In Case 104/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling in the action pending before that court between

FIRMA WOLFGANG OEHLSCHLÄGER, Hilden

and

HAUPTZOLLAMT (Principal Customs Office) EMMERICH,

on the interpretation of the provisions of the Common Customs Tariff relating to the tariff classification of unwrought aluminium and aluminium waste and scrap,

THE COURT (First Chamber)

composed of: G. Bosco, President, A. M. Donner and A. O'Keeffe, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Facts and Issues

The facts of the case, 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

1. In August 1970 Oehlschläger imported into the Federal Republic of Germany two consignments of goods which it described as "aluminium milling waste and filings" and it applied for them to be cleared through customs into free circulation. In the consignment notes, the goods were described as "aluminium pellets".

According to the details supplied in the order making the reference, the goods in question take the form of light grey shining metal pellets. Made out of

cables of various thicknesses by means of a machine called a shredder, they consist essentially of aluminium and contain only minute proportions of other metals. The original materials are first cut into short pieces with mechanical cutters. Then most of the particles of iron are removed with magnets, and the remaining materials are comminuted into irregularly-shaped grains by rotating cutters. At the same time the insulation is separated from the cables and reduced to small pieces. The constituent parts of the resulting mixture are then separated by an air jet by a process based on the difference in their specific gravity, and the materials thus separated from one another (aluminium, copper, insulation) are sorted into different storage bins.

The Hauptzollamt (Principal Customs Office) Emmerich (HZA) classified the said goods under subheading 76.01 A of the Common Customs Tariff (CCT) as "unwrought aluminium" in a provisional duty notice, which was declared final after an expert opinion had been obtained from the Zolltechnische Prüfungs- und Lehranstalt (Customs Technical Testing and Research Institute) Cologne. In 1970 unwrought aluminium was subject to autonomous duty of 10% or conventional duty of 9%.

On the other hand, the importing undertaking asked for the goods to be classified under subheading 76.01 B II of the CCT, under the designation "aluminium scrap". The products covered by that subheading are free of duty.

Proceedings in which objections were raised were unsuccessful, and the said undertaking commenced proceedings before the Finanzgericht (Finance Court) Düsseldorf. By a judgment of 3 September 1974 that court found against the undertaking, which appealed to the Bundesfinanzhof (Federal Finance Court) before which the case is now pending.

In the HZA's submission, the fact that the original material — which is admitted to be scrap for the purposes of the CCT — has been processed "deliberately and for a specific purpose" has given rise to a new product which must be classified according to its own properties. Since the goods at issue cannot be regarded in their present form as unusable, worn-out or broken articles, they cannot be classified as aluminium scrap under subheading 76.01 B II. They should be classified as unwrought aluminium in the form of rough pellets.

On the other hand the importing undertaking submits that the goods have not lost their status as scrap by virtue of their processing in the shredder, as breaking down cables for scrap involves more than merely comminuting them. Moreover final sorting is carried out only after importation. The goods still have the nature and the properties of used cables and have not been converted into a new product. Furthermore it is submitted that the said goods cannot be regarded as unwrought aluminium. On one hand, unwrought aluminium can be obtained only by a process of fusion; on the other, the imported goods contain not only aluminium but also other metals.

For its part, the Bundesfinanzhof considers that, on account of the structure of Chapter 76 (Aluminium) of the CCT, which draws a distinction between unwrought metal (76.01), semi-finished products (76.02 to 76.05) and articles of aluminium (76.06 to 76.16), the goods in question can only come under heading 76.01.

Therefore the only question to be decided is under which of the two subheadings in heading 76.01 the goods at issue are to be classified: under subheading 76.01 A, as "unwrought

aluminium", or under subheading 76.01 B, as aluminium waste or scrap.

Considering that the interpretation of the CCT applicable in this instance was not free from doubt, the said court by an order of 27 July 1977 stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Must tariff subheading 76.01 B of the Common Customs Tariff be interpreted as including goods consisting of chopped aluminium wire of a light grey shining appearance and produced in a so-called shredder by the comminution of used aluminium cables and substantial removal of the insulation?

2. In the event of Question 1 being answered in the negative, do such goods come under tariff subheading 76.01 A?"

2. A copy of the order making the reference was received at the Court Registry on 22 August 1977.

The Commission of the European Communities, represented by its Legal Adviser Manfred Beschel acting as Agent, submitted written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

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. By an order of 30 November 1977 it decided to assign the case to the First Chamber, pursuant to Article 95 of the Rules of Procedure.

