OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 31 OCTOBER 1972[1]

Mr President,
Members of the Court,

The College van Beroep voor het Bedrijfsleven by order dated 2 May 1972 has referred two questions for a preliminary ruling under Article 177 of the EEC Treaty in connexion with the proceedings pending before it between the company Granaria and the Produktschap voor Veevoeder (a Netherlands authority having functions in the law of the organizations of the market).

The first question is worded as follows:

'Does a true construction of Article 14 of Regulation (EEC) 120/67 and heading No 23.02 of the Common Customs Tariff referred to in Annex A to that regulation and reading as follows: "Bran, sharps and other residues derived from the sifting, milling or working of cereals" imply that a product, the mode of preparation and composition and qualities of which are as described above in respect of the product "hominy chop specified", must be classified under this heading?'

In the event of this question's being answered in the affirmative the court would further like to know whether any provision of the Treaty establishing the European Economic Community or of any regulation based on this Treaty and in particular of any of the EEC regulations mentioned in the present order provide for the possibility that the national authorities of a Member State may make use of a provision like that of Article 12(1) of the In- en Uitvoerbesluit Landbouwgoederen 1963 in conjunction with Article 2(g) of the In- en Uitvoerbeschikking Produktschap voor Veevoeder 1963 or like that of Article 15(1)(d) of the Beschikking Landbouwheffingen- en restitutieregime 1968 II for the granting of exemption from an obligation to pay the levy referred to in Article 14 of Regulation No 120/67/EEC in connexion with the import into the Community of a product falling under heading No 23.02 referred to in Annex A to that regulation.

For an understanding of these questions the following observations are called for.

In the period from 18 July 1968 to 13 July 1970, the plaintiff in the main action regularly imported a maize product called 'hominy chop specified' into the Netherlands from South Africa. In accordance with the plaintiff's declarations and after the taking of random samples, this product was assigned to tariff heading No 23.02, that is the heading number having the description: 'Bran, sharps and other residues derived from the sifting, milling or working of cereals'. Since this heading number is listed in Annex A to Regulation No 120 on the common organization of the market in cereals, the levies due under this regulation and the relevant implementing regulations were charged. Apparently, as the plaintiff learned at the end of 1969, classification was made under heading No 23.04 B on the import of 'hominy chop specified' and comparable products into Belgium and the Federal Republic of Germany, that is under the tariff heading which has the description 'oilcake and other residues (except dregs) resulting from the extraction of vegetable oils'. In view of the fact that this heading number is not covered by any levy rules, these imports remained free of levy. The same is said to have happened on the import of comparable products into the Netherlands from the USA. In any case, about 17 July 1970, the Netherlands authorities arrived at the view that 'hominy chop specified' belonged not under heading No 23.02 but under heading 23.04 B and could therefore be imported free of levy.

Having regard to these facts, Granaria wrote on 10 September 1970 to the Produktschap voor Veevoeder for the refund of the levies paid by it. This was, however,

1 — Translated from the French.

rejected in respect of consignments subjected to the levy before 10 August 1970, on the grounds that it was not apparent that the levy had been wrongly charged and that alteration of the tariff classification was not a measure with retroactive effect.

Since Granaria did not accept this, it brought an action before the College van Beroep voor het Bedrijfsleven and thus initiated the proceedings from which the two questions mentioned at the beginning arose. That court considers that the questions are material to its judgment because it does not appear sufficiently clear from the descriptions of the imported goods given by the parties (which have not been contested) whether classification under heading No 23.02 is really appropriate. Moreover, the court is faced with the fact that, in the event that classification should be under heading No 23.02, a refund of the levies could be made only on the application of the Netherlands provisions on exemption from levies, as is mentioned in the second question. In this respect the court needs to know whether the application of these provisions is compatible with Community law.

My opinion on these two questions which I have thus set out is as follows.

1. First, on the question whether heading No 23.02 of the Common Customs Tariff quoted in Annex A to Regulation No 120 (OJ, English Special Edition 1967, p. 33) is to be interpreted as meaning that it covers products corresponding to 'hominy chop' according to their preparation, composition and qualities.

In this connexion, the court has given a more precise definition of the goods in question having regard to the uncontested description given by the parties. According to this, what is involved, in the view of the Produktschap, is 'South African maize germ flour, unsuitable for oil extraction, with or without an admixture of coarse bran and with not more than 50% by weight of starch calculated on the dry product'. With regard to composition, the plaintiff has supplied the information that the goods contain at least 19% albumin and fats, at most 8% raw fibres and at most 35% starch. The plaintiff has described the method of preparation as follows: 'The maize germ is separated from grains of maize pre-treated with steam by means of a germ separating installation. In this process, the husks (bran) and a part of the soft endosperm are also inevitably separated from the grain. One thus obtains, on the one hand:

(a) germless, husked whole grains of maize,

(b) maize rice,

(c) maize meal and

(d) straw

and on the other hand:

(a) flour of maize germ and

(b) bran.

