RHEINKRONE-KRAFTFUTTERWERK v HAUPTZOLLAMT HAMBURG-JONAS

OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 25 May 1989 *

Mr President,
Members of the Court,

Introduction

1. The Finanzgericht Hamburg (hereinafter referred to as 'the national court') has referred the following question to the Court of Justice:

'Is Article 30(3) of Regulation (EEC) No 1371/81 of 19 May 1981 (Official Journal 1981, L 138, p. 1) to be interpreted as meaning that the term "mixture" covers only a product whose components fall under Chapters 2, 10 or 11 of the Common Customs Tariff or does that term also cover products whose components consist of products falling under Chapters 2, 10 or 11 and of products falling under other chapters; in particular, are mixtures of wheat flour and wheat bran which according to the General Rules for the interpretation of the Common Customs Tariff are to be classified as wheat flour mixtures within the meaning of Article 30(3) of Regulation No 1371/81?'

Commission Regulation (EEC) No 1371/81 lays down detailed rules for the administrative application of monetary compensatory amounts.

2. Article 30 of that regulation, on which the Court has not yet been requested to give a ruling, must be viewed in the light of the general principle that also finds expression in Articles 6 and 9 of the regulation, namely that unless otherwise provided for, the provisions for the application of the Common Customs Tariff and the rules for its interpretation are also applicable to monetary compensatory amounts because they complement the intervention measures provided for in the context of the common organization of agricultural markets. [1] The first two paragraphs of Article 30 expressly provide that Additional Notes to certain chapters of the Common Customs Tariff are to apply, *mutatis mutandis*, to monetary compensatory amounts. One of those is Additional Note 3 to Chapter 11 (the relevant chapter in this case), which was inserted by Regulation (EEC) No 3324/80 and introduces for 'mixtures' falling within the chapter in question a calculation (of duty) which corresponds to the calculation (for the monetary compensatory amounts to be granted) provided for in Article 30(3). Article 30(3) introduces special provisions in regard to monetary compensatory amounts

* Original language: Dutch.

1 — See Article 1(2) of Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (OJ, English Special Edition 1971 (I), p. 257).

for mixtures falling within Chapters 2, 10 and 11 of the Common Customs Tariff.

Article 30(3) is worded as follows:

'Monetary compensatory amounts which may be granted on mixtures falling within Chapter 2, 10 or 11 of the Common Customs Tariff shall be determined as follows:

(a) in mixtures where one of the components represents at least 90% by weight, the rate applicable to that component applies;

(b) in other mixtures, the rate applicable shall be that of the component which results in the lowest monetary compensatory amount. In cases where one or more of the components are not eligible for monetary compensatory amounts, no monetary compensatory amount shall be granted for the mixtures'.

3. The divergence of opinion between the applicant in the main proceedings, (hereinafter referred to as 'Rheinkrone') and the Commission, which in its observations supported the position of the defendant in the main proceedings, Hauptzollamt Hamburg-Jonas (hereinafter referred to as 'the Hauptzollamt'), may be broken down into two elements which to a certain extent are reflected in the question raised by the national court.

The first element is the general question whether Article 30(3) is to be interpreted as meaning that the term 'mixtures' also covers products whose components consist of products falling under Chapters 2, 10 or 11 and of products falling under other chapters. The second, more specific element of the question raised is whether mixtures of wheat flour and wheat bran which according to the General Rules for the interpretation of the Common Customs Tariff are to be classified as wheat flour are mixtures within the meaning of Article 30(3).