## II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *Commission of the European Communities* observes that the term "scrap" in subheading 76.01 B of the Common Customs Tariff generally refers to remnants of metal having little or no remaining value, namely defective, worn or irreparable objects the original purpose of which can still be discerned but which can no longer serve that purpose

The scrap envisaged here consists of

— used metal goods which have become unusable for one reason or another,

— metal goods the state of which is not due to deliberate processing,

— metal goods fit only for the recovery of metal, the only remaining value of which is consequently the value of the metal itself.

The last of these three essential characteristics of "scrap" is emphasized by Note 6 to Section XV of the CCT, according to which "the expression 'waste and scrap' means waste and scrap metal fit only for the recovery of metal or for use in the manufacture of chemicals".

It is not correct to interpret this definition of "scrap" as turning only on the use for which the product is intended and as meaning that any object fit only for the recovery of metal must be regarded as "scrap" whatever its nature.

In fact, such an interpretation is not compatible with the fundamental rule of the CCT, which is that it is generally preferred to employ classifications based on the objective characteristics and properties of a product. That interpretation is also not in accordance with the wording of the note in question, from which it precisely emerges that the concept of "scrap" is not confined to objects which are "fit only for the recovery of metal".

On the contrary, as also emerges from the Explanatory Notes to the Brussels Nomenclature on heading 73.03 of the Customs Cooperation Council Nomenclature (CCCN), it is logical to interpret the note cited above as meaning that "unusable, worn-out and broken articles of iron and steel" must be regarded as "scrap".

Moreover that interpretation is convincing from the economic point of view, because, in so far as scrap can be partially or wholly separated and used for purposes other than the recovery of metal, it would lose its quality of being unusable used goods. For such goods, Note 6 — like the Explanatory Notes to the Brussels Nomenclature on heading 73.03 of the CCCN — excludes any possibility of tariff classification as scrap.

It follows from these considerations that, albeit that old aluminium cables may be classified as scrap, the goods at issue in the state in which they were imported cannot be so classified. In fact, in the case of those goods the original material had undergone complex processing designed to recover the metal. The product resulting from that processing was not merely "chopped aluminium wire" but grains of aluminium of a high degree of purity. Thus this case concerns fresh goods which, on the basis of their nature and properties, cannot be described as "scrap", and consequently cannot be classified under tariff subheading 76.01 B II.

As regards the possibility of tariff classification under subheading 76.01 A, the better view is that the expression "unwrought aluminium" which appears there does not designate a particular technical category of that metal, but the metal as such in its physical and chemical composition and as yet unprocessed. Although the material composition of "unwrought aluminium" is not defined in the CCT, a distinction is none the less made in the technical and scientific field between four sorts of "pure" aluminium according to their degree of purity, namely "Al 99., Al 99.6, Al 99.8 and Al 99.99, the letter H being added to these abbreviations in the case of cast aluminium.

Thus if grains of aluminium made out of aluminium cables by means of a shredder have the material composition of one of the four sorts of "unwrought aluminium" mentioned above, those grains must be classified as unwrought aluminium for the purposes of subheading 76.01 A, the ambit of which can moreover cover less "pure" products since according to general Rule No 2 (b) for the interpretation of the Nomenclature of the CCT:

"Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances . . . ."

That being the case, it follows that, in so far as aluminium is the distinctive component of the mixture in goods such as those at issue in this case, in the absence of any specific provisions for the interpretation of the Nomenclature of the CCT, such mixture must be classified as "unwrought aluminium" under subheading 76.01 A. The process by which the characteristics mentioned in the CCT have been acquired by the mixture have no relevance in this connexion.

In support of that conclusion, the Commission refers to the Explanatory Notes on heading 76.01 of the CCCN and to a "classification slip" of the Committee on CCT Nomenclature dated 18 May 1972.

It proposes that the questions raised should be answered as follows:

"Chopped aluminium wire of a light grey shining appearance and produced in a so-called shredder by the

comminution of used aluminium cables and substantial removal of the insulation comes under subheading 76.01 A of the CCT."

III — Oral procedure

Firma Wolfgang Oehlschläger, represented by Klaus Gründler, and the Commission of the European Communities presented oral argument at the hearing on 2 February 1978.

At that hearing Firma Wolfgang Oehlschläger alleged that the description of the goods at issue given by the court making the reference was not factually correct.

The Commission objected that it is not for the Court of Justice in the context of the present proceedings to verify the findings of fact concerning the goods at issue made by the national court.

The Advocate General delivered his opinion at the hearing on 23 February 1978.

## Decision

1 By an order of 27 July 1977 which was received at the Court on 22 August 1977, the Bundesfinanzhof under Article 177 of the EEC Treaty asked questions concerning the interpretation of certain provisions of the Common Customs Tariff relating to unwrought aluminium and aluminium waste and scrap.

