JUDGMENT OF THE COURT
14 December 1995 *

In Case C-267/94,

French Republic, represented by Catherine de Salins, Assistant Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Jean-Louis Falconi, Secretary of Foreign Affairs in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri,

applicant,

v

Commission of the European Communities, represented by Francisco de Sousa Fialho, of its Legal Service, and Jean-Francis Pasquier, a national civil servant on secondment to the Commission's Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Regulation (EC) No 1641/94 of 6 July 1994 amending Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1994 L 172, p. 12),

* Language of the case: French.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, P. J. G. Kapteyn (Rapporteur), C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 September 1995, in which the French Republic was represented by Gautier Mignot, Secretary for Foreign Affairs at the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and the Commission by Francisco de Sousa Fialho and Jean-Francis Pasquier,

after hearing the Opinion of the Advocate General at the sitting on 17 October 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 26 September 1994, the French Republic brought an action under Article 173 of the EC Treaty for the annulment of Commission Regulation (EC) No 1641/94 of 6 July 1994 amending Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1994 L 172, p. 12, hereinafter 'the contested regulation').

2 Regulation No 2658/87 of 23 July 1987, referred to above (OJ 1987 L 256, p. 1), contains, in Annex 1 thereto, Chapter 23 entitled 'Residues and waste from the food industries; prepared animal fodder', which includes, among others, the following nomenclature codes:

'23 03 Residues of starch manufacture and similar residues, beet-pulp, bagasse and other waste of sugar manufacture, brewing or distilling dregs and waste, whether or not in the form of pellets:

23 03 10 — Residues of starch manufacture and similar residues:

— — Residues from the manufacture of starch from maize (excluding concentrated steeping liquors), of a protein content, calculated on the dry product:

23 03 10 11 — — — Exceeding 40% by weight

23 03 10 19 — — — Not exceeding 40% by weight

23 03 10 90 — — Other

...

23 09 Preparations of a kind used in animal feeding'.

3 By virtue of Article 9(1)(a), (b), (d) and (e) of Commission Regulation No 2658/87, the Commission has the power, according to the procedural rules laid down in Article 10, to adopt measures concerning the following:

'(a) application of the combined nomenclature and the Taric concerning in particular:

— the classification of goods in the nomenclatures referred to in Article 8,

— explanatory notes;

(b) amendments to the combined nomenclature to take account of changes in requirements relating to statistics or to commercial policy;

...

(d) amendments to the combined nomenclature and adjustments to duties in accordance with decisions adopted by the Council or the Commission;

(e) amendments to the combined nomenclature intended to adapt it to take account of technological or commercial developments or aimed at the alignment or clarification of texts;

...'

4 Article 1 of Commission Regulation (EEC) No 3492/91 of 29 November 1991 amending Regulation (EEC) No 2658/87, referred to above (OJ 1991 L 328,

p. 80), adopted pursuant to Article 9 of the latter regulation, added the following Additional Note No 1 to Chapter 23 of the combined nomenclature:

'1. Subheadings 2303 10 11 and 2303 10 19 include only residues from the manufacture of starch from maize and do not cover blends of such residues with products derived from other plants or products derived from maize otherwise than in the course of production of starch by the wet process. These products may, however, contain residues from the extraction of maize germ oil by the wet process.

Their starch content may not exceed 28% by weight on the dry product in accordance with the method contained in Annex I. I to Directive 72/199/EEC of the Commission and their fat content cannot exceed 4, 5% by weight on the dry product determined in accordance with method A contained in Annex I to Directive 84/4/EEC of the Commission.'

5 Article 9 of Regulation No 2658/87 was also the basis on which the Commission adopted the contested regulation, which provides, in the first and fifth recitals in the preamble thereto, that, in order to ensure uniform application of the combined nomenclature it is necessary to adopt provisions concerning the classification of residues of starch manufacture and to specify the scope of subheading 2303 10 19 by replacing Additional Note No 1 to Chapter 23.