Facts and main proceedings

4. The facts are described in paragraphs 2 to 6 of the Report for the Hearing. I shall briefly summarize them here. During the period from August 1981 to August 1984, the applicant in the main proceedings applied for the grant of monetary compensatory amounts for the export from the Federal Republic of Germany to the Netherlands of a product obtained by mixing wheat flour (between 80 and 90% by weight) and wheat bran (between 10 and 20% by weight). Rheinkrone declared the product in question as wheat flour falling under subheading 11.01 A of the Common Customs Tariff. [2]

5. Note 2 to Chapter 11 of the Common Customs Tariff, the chapter concerning 'Products of the milling industry; malt and starches; gluten; inulin', contains rules for distinguishing 'cereal flours', that is to say Heading 11.01, from Headings 11.02 and 23.02. Heading 11.02 comprises 'cereal groats and cereal meal; other worked cereal grains (for example, rolled, flaked, polished,

2 — Council Regulation (EEC) No 3618/86 of 24 November 1986 amending Regulation (EEC) No 3331/85, amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ L 345, 8.12.1986, p. 1, at pp. 60 to 61).

pearled or kibbled but not further prepared) . . . ; germ of cereals, whole, rolled, flaked or ground' (hereinafter referred to as 'cereal groats'). Heading 23.02 covers 'Bran sharps and other residues derived from the sifting, milling or working of cereals or of leguminous vegetables' (hereinafter referred to as 'bran'). This heading forms part of Chapter 23, 'Residues and waste from the food industries; prepared animal fodder'.

Note 2 A contains the following rule: products derived from the milling of wheat[3] fall within Chapter 11, that is to say Headings 11.01 (cereal flours) or 11.02 (cereal groats) if they have, by weight on the dry product, a starch content exceeding 45% and an ash content not exceeding 2.5%. Products derived from the milling of wheat which do not fulfil the above conditions are classified under Heading 23.02 (bran).

Note 2 B then contains a rule for classifying the products which according to the foregoing fall under Chapter 11 under Heading 11.01 (cereal flours) or under Heading 11.02 (cereal groats). As regards wheat products, the rule is as follows: if the percentage passing through a silk gauze or man-made textile sieve with an aperture of 315 micrometers is (by weight) equal to or greater than 80%, those products are to be classified under Heading 11.01 (cereal flours) and are wheat flour. If not, they are to be classified under Heading 11.02 (cereal groats) and are wheat groats or wheat meal.

6. As indicated above, Rheinkrone declared the product in issue as wheat flour falling under subheading 11.01 A.[4] That declaration was confirmed by the analysis carried out on a number of samples by the Zolltechnische Prüfungs- und Lehranstalt (Customs Laboratory and Training College), Berlin, in accordance with the criteria laid down in Notes 2 A and 2 B.

Initially, that is to say from August 1981 to November 1983, that declaration was accepted by the Hauptzollamt. Only subsequently, in a decision of 7 December 1984, did the Hauptzollamt come to the conclusion that in accordance with Article 30(3) of Regulation (EEC) No 1371/81 monetary compensatory amounts should have been granted only at the lower rate applicable to wheat bran falling under subheading 23.02 A II of the Common Customs Tariff. In support of this new conclusion, the Hauptzollamt did not rely upon the analysis of the characteristics of the product carried out by the Zolltechnische Prüfungs- und Lehranstalt. Moreover, that analysis was not concerned with the manner in which the product at issue was obtained. According to Rheinkrone, whose assertion was confirmed at the hearing by the Commission's expert, that is a question to which a reply cannot be given *ex post facto*, that is to say after the manufacture of the product.

The only relevant matter of fact on which the Hauptzollamt's new conclusion was

3 — Analogous rules with regard to cereal products derived from the milling of rye, barley, oats, maize, rice and others are not relevant to these proceedings.

4 — The 'A' indicates wheat products; see the previous footnote.

based was therefore the indication given by the applicant, appearing on the control copies of the declaration, that it had manufactured the product from white wheat flour as to 80-90% by weight and wheat bran as to 10-20% by weight.

The preliminary question

7. The question for the national court is whether this new conclusion on the part of the Hauptzollamt is justified. Initially the national court referred to the Court an additional question relating to 'legitimate expectations' in connection with the Hauptzollamt's change in attitude, but this question was subsequently withdrawn. The only remaining question is thus the one which logically precedes it, whether a finished product obtained by mixing wheat flour (subheading 11.01 A) and wheat bran (subheading 23.02 A II) which, on the basis of the rules of the Common Customs Tariff, applied in this case after an analysis of samples, is wheat flour within the meaning of subheading 11.01 A of the Common Customs Tariff must be regarded as a 'mixture' of those two products within the meaning of Article 30(3) of the regulation on the application of monetary compensatory amounts.