The maize germ flour is intended and used for the extraction of oil; the end products are oil and maize germ flour from which the oil has been removed. That part of the maize germ flour which is unsuitable for the extraction of oil is compressed—with or without an admixture of bran—in pellets into "hominy chop specified".'

If we attempt to answer the first question in the light of these statements, it is, of course, certain that it cannot be the task of this Court directly to undertake a tariff classification, for this in itself would amount to application of the law. At present it is only a question of interpreting the relevant tariff headings and laying down criteria for definition with the help of which the national court may undertake the classification. The question submitted is to be understood in this way. It is thus at the same time clear that in spite of its very specific wording, it is not to be regarded as inadmissible. As in other cases (12/71, 14/71), it must be assumed that the said precise definitions were rightly given because they serve to define the precise legal limits for which alone an interpretation can be given which may be of use in the main action.

With this reservation, I can now examine the problems submitted to us.

As you know the plaintiff says with regard to the interpretation of heading No 23.02 (bran, sharps and other residues derived from the sifting, milling or working of the cereals) that it obviously covers only residues from particular production processes such as sifting and milling and similar processes and is thus limited to the products of dry milling. Since, however, a wet process is used for the production of 'hominy chop specified', as indicated, there can be no classification of it under 23.02. On the other hand, heading No 23.04 (oilcake and other residues ... resulting from the extraction of vegetable oils) comes into consideration, because 'hominy chop specified' is obtained by oil extraction and because it must depend on the total context of the production process.

If in this question of definition heading No 23.04 is first considered, then considerable doubts as to the correctness of the interpretation given by the plaintiff quickly appear. In the first place the *wording* of the tariff heading is against it and in answering questions of classification this above all must be the basis. It is true that the wording 'residues ... resulting from the extraction of vegetable oils' on an unsophisticated interpretation would appear to refer to what remains from the basic material used after oil has been extracted, while it is difficult to reconcile the idea with this that it covers everything, apart from oil, which is obtained from the whole production process. Further reference may be made to the Explanatory Notes to the Brussels Nomenclature and the words solid residues remaining after the extraction of oil from oil seeds, oleaginous fruits and germ of cereals by solvents or in a press or rotary expeller (résidus solides de l'extraction par pressage, par solvant ou par centrifugation de l'huile contenue dan les graines) which point in the same direction citing oilcakes as products typically coming under heading 23.04. What the Court said in Case 36/71 [1972] ECR at paragraph 11 is also significant. In order to constitute residues within the meaning of those headings 'either starch or oil must have been extracted from the basic product in proportions equal to those which may be achieved by an economically rational application of modern procedures'. It appears to me that the applicant's inter pretation can scarcely be reconciled with this. Finally, it is necessary to bear in mind the general principle that production processes ordinarily have no relevance in tariff classification, but that rather the qualities of the goods in question and their composition are what matters. From this it may be concluded that, in interpreting tariff headings which are, exceptionally, based on the production process and thus necessitate its being taken into account, a restrictive interpretation is called for. In relation to heading No 23.04 this means that only the actual process of the extraction of oil can be considered or, in other words, only a product in which the production process is directly to be recognized. A wide interpretation in the manner advocated by the plaintiff would, on the other hand, obviously lead to considerable difficulties for the customs authorities and to uncertainty in classification. Accordingly, only residues from oil extraction can be classified under heading No 23.04. This clearly means that the 'hominy chop specified' imported by the plaintiff does not come within the heading, for the plaintiff says itself that it is produced from maize germ flour which from the beginning is unsuitable for oil extraction.