6 The new Additional Note No 1 in Article 1 of the contested regulation provides:

'1. Subheading 2303 10 19 includes only residues from the manufacture of starch from maize and does not cover blends of such residues with products derived from

other plants or products derived from maize otherwise than in the course of the production of starch by the wet process.

These residues may, however, contain residues from the extraction of maize germ oil by the wet milling process, screenings from maize used in the wet process in a proportion not exceeding 15% by weight and residues of maize steep-water, from the wet process, including residues of steep-water used for the manufacture of alcohol or of other starch-derived products.

Their starch content may not exceed 28% by weight on the dry product in accordance with the method contained in Annex I. I to Directive 72/199/EEC of the Commission and their fat content cannot exceed 4, 5% by weight on the dry product determined in accordance with method A contained in Annex I to Directive 84/4/EEC of the Commission.'

7 The last recital in the preamble to the contested regulation states that the Combined Nomenclature Committee has not given its opinion within the time-limit indicated by its Chairman.

8 It is apparent from the documents before the Court that the Commission adopted both Regulation No 3492/91 and the contested regulation in the framework of the negotiations which, on behalf of the Community, it had conducted since 1991 with the United States of America on the importation into the Community of corn gluten feed from the USA.

9 It is established that corn gluten feed is a natural by-product derived from the extraction of starch from maize by the wet process and is classified under subheading 2303 10 of the combined nomenclature. It also appears from the case file that

those products have been admitted into the territory of the Community since 1967 free from customs duties and levies.

10 Regulation No 3492/91 stated that the residues from the manufacture of starch may contain residues from the extraction of maize germ oil by the wet process and mentioned their maximum starch and fat content.

11 The purpose of the contested regulation is, according to its wording, to bring within subheading 2303 10 19 residues from the manufacture of starch from maize containing (i) screenings from maize used in the wet process in a proportion not exceeding 15% by weight and (ii) residues of maize steep-water, arising from the wet process, including residues of steep-water used for the manufacture of alcohol or of other starch-derived products.

12 That regulation thus makes clear that corn gluten feed incorporating screenings not exceeding a certain proportion and residues from the use of the steep-water used in such manufacture falls under subheading 2303 10 19 of the combined nomenclature.

13 The French Government considers, however, that, by reason of their composition, those products do not fall under subheading 2303 10 19 but under heading 2309 so that they must be subject to custom duties upon their importation into the Community.

14 In support of its action against the contested regulation, it puts forward four pleas in law alleging lack of competence of the Commission to adopt the contested regulation, breach of the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on 14 June 1983 and approved

on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1, hereinafter 'the Convention'), insufficient statement of reasons and misuse of powers.

15 It is appropriate to examine first the plea in law concerning the lack of competence of the Commission.

16 In this connection, the French Government observes that, in accordance with Article 9 of Regulation No 2658/87, the Commission has the power to provide clarifications on the combined nomenclature and to adopt, under Article 9(1)(a) thereof, explanatory notes. On the other hand, it has no power to amend the scope of a tariff heading which is also fixed by the harmonized system established by the Convention. In this case, the Commission amended, by means of the contested regulation, tariff heading 2303 and thus indirectly granted new tariff concessions to non-member States, whereas the Council alone has the power to do so.

17 The Commission replies that, by supplementing by means of the contested regulation Additional Note No 1 to Chapter 23 of the combined nomenclature, it did no more than clarify the tariff heading in question, a power conferred upon it by Article 9(1)(b), (d) and (e) of Regulation No 2658/87. It considers that it did not thus grant any new tariff concessions to non-member States.

18 It is to be noted first of all that, according to its preamble, the aim of the contested regulation is to adopt provisions concerning the classification of residues of starch manufacture and to specify the scope of subheading 2303 10 19.

19 In such matters the Council has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, a broad discretion to

define the subject-matter of tariff headings falling to be considered for the classification of particular goods (see Case C-265/89 *Vismans Nederland* [1990] ECR I-3411, paragraph 13, and Case C-401/93 *GoldStar Europe* [1994] ECR I-5587, paragraph 19).

20 However, the Commission's power to adopt the measures mentioned in Article 9(1)(a), (b), (d) and (e) of Regulation No 2658/87 does not authorize it to alter the subject-matter of the tariff headings which have been defined on the basis of the harmonized system established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify.

21 It must therefore be considered whether the Commission, notwithstanding what is stated in the preamble to the contested regulation, has in fact amended heading 2303 of the combined nomenclature, thus exceeding the limit of the powers conferred upon it by Article 9 of Regulation No 2658/87.

22 The French Government claims in that regard that neither screenings from maize nor residues from steep-water used for the manufacture of alcohol or of other starch-derived products may be considered to be 'residues of starch manufacture' falling under position 2303.

23 According to the French Government, it is apparent from the case-law of the Court (Case 268/87 *Cargill* [1988] ECR 5151) that the term 'residues' refers only to products which are the direct result of an extraction process, to the exclusion of products, such as maize screenings, which were already in the basic product and do not undergo any change in the course of that process. Likewise, it does not refer to products, such as residues of steep-water used in the production of ethanol or other products, which derive from processing subsequent to and separate from the extraction process.

24 The Commission, on the other hand, considers that 'manufacture of starch from maize', within the meaning of heading 2303, is something broader than extraction of starch so that it encompasses the whole of the process of manufacture of starch and of derivative products using maize as the raw material. Residues of starch manufacture must therefore include all products resulting from the various stages of the starch manufacturing process, not only the products resulting directly from the extraction operation. The case-law on the definition of 'residues', relied on by the French Government, applies only to activities restricted to extraction.

25 The Commission emphasizes that maize screenings, which are produced in a screening operation forming part of the starch manufacturing process, must be considered to be residues of starch manufacture. The same applies to residues from steep-water used in the production of ethanol or of other starch-derived products since starch production plant and alcohol production plant are linked and that steep-water comes in fact from the starch manufacturing process.

26 The Court recalls first of all that, when interpreting heading 23.04 concerning residues resulting from the extraction of vegetable oils, it has held that the term 'residue' is not to be confused with that of 'waste'. That heading does not therefore cover all the products which remain after the extraction of a vegetable oil. On the contrary, in order to be covered by that heading they must be products which result directly from the operation of oil extraction and not products already in the basic product and not undergoing any change in the course of the oil-extraction process (see *Cargill*, paragraph 11, above).

27 Next, as pointed out by the Advocate General at point 64 of his Opinion, 'residues from the manufacture of starch from maize' within the meaning of subheading 2303 10, are in fact the residues resulting from the operation of extracting starch from maize.

28 Accordingly, products already in bulk maize and not undergoing any change in the course of the starch-extraction process may not be considered to be residues of starch manufacture.

29 That is precisely the case with maize screening residues.

30 As is apparent from the pleadings of the parties and the Opinion of the Advocate General (points 46 to 52), the first stage of the process of manufacturing of starch by the wet process consists in dry cleaning the bulk maize upon arrival at the factory by a screening process intended to remove broken grain, impurities and dust. Since those screening residues are already to be found in the bulk maize and do not undergo any change as a result of the extraction of starch from the maize, they do not therefore constitute residues from the manufacture of starch from maize.

31 Moreover, as the French Government rightly points out, the residues resulting from screening may not be considered to be mere impurities which, besides residues resulting from the extraction of starch, are contained in corn gluten feed.

32 In Case C-194/91 *Krohn* [1992] ECR I-6661, which concerned the question whether products deriving from the extraction of maize oil fell under subheading 23.04 B of the Common Customs Tariff even if they contained, besides oil extraction residues, other matter deriving in particular from the maize plant, other cereals or soya, the Court ruled that those products fall under that subheading in so far

as the substances extraneous to maize grain are present in very small quantities and it is established that it is technically impossible to avoid their presence under normal conditions of production, processing, transport, transshipment and storage, save by incurring costs disproportionate to the commercial value of the derived products in question.