The nub of the question is therefore the manner in which the term 'mixture' in Article 30(3) of Regulation No 1371/81 should be construed in the light of the relevant general and special rules of the Common Customs Tariff. What are those rules? In the first place, there is naturally Note 2 A and B of Chapter 11, which defines the product in question as wheat flour. Then there are rules relating to the concept of 'mixtures', which is also used in the Common Customs Tariff (*inter alia*, as has already been mentioned, in Additional Note 3 to Chapter 11, to which Article 30(2) refers). Thus, the Commission relies on General Rule A 2 (b) of the Common Customs Tariff, which in its first and last sentences provides:

'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. . . . The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3' (see below).

For its part, the national court attaches some importance to General Rule A 3 (b) of the Common Customs Tariff,[5] which contains a provision intended to facilitate the classification of 'composite products' under one heading or another. Under the terms of General Rule A 1, these two general rules govern the classification of products under tariff headings only 'provided such headings or Notes do not otherwise require'.[6]

5 — '3. When, for any reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

. . .

(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.'

6 — General Rule A 1:
'The titles of sections, chapters and subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.'

Let us now examine more closely the arguments of the parties on these two subquestions.

line of reasoning does not prevent the Commission from going on to maintain that the effect of Article 30(3), as thus declared applicable, is that the product in question must be regarded not as wheat flour, but as a mixture of wheat flour and wheat bran.

Arguments of the parties

8. In the first place, the question arises as to the interpretation of the expression 'mixtures falling within Chapter 2, 10 or 11 of the Common Customs Tariff'. Whether the word 'en' in the Dutch version, which corresponds to the word 'und' in the German version in fact conveys less accurately the intention of the legislature than the word 'ou' in the French version is not directly relevant to the solution of the dispute, which has no connection with Chapters 2 and 10. The question, however, is whether the enumeration of those three chapters is exhaustive. The wording of the provision suggests such a conclusion, and in their observations Rheinkrone and the Commission are agreed on that point. The conclusions which Rheinkrone and the Commission draw from this observation are not identical as regards the reply to be given to the second part of the question.

In its written observations, Rheinkrone, which was not aware of this point of view of the Commission, put forward not a parallel but an opposite line of reasoning. At the hearing, however, it did plead that Article 30(3) is not applicable since the product in question is a mixture of wheat flour (Chapter 11) and wheat bran (Chapter 23) and pointed out that Chapter 23 is not mentioned in the exhaustive enumeration. The applicant put forward that line of argument only in the alternative to its main argument that the product in question is not a mixture at all. Thus in the applicant's view the first, preliminary, question is whether the product in issue is a 'mixture'. I think this question must indeed be examined first. It is only if it appears that the product in question is a 'mixture' within the meaning of Article 30(3) that it becomes necessary to determine whether mixtures falling within Chapters 2, 10 and 11 of the Common Customs Tariff are the only ones covered by that article.

In the Commission's view, no assistance is to be gained from the exhaustive nature of the enumeration of those chapters in order to invalidate the Hauptzollamt's decision. The product in question is a product derived from the milling of cereals which, according to the criteria in Note 2 to Chapter 11 of the Common Customs Tariff, falls exclusively within that chapter, so that Article 30(3) is indisputably applicable. That

9. In relation to the question which must now be examined first, namely whether the product in question is a 'mixture' within the meaning of Article 30(3), the Commission put forward two arguments, one concerning the general meaning of the term 'mixture' as used in the Common Customs Tariff and the other concerning the specific objectives pursued by monetary compensatory amounts.

Let me begin by recounting the first argument. The Commission proceeds on the basis that the term was not defined in Regulation (EEC) No 1371/81 or in the General Rules for the interpretation of the nomenclature of the Common Customs Tariff. It does, however, refer to General Rule A 2 (b) (cited in point 7, above), according to which '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'. In the Commission's view, this provision refers to normal linguistic usage whereby any homogeneous product obtained from different materials constitutes a mixture. It infers therefrom that a product obtained from wheat and bran is a mixture, whether the bran mixed with the wheat comes from stocks or was separated from the flour produced from the same batch of grain, wheat and bran constitute two different substances which together form a homogeneous mixture comparable to flour.