2 Those questions were raised in the context of a dispute over the tariff classification of goods described by the importer as "aluminium milling waste and filings".

According to the details supplied by the national court in its order making the reference, the goods at issue consist of light grey, shining metal grains, which are obtained from used aluminium cables and from remnants of cables cut into short pieces in a shredder and then comminuted into irregularly-shaped grains by rotating cutters, the constituent parts of the resulting mixture then being separated and isolated from one another.

After obtaining an opinion from the Zolltechnische Prüfungs- und Lehranstalt (Customs Technical Testing and Research Institute) Cologne the German customs authorities classified the said goods under subheading 76.01 A of the Common Customs Tariff ("unwrought aluminium") bearing autonomous duty of 10%.

The importer challenged that classification, arguing that the imported goods came under tariff subheading 76.01 B II ("aluminium scrap") and are therefore free of duty.

3 In its oral observations, the plaintiff in the main action stated that the description of the goods given by the national court in its order making the reference is incorrect.

4 Under Article 177 of the Treaty, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter is empowered only to give rulings on the interpretation or the validity of a Community provision on the basis of the facts which the national court puts before it.

To verify whether such facts are correct is not within the competence of the Court of Justice, and is a matter for the national court.

5 In its first question, the Bundesfinanzhof asks the Court whether tariff subheading 76.01 B of the Common Customs Tariff must be interpreted as including goods having the characteristics defined above.

In the event of that question being answered in the negative, it is then asked whether the aforesaid goods come under tariff subheading 76.01 A.

As the tow questions relate to the tariff classification of the same goods, they must be dealt with together.

6 Subheading 76.01 B, Chapter 76, Section XV of the Common Customs Tariff refers to aluminium "waste and scrap".

The expression "waste and scrap" is defined by Note 6 to Section XV of the CCT as meaning, for the purposes of that Section, "waste and scrap metal fit only for the recovery of metal or for use in the manufacture of chemicals".

In addition, the Explanatory Note to the Brussels Nomenclature on heading 76.01 refers, for the definition of "aluminium waste and scrap", to the Explanatory Note on heading 73.03 concerning waste and scrap of ferrous metals.

The latter note defines the concept of "waste and scrap" by reference to "waste and scrap resulting from the cutting, shaping or other mechanical working of iron and steel" or to "unusable, worn-out and broken articles of iron or steel".

The same note also states that such articles are "frequently crushed or compressed together".

It follows from these provisions that the concept of "waste and scrap" in subheading 76.01 B of the CCT covers products which, as far as their objective characteristics are concerned, are left over from the cutting, shaping or other mechanical working of aluminium objects or are defective, used or irreparable aluminium articles and which, as regards the use to which they can be put, have no remaining value other than being fit for the recovery of metal.

Therefore, in view both of their form and of the processing from which they resulted, it does not appear that the goods described by the national court can be regarded as waste or scrap for the purposes of subheading 76.01 B of the CCT.

7 Accordingly, classification under that subheading being excluded, it falls to be considered, under the second question asked by the national court, whether the said goods can be classified under tariff subheading 76.01 A, which relates to "unwrought aluminium".

8 It emerges from the structure of Chapter 76, headings 76.02 to 76.05 of which refer to semi-finished products and headings 76.06 to 76.16 of which apply to finished products and other articles of aluminium, that the expression "unwrought aluminium" in subheading 76.01 A designates the metal as such, as yet unprocessed.

Although the Common Customs Tariff does not specify the percentage of metal which products coming under that subheading must contain, general Rule No 2 (b) for the interpretation of the Nomenclature Common Customs Tariff states that "Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances".

Furthermore, the Explanatory Note to the Brussels Nomenclature on heading 76.01 states that the expression "unwrought aluminium" also includes "aluminium pellets, mainly used in metallurgy".

According to the information supplied by the national court, the goods described are formed of grains of metal consisting essentially of aluminium and containing only minute proportions of other metals.

9 For all these reasons, the appropriate answer to the questions raised is that goods consisting of chopped aluminium wire of a light grey shining appearance and produced in a so-called shredder by the comminution of

used aluminium cables and substantial removal of the insulation come within subheading 76.01 A of the Common Customs Tariff in so far as they consist essentially of aluminium and contain only minute quantities of other metals.

## Costs

10 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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by an order of 27 July 1977, hereby rules:

**Goods consisting of chopped aluminium wire of a light grey shining appearance and produced in a so-called shredder by the comminution of used aluminium cables and substantial removal of the insulation come within subheading 76.01 A of the Common Customs Tariff in so far as they consist essentially of aluminium and contain only minute quantities of other metals.**

Bosco Donner O'Keeffe

Delivered in open court in Luxembourg on 16 March 1978.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber