classified in accordance with the material which gives them their essential character the Explanatory Notes to the Brussels Nomenclature nevertheless state that that rule "can only take effect provided the terms of headings or Section or Chapter Notes do not otherwise require". In those circumstances, it is impossible to classify a commodity having the character of the product in question under "birds' eggs and egg yolks" within the meaning of subheading 04.05 B I. On the other hand that product displays the characteristics peculiar to a "food preparation within the meaning of the Common Customs Tariff". Since the product is not referred to in any heading of the Nomenclature or in any heading or subheading of Chapter 21 of the Tariff it may thus be considered as coming under the "Food preparations not elsewhere specified or included ... Other" of subheading 21.07 G I (a) 1.

9 For those reasons the reply to the first question must be that a product composed of 52% whole hen-egg powder, 25% soya meal, 22% glucose syrup and 1% salt and lecithin does not come under heading 04.05 B I of the Common Customs Tariff but constitutes a "food preparation" coming under subheading 21.07 G I (a) 1 of the Tariff.

10 With regard to the second question its wording indicates that the national court submitted that question with reference to circumstances in which "even if the product 'Hentex' does fall under tariff subheading 04.05 B I" the importing Member State refuses to furnish a certificate to that effect.

11 It is clear from the foregoing considerations that the product in question does not come under tariff heading 04.05 B I applied by the exporting Member State. Since the refusal for the importing Member State to accept such a classification has thus proved to be justified under the Common Customs Tariff the second question submitted becomes devoid of purpose.

Costs

12 The costs incurred by the Commission of the European Communities and the Government of the United Kingdom, which have submitted observations to the Court, are not recoverable. As these proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by a judgment of 9 June 1978, hereby rules:

A product composed of 52% whole hen-egg powder, 25% soya meal, 22% glucose syrup and 1% salt and lecithin does not come under

heading 04.05 B I of the Common Customs Tariff but constitutes a "food preparation" coming under subheading 21.07 G I (a) 1 of the Tariff.

Mertens de Wilmars O'Keeffe Bosco

Delivered in open court in Luxembourg on 2 May 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 22 MARCH 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the College van Beroep voor het Bedrijfsleven, which I shall call for short "the College".

The Appellants in the proceedings before the College are an American company, Henningsen Food Inc., whose registered office is in Nebraska, and a Dutch company, Van den Burg Eierprodukten BV, whose registered office is at Waalwijk in the Netherlands. They have brought the proceedings in their capacity as managing partners of a Dutch firm named Henningsen Van den Burg, which carries on business at Waalwijk. I shall refer to them collectively as "Henningsen".

The Respondent, to which I shall refer as such, is the Produktschap voor Pluimvee en Eieren, a body whose functions include the application in the Netherlands of the Community legislation relating to monetary compensatory amounts (MCAs) on products subject to the common organization of the market in eggs.

The products covered by that organization are defined by Article 1 (1) of Council Regulation (EEC) No 2771/75 as being those of CCT Heading 04.05 A I "Poultry eggs in shell, fresh or preserved" and of CCT Heading 04.05 B I "Eggs not in shell and egg yolks suitable for human consumption, fresh, dried or otherwise preserved, sweetened or not". Those descriptions