In its second argument the Commission points out generally that Regulation (EEC) No 1371/81 is based on the principle that the monetary compensatory amounts to be granted do not always correspond to the headings of the Common Customs Tariff. If that were not the case Article 30(3) would be deprived of meaning, since the Common Customs Tariff lays down detailed rules of classification for the purpose of fixing customs duties and levies applicable to composite products. The Commission goes on to justify the existence of differences between customs law and the law on monetary compensatory amounts on two grounds, first the fact that monetary compensatory amounts constitute a means of regulating intra-Community trade, whereas customs duties and levies, in the context of the organization of agricultural markets, are intended to protect the Community market against the outside world and are based partly on international agreements, and secondly the fact that customs duties and levies are only charged, whereas monetary compensatory amounts may also be granted, that is to say they may not only be negative but also positive. The Commission concludes from the foregoing that stricter conditions were laid down for monetary compensatory amounts than for duties and levies. Those stricter conditions are, it says, intended in particular to make it more difficult to obtain products by mixing which do not correspond to market requirements in order to export them to another Member State, receiving considerable monetary compensatory amounts, and then separate them into their components and re-import the low-value component subject only to the payment of low monetary compensatory amounts. The Commission adds that there is nothing to indicate that the applicant in the main proceedings engaged in so-called 'carousel' transactions, but it is the risk of such transactions that justifies the existence of the provisions of Article 30(3) and the manner in which the Commission interprets those provisions.

10. As regards the meaning of the expression 'mixture' in Article 30(3), Rheinkrone takes as its starting point the judgment of the Court of 1 July 1982 in Case 145/81 *Hauptzollamt Hamburg-Jonas* v *Wünsche* [1982] ECR 2493, which concerned export refunds for compound feedstuffs. At paragraph 10 of the judgment,

the Court based itself on Note 2 A to Chapter 11 of the Common Customs Tariff (quoted above at point 5), a provision which classifies products derived from the milling of cereals under Chapters 11 or 23 of the Common Customs Tariff. The Court drew the following conclusions:

'It follows that the manufacturing process must be disregarded as far as the products in question are concerned. They must therefore be classified directly in the specific heading whose criteria for classification they satisfy' (paragraph 11).

'In that regard it should be emphasized that according to the consistent case-law of the Court, the decisive criterion for the classification of goods for customs purposes must in general be sought in their objective characteristics and properties as defined by the wording of the relevant heading of the Common Customs Tariff and the notes relating to the relevant sections or chapters thereof' (paragraph 12).

Rheinkrone concludes from that judgment that as regards mixtures comprising cereals or cereal-based products (flour), the manufacturing process cannot be used as a criterion; regard may be had solely to the objective characteristics and properties of the products as determined at the time when they are presented for customs clearance.

Rheinkrone then points out that although the product in question was obtained in this case by mixing wheat flour with wheat bran, it is not only, as the Commission stated, 'comparable to' wheat flour, but is in fact wheat flour. In support of that point of view, the applicant alleges that wheat bran is a form of wheat flour, the only difference between wheat bran and lighter wheat flour being a difference in the starch and ash content. In other words, wheat bran and wheat flour form a continuum, and the only possible objective criterion for distinguishing between them is a combination of limits for the ash and starch content, that is to say the criterion which is in fact used in Note 2 to Chapter 11 of the Common Customs Tariff, quoted above at point 5. It follows from the foregoing that when wheat flour within the meaning of the Common Customs Tariff is mixed with wheat bran, the bran loses its identity when the starch content of the finished product exceeds 45% by weight and the ash content falls below 2.5% by weight. The converse is equally true: if one of these two conditions was not satisfied, or neither of them was, the finished product would have to be regarded as 'bran' and the identity of the 'flour' used would disappear. At the hearing the Commission's expert endorsed the applicant's arguments on this point.

Moreover, so the applicant argues, there is no reason to suppose that the definition of 'mixtures' cited above, which has been applied by the Court as regards export refunds, should not also be valid in the case of monetary compensatory amounts. Article 30(3) contains no express and divergent definition of the concept of 'mixtures'. The fact that the same wheat flour (having an ash content in this case of 1.6% by weight) can be produced in two different ways points in the same direction.

The first method is to produce the wheat flour by a series of milling operations using whole grains of wheat, in which case there is no question of 'mixing' or of 'mixtures'. The second method — the one which was used in this case — consists of two series of operations. First, white wheat flour with an ash content of 0.6% by weight, then bran with a starch content of less than 28% by weight, are produced from the kernels and husks of cereal grains, separated by sieving. The white wheat flour and the bran are then mixed. Given that the quantity of raw materials needed and their price are the same whichever of the two methods are used, these factors cannot give rise to any differences in cost. Moreover, although according to Rheinkrone it is 'by definition' more expensive to conduct two operations, again according to Rheinkrone's assertions, which have not been contradicted, it is nevertheless more reasonable from a business point of view to proceed in two stages because the two intermediate products which are manufactured during the initial phase are in great demand, whereas there is little demand for the final product. In the exceptional event that there is a demand for the final product in question, it is not worthwhile to alter the technical manufacturing process; it is simpler to mix the two products which are in great demand and are therefore in continuous production. According to the applicant, a producer who is guided by such principles of business management cannot be regarded as having enriched himself in an unlawful manner. As I understand the applicant's argument, the manufacturing process used and chosen purely on grounds of business management cannot have any influence on the application of the Common Customs Tariff or the provisions relating to monetary compensatory amounts.

Assessment

11. After this extensive account of the parties' arguments, I can be relatively brief in formulating my own assessment. I should, however, state that I have some sympathy for the positions defended by both parties and that it is not without some hesitation that I have reached a conclusion. To explain my point of view let me set out two possible lines of reasoning.

The reasoning which leads to the acceptance of Rheinkrone's position is as follows. In view of the Court's case-law it is undeniable that the interpretation of the Common Customs Tariff and its headings is in principle applicable to market organizations, including monetary compensatory amounts, 'in the absence of any express provision' (as the Court expressly held in its judgment of 14 July 1978 in Case 5/78 *Milchfutter* v *Hauptzollamt Gronau* [1978] ECR 1597, paragraph 12). Moreover, the Court has frequently and consistently held that, in the classification of products under headings of the Common Customs Tariff, objective, independently verifiable criteria must play a decisive role, that is to say in general the manufacturing processes of the composition and the purpose for which the products are intended (see *inter alia* the judgments of 16 December 1976 in Case 38/76 *Luma* v *Hauptzollamt Duisburg* [1976] ECR 2027, paragraph 7, first subparagraph, and in *Wünsche*, cited by the applicant in the main proceedings and mentioned above at point 10). In the present case this point of view is all the more convincing since the

product in issue is a product: (1) which may be placed on a sliding continuous scale ranging from (very coarse) bran to (very light) wheat flour, (2) which may be manufactured in two different ways, either in a way which does not include any real mixing operation, by means of one series of milling operations from whole grains of wheat, or in a manner which does include a mixing operation, that is to say by separate milling of kernels and husks into fine flour and bran respectively, followed by the mixing of them both in order to obtain less light flour, and (3) in respect of which it can subsequently, on customs clearance, no longer be established in what way it was produced.

If, in the case of a product which, in accordance with Note 2 A of Chapter 11 of the Common Customs Tariff, is indisputably wheat flour and therefore not a mixture, the Commission wishes, for the purposes of monetary compensatory amounts, to define that product in a different manner, that is to say as a 'mixture' of wheat flour and bran, it must do so clearly and unambiguously. Article 30(3) of Regulation No 1371/81 does contain a special provision for 'mixtures', but does not define that concept in a manner which differs from the Common Customs Tariff. Wheat flour, as defined by the Common Customs Tariff, therefore remains wheat flour for the purposes of monetary compensatory amounts and does not become a mixture within the meaning of Article 30(3). That article relates solely to objectively identifiable mixtures of two different varieties of grain or their derivatives whose heterogeneous composition and method of production by mixing is detectable *a posteriori* (by means of technical aids).

