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

accurately reflect the terms of Headings 04.05 A I and 04.05 B I as set out in the CCT itself.

Henningsen manufactures in the Netherlands and exports to the United Kingdom under the trade names "Hentex 76" and "Hentex 10" products of which the main ingredient is whole hen-egg powder. The Order for Reference is framed on the footing that there is no difference between the composition of Hentex 76 and that of Hentex 10. Their composition is, in that Order, stated to be:

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

At the hearing Counsel for Henningsen told us that that was in fact the composition of Hentex 76 and that the composition of Hentex 10 was different, namely:

74% whole hen-egg powder
25% glucose syrup
1% salt.

This Court cannot, however, on a reference under Article 177 of the EEC Treaty, go behind the findings of the national court on facts of that kind. Especially can it not do so on the basis of a mere oral statement by Counsel.

According to the findings of the College as set out in the Order for Reference, which is dated 9 June 1978, Henningsen's practice had been, for some two years before that, to enter the Hentex products for export as "whole hen-egg powder" and to classify them for that purpose under CCT Heading 04.05 B I. That classification was accepted by the Respondent until the British Customs authorities, in the latter part of 1977 it seems, challenged it. Those authorities, after a test of the goods by the British Government Chemist, decided that they should be classified under CCT Heading 21.07 which covers "Food preparations not elsewhere specified or included". The relevant sub-heading of that Heading was F I (a), which, as a result of an amendment of the CCT made by Council Regulation (EEC) No 2500/77 of 7 November 1977, became G I (a).

The important difference is that, whilst goods of Heading 04.05 B I attract MCAs, those of Heading 21.07 do not.

Your Lordships will have it in mind that, under Council Regulation (EEC) No 974/71 as (repeatedly) amended, a Member State with an appreciated currency, such as the Netherlands, grants MCAs on exports, whilst a Member State with a depreciated currency, such as the United Kingdom, grants them on imports. The result is that goods exported from the Netherlands to the United Kingdom, if they are goods to which MCAs apply, attract, cumulatively, the benefit of a "Dutch" MCA on exportation from the Netherlands and the benefit of a "British" MCA on importation into the United Kingdom.

Article 2a of Regulation No 974/71 (as replaced by Article 2 of Council Regulation (EEC) No 1112/73) enables agreements to be made between Member States for the two MCAs to be, in such circumstances, paid by the exporting Member State. There has at all material

times been such an agreement between the Netherlands and the United Kingdom.

Article 11 (2) of Commission Regulation (EEC) No 1380/75 provides that, where there is such an agreement, payment by the exporting Member State of the importing Member State's MCA "shall be conditional upon the production of proof that customs import formalities have been completed" and that that proof "shall be furnished by production of the control copy provided for in Article 1 of Regulation (EEC) No 2315/69" completed in certain specified respects. In particular, the competent customs office in the importing Member State must have completed the section of the form headed "Control as to use and/or destination" and added the formula "Monetary compensatory amount applicable on [date of entry for home use] not granted in [importing Member State]".

In the case of the consignments here at issue the British Customs declined to add that formula. The Respondent accordingly considered itself bound to refuse to pay any British MCA on those consignments although it had paid Dutch MCAs on their exportation.

The Respondent did, however, ask the Dutch Ministry of Agriculture and Fisheries to consult the Commission as to the correct tariff classification of the Hentex products. The Commission, in reply, expressed the opinion that those products, having regard to their composition, should be classified under Heading 21.07 G I (a) 1. We were told on behalf of the Commission that, whilst that opinion was not legally binding, there was behind it the sanction that, if the Dutch authorities paid MCAs in disregard of it, the Commission would resist any claim by the Netherlands for recoupment of the amounts so paid out of the EAGGF.

On 9 March 1978 Henningsen lodged an appeal with the College against the Respondent's refusal to pay the British MCA. As a result of some of the arguments presented to it on behalf of the parties, the College, by Order dated 9 June 1978, referred to this Court two questions.

The first is, essentially, whether a product composed of 52% whole hen-egg powder, 25% soya meal, 22% glucose syrup and 1% salt and lecithin should be classified under Heading 04.05 B I or Heading 21.07 G I (a) 1 of the CCT.

The College makes it clear, in its Order, that, if that question is answered in favour of Heading 21.07, the second question is irrelevant. That question — and again I leave out what is inessential in its formulation — is whether, even if the Hentex product is within CCT Heading 04.05 B I, the absence of a "control copy" completed by the United Kingdom authorities so as to comply with the requirements of Article 11 (2) of Regulation No 1380/75 precluded the Respondent from paying the British MCA.

In my opinion, there can be no doubt that a product having the composition set out in the College's first question is not within CCT Heading 04.05 B I but within Heading 21.07. The wording of Heading 04.05 B I does not fit such a

mixture. On the other hand the wording of Heading 21.07 G I (a) 1 does fit it.

The conclusion that I would thus reach, on the basis simply of the wording of each of those Headings, is supported by, so far as they go, the Explanatory Notes to the CCC Nomenclature and the Explanatory Notes to the CCT itself. These, particularly the latter, show that Heading 04.05 is not intended to include any and every product having an egg base, or even any product, however composed, consisting mostly of egg. In so far as Heading 04.05 includes a mixture at all, it does so only where there has been added to egg yolk or to whole egg either sweetening or a small quantity of salt or of a preservative chemical. Heading 04.05 is certainly not intended to comprise a product that consists, as to 25%, of soya meal.

On behalf of Henningsen it was sought to escape from that conclusion by invoking the General Rules for the interpretation of the Nomenclature of the CCT, in particular General Rules 2 (b), 3 (a) and 3 (b).

Those rules, however, by virtue of Rule 1, apply only where the Headings in the Nomenclature do not "otherwise require". So Rule 2 (b), which relates to mixtures, is in my opinion to be invoked only where there is no Heading in the Nomenclature expressly covering the mixture that is in question. Here that condition is not fulfilled, because Heading 21.07 covers it.

Rules 3 (a) and (b) are subject, not only to the general qualification in Rule 1, but also to the qualification expressed in Rule 3 itself that they apply only "when for any reason, goods are, *prima facie*, classifiable under two or more headings". Here that is not so, because the Hentex products are *prima facie* classifiable only under Heading 21.07.

The Commission, with its usual (and commendable) thoroughness, mentioned the possibility that those products might be classifiable under Heading 23.07, which covers "Sweetened forage" and "other preparations of a kind used in animal feeding". There is, however, nowhere in the papers, and in particular nowhere in the Order for Reference, any suggestion that the Hentex products are for use in animal feeding. For what it is worth, Counsel for Henningsen said at the hearing that those products "are used for many different purposes in the human food sector". So I think that we may properly disregard, in this case, Heading 23.07.

In the result I am of the opinion that Your Lordships should, in answer to the first question referred to the Court by the College, rule that a product having the composition set out in that question is within Heading 21.07 of the CCT and not within Heading 04.05.

On that footing the second question does not call for an answer and it would not be right for me to take up Your Lordships' time in discussing it. I will say only that I am impressed by the Commission's arguments leading to the conclusion that Article 11 (2) of Regulation No 1380/75 means exactly what it says. If that is right, it must follow that, in the present case, if the decision of the British Customs authorities had been wrong, Henningsen must have sought its remedy in the courts of the United Kingdom rather than in the Dutch courts.