33 The presence of 15% by weight of residues resulting from the screening of maize is clearly not a very small quantity.

34 As regards residues from steep-water used in the manufacture of alcohol or of other starch-derived products, as the Advocate General points out at points 50 and 51 of his Opinion, the starch obtained at the end of the manufacturing process may be subjected to further processing in order to obtain alcohol or other organic products by hydrolysis from which glucose is obtained by means of which ethanol or those other products are made. The steep-water is used in the process of manufacturing ethanol or other products from glucose.

35 Since the process of manufacturing alcohol or other products is a separate process, subsequent to that of the manufacture of starch, the steep-water residues obtained at the end of that separate and subsequent process cannot be regarded as residues from the manufacture of starch from maize, even though the steep-water used in that process comes from that used in the manufacture of starch.

36 Furthermore, the fact, mentioned by the Commission, that, following technical and economic developments, the process for the manufacture of ethanol has

become linked to that for the manufacture of starch in many production plants cannot alter the fact that two separate processes, each giving rise to their own residues, are involved.

37 That interpretation is moreover confirmed by the opinion of the Nomenclature Committee, referred to by the Advocate General at points 54 and 55 of his Opinion, according to which a product approximately one third of which consists of residues of starch manufacture, one third of residues resulting from the extraction of maize germ oil by the wet milling process and one third of ethanol steep-water solubles cannot be classified under heading 2303. Since such solubles are obtained during a totally different process, notably the manufacture of alcohol from cereals, the Committee considered that it was more appropriate to classify those products, having a specific composition in fats and proteins suitable for the feeding of certain animal species, under heading 2309.

38 As regards the Commission's argument that corn gluten feed, which had been exempt from import duties since 1967, has remained fundamentally unchanged as regards its essential components, including the addition of residues resulting from the screening of maize and of steep-water, and that it is rather the analysis techniques which have improved, enabling the composition of a product to be better determined and making necessary a clarification of the tariff heading in which the product is to be classified, it is sufficient to point out, as the French Government rightly does, that corn gluten feed was exempt from duties as residues from the manufacture of starch from maize falling under heading 2303 and that a better determination of the composition of corn gluten feed cannot alter the scope of that heading.

39 Finally, as regards the Commission's point that, if 'residues of starch manufacture' means only products resulting directly from the extraction operation, Regulation No 3492/91 and the contested regulation which replaced it also wrongly include in

that definition residues resulting from the extraction of maize germ oil by the wet milling process, it must be stated that the French Government has raised no objection against that part of the Additional Note. There is therefore no need to consider it.

40 It follows from all the foregoing considerations that, by including, in residues from the manufacture of starch from maize, residues resulting from the screening of maize used in the wet process in a proportion not exceeding 15% by weight and residues of steep-water used in the manufacture of alcohol or other starch-derived products, the Commission has modified heading 2303 and has therefore exceeded its powers.

41 Accordingly, without it being necessary to consider the other pleas in law of the French Republic, the contested Commission regulation must be annulled inasmuch as it provides that residues from the manufacture of starch from maize may contain residues resulting from the screening of maize used in the wet process in a proportion not exceeding 15% by weight and residues of steep-water used in the manufacture of alcohol or other starch-derived products.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Annuls Commission Regulation (EC) No 1641/94 of 6 July 1994 amending Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff inasmuch as it provides that residues from the manufacture of starch from maize may contain residues resulting from the screening of maize used in the wet process in a proportion not exceeding 15% by weight and residues of steep-water used in the manufacture of alcohol or other starch-derived products.**

2. **Orders the Commission to pay the costs.**

Rodríguez Iglesias Kakouris Hirsch

Mancini Schockweiler Kapteyn Gulmann

Murray Jann Ragnemalm Sevón

Delivered in open court in Luxembourg on 14 December 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President