The line of reasoning which, conversely, leads to acceptance of the Commission's viewpoint may be stated as follows. Article 30 of Regulation (EEC) No 1371/81 lays down, as regards the Common Customs Tariff, the special rules applicable to monetary compensatory amounts. Thus, paragraphs 1 and 2 state that certain Additional Notes are to apply *mutatis mutandis* to the levying of compensatory amounts on imports from a non-Member country and on exports to a non-Member country or to imports or exports in intra-Community trade. More specifically, Article 30(2) states *inter alia* that Additional Note 3 to Chapter 11 of the Common Customs Tariff is to apply, *mutatis mutandis*, to the levying of monetary compensatory amounts. Additional Note 3 refers to mixtures falling within Chapter 11 of the Common Customs Tariff and contains a rule which is identical in effect to that laid down in Article 30(3). The latter provision lays down a special provision relating to the grant of monetary compensatory amounts for mixtures falling within Chapters 2, 10 and 11 of the Common Customs Tariff. It is clear that the concept of a mixture within the meaning of Article 30(3) has the same meaning as the

concept of mixture in Additional Note 3 to Chapter 11 of the Common Customs Tariff, to which Article 30(2) expressly refers. Since that note does not contain any definition, in order to determine the meaning of the term 'mixture' as used in that note and in other notes (whether ordinary or additional notes), it is necessary to refer to General Rules A 2 (b) and A 3 (b) of the Common Customs Tariff. It appears therefrom that the concept is to be construed broadly and covers 'combinations of [a] material or substance with other materials or substances' or mixtures 'consisting of different materials' or 'made up of different components'. The Common Customs Tariff treats wheat flour and wheat bran, although they lie on a single 'continuum', as two different articles, so that a combination of those products constitutes a mixture.

12. The problem with the line of reasoning favourable to the Commission's viewpoint is that it relies on a rather problematic definition of the term 'mixture' in the Common Customs Tariff. Neither General Note A 2 (b), nor General Note A 3 (b) seek to give a definition of 'mixtures', but are intended to enable products to be classified under headings; the concept of a mixture is described there only incidentally. Might one not have expected the Commission, as the legislative authority, to have included a clear provision in Regulation (EEC) No 1371/81? That is true in particular of products such as the goods in question which can be manufactured in two different ways, one of which, the one used by Rheinkrone in the present case, constitutes a mixture but the other not, and in order to ascertain *ex post facto* which of the two methods was applied one can only rely on the manufacturer's declarations.

However that may be, it must be acknowledged that the concept of 'mixture' to which Article 30(3) refers is no different from the same concept as it appears in the Common Customs Tariff, *inter alia* (but not only) in Additional Note 3 to Chapter 11 (to which Article 30(2) refers) and that there it is described, if only incidentally, in General Rules A 2 (b) and A 3 (b) in a broad sense as a substance mixed or combined with other substances or as a product composed of different materials or made up of different components. It appears to me that bran and flour, even if they do constitute a 'continuum' in relation to each other, are, as regards their composition and the use to which they are intended to be put, different materials the assembly or mingling of which amounts to a mixture.

It is true that the abovementioned general rules only apply if, as regards the classification of goods under headings, they do not conflict with the terms of the tariff headings and the notes relating thereto. However, I think that Note 2 A to Chapter 11 of the Common Customs Tariff does provide a definitive answer to the question of the classification of the product in issue under subheading 11.01 A but does not provide a definitive answer to the question whether the product constitutes a 'mixture' (see also below at point 13). On this latter point, regard may (and must) therefore be had to the General Rules of the Common Customs Tariff.

A consequence of the foregoing considerations is that an important argument under-

pinning the point of view of the applicant in the main proceedings is removed, namely the assertion that in the absence of an expressly different definition of mixtures in Article 30(3) of Regulation (EEC) No 1371/81, the provisions of the Common Customs Tariff apply *mutatis mutandis* as regards monetary compensatory amounts, or rather, that assertion remains valid, but since a definition (albeit incidental) of 'mixture' appears in the General Rules of the Common Customs Tariff, this definition is indeed applicable but not in the way contended for by the applicant in the main proceedings. There remains Rheinkrone's second argument based on the reference to two different manufacturing processes, one of which consists of mixing and the other not. Since it has been established that Rheinkrone did in fact use the first method, this argument has only theoretical value in this case.[7] Consequently the reply which I suggest below applies solely to a mixture of the type appearing in this actual case, that is to say a mixture obtained by mixing different materials. I would, however, like to add that the broad definition of mixture mentioned above which is given in the Common Customs Tariff seems to encompass both manufacturing processes. However, for reasons of legal certainty, the Commission ought to make clear provision for that by the adoption of rules.

In conclusion, I would therefore recommend that the Court follow the second of the lines of reasoning described above. I do so partly in the knowledge that, as appeared when the national court withdrew the second preliminary question, the Hauptzollamt's decision seeking to recover monetary compensatory amounts which it considered have been wrongfully paid has been set aside (see the Report for the Hearing, at paragraph 11). In view of the good faith of the applicant in the main proceedings, the long delay and the change in attitude of the Hauptzollamt as to the application of the rules on monetary compensatory amounts and the difficulties of interpretation caused by Article 30(3) of Regulation (EEC) No 1371/81, the reply to that second preliminary question would not have presented me with many difficulties.

13. Now that I have arrived at the conclusion that Rheinkrone's product is a 'mixture' within the meaning of Article 30(3), even though that product constitutes wheat flour falling within subheading 11.01 A of the Common Customs Tariff, I must briefly go into the second part of the question, that is to say whether mixtures of products certain components of which fall under chapters of the Common Customs Tariff other than Chapters 2, 10 and/or 11 are also covered by the term 'mixture' in Article 30(3). On this point I agree with the opinion shared by the parties. It seems to me evident that the terms of Article 30(3) must be understood as being exhaustive. Does that, however, imply that the applicant's product escapes the application of the abovementioned provision on the ground that it is a 'mixture' of wheat flour (subheading 11.01 A) and wheat bran (subheading 23.01 A II)? Here again I am

7 — It should be noted that the Commission has not really stated its views on this argument. In its observations, it does make reference to two methods of mixing (see above at point 9). However, both cases concern separate products which have been mixed (either flour and bran from stocks or flour and bran from the same consignment of cereals) and not a product derived from a single milling operation (as described at point 10 of this Opinion).

unable to share the applicant's point of view. My opinion is based on the abovementioned General Rules A 2 (b) and A 3 (b) of the Common Customs Tariff. Those provisions are intended to facilitate the classification in a single heading of composite products consisting of mixtures or combinations of materials, or mixed products consisting of different materials or made up of different components. It follows that there is no contradiction between the fact that a product may constitute a mixture and its classification in a tariff heading. In other words, although it is a product falling within tariff subheading 11.01 A, wheat flour mixed with wheat bran nevertheless constitutes a mixture within the meaning of the Common Customs Tariff and Article 30(3) of Regulation (EEC) No 1371/81. Or again: the fact that a product is classified in a single tariff heading does not prevent that product from being a mixture.

Conclusion

14. On the basis of the foregoing considerations, I propose that the Court should reply to the question raised by the national court as follows:

'When, as a result of mixing white wheat flour falling under tariff subheading 11.01 A of the Common Customs Tariff with wheat bran falling under subheading 23.02 A II of the Common Customs Tariff, a product is obtained which, according to Notes 2 A and B of Chapter 11 of the Common Customs Tariff, is considered to be wheat flour, that product may nevertheless constitute a "mixture" within the meaning of Article 30(3) of Regulation (EEC) No 1371/81 and, in particular, a mixture falling within Chapter 11 of the Common Customs Tariff, that is to say one of the chapters which are exhaustively listed in that article.'