On the other hand, the following should be said with regard to heading No 23.02. Its wording alone, 'bran, sharps and other residues derived from the sifting, milling or working of cereals', that is, the use of the collective term 'working of cereals', scarcely allows the assumption that only products which are obtained from a dry milling process are covered. The words used seem rather to refer generally to all possible methods of processing cereals. It is true that, on the other hand, in the general considerations to Chapter 11 in the Explanatory Notes to the Brussels Nomenclature reference is made to heading No 23.02 in respect of residues from the milling of cereal grains ('résidus de *mouture*') and that this could favour the plaintiff's view. In this respect it is of interest that Article 3 of Regulation No 302/69 of the Council of 18 February 1969 (OJ, English Special Edition 1969

[I], p. 47) expressly provides 'Cereal germ, whether milled or not, shall in all cases fall within tariff heading No 11.02'. Such products are thus assigned to the chapter dealing with products of milling, and this apparently regardless of the manner (dry or wet) in which a separation of the germ came about. Also of interest is what is said in Regulation No 1052/68 of the Council of 23 July 1968 (OJ, English Special Edition 1968 (II), p. 323) in relation to the distinction between heading No 11.01 and 11.02, on the one hand (which are obviously not relevant here), and heading No 23.02, on the other. We read there in a footnote to heading No 11.01 (cereal flours): 'Inclusion under this heading is subject to the condition that the product in question has a starch content exceeding 45% and an ash content not exceeding ... 2% for products based on maize ... If either of the two conditions mentioned above is not fulfilled, the product in question shall be classified under tariff subheading 23.02 A on the basis of its starch content'. It may be concluded from this that reference to heading No 23.02 is important from the point of view of *principle*, that is, it may be assumed that the said heading No 23.02 is the *general* heading number in this connexion.

Accordingly, the view may be taken, as the Commission has done, that classification under heading No 23.02 is to be considered for a product if it is branlike and a residue in the working of cereals, including maize, and if furthermore, because it cannot be said to be a residue from oil extraction, the special heading (23.04) on such residues is excluded. Contrary to the view of the plaintiff, the first question must be answered to this effect and perhaps, as the Commission has proposed, it should be added that this also applies if the relevant product arises from a production stage prior to the actual oil extraction.

2. Question 2

The further question raised by the national court arises it is true only in the event of the Court's answering the first question in the affirmative (which, because this would mean the application of law, is in fact not possible).

It is permissible, however, to understand the national court to mean that the second question should be dealt with if this Court takes the view that it is possible that the products in question have to be classified under heading No 23.02. Since I consider that this may be said in respect of the first question, I must in consequence deal with the second.

As is known, the national court would like to know whether any provisions of the Treaty or a Community regulation *empower* national authorities *to apply* provisions of exemption as in the *law of the Netherlands* and thus to exempt from payment of the levies.

On this it must be recalled at the outset that Article 12 of the 1963 regulation concerning import and export of agricultural products adopted under the Netherlands import and export law provided that the competent minister should have power on application to grant exemptions from the provisions adopted in accordance with Article 7 (and thus *inter alia* from Community levies on goods coming under heading No 23.02) and that this power was delegated to the defendant in the main action by the In- en Uitvoerbeschikking Produktschap voor Veevoeder 1963. It should further be mentioned that after the repeal of this Beschikking with effect from 31 October 1968 the said Produktschap had the power as from 1 November 1968 on the basis of Article 15 of the Beschikking Landbouwheffingen- en restitutieregime 1968 II to grant exemption from the obligation to pay the levy if the levy was wrongfully charged (which is not so in the present case) and 'in certain cases on grounds of natural justice'. The second question should be answered in the light of these provisions.

If the question is considered according to its actual wording, the relevant answer may certainly be given without lengthy discussion. As the Commission has said, there is nowhere in the Treaty or in derived Community law a provision to be found which empowers the national authorities to grant exemptions from the obligation to pay the levy. Rather, the relevant

provisions lay down an unconditional obligation to charge the levy where the appropriate conditions apply. On this, reference may be made to Articles 14 and 15 of Regulation No 120 and also to the regulations of the Commission fixing the levies. A provision in Article 120 on the possibility of prohibiting the use of inward processing arrangements is of interest in this connexion. Taken literally this second question must accordingly be answered in the negative.

As the Commission has shown, the question may, however, be understood in a further sense, namely whether exemptions from the rules on levies, as the national court has in mind, are *compatible* with Community law. The following observations arise on this interpretation.

Reference must first be made, as the Commission does, to the extensive case-law relevant in this connexion. In fact, on the problem of the application of Community law by national authorities, a principle has been repeatedly emphasized in this case-law that the *scope* of Community law provisions cannot be affected by national rules; it is only national provisions on form and procedure which are relevant in the application of Community law and only then to the extent *required* to implement Community law. The Commission has carefully collected the numerous judgments relevant in this respect in its statement. The main thing in the light of these is, for present purposes, however, that the Netherlands provisions on exemption, with which the national court is concerned, relate not only to provisions on form and procedure but to provisions which affect *substantive* Community law since their aim is not to make the levy in the particular case.

Then, for an assessment of the compatibility of these Netherlands rules with Community law, a further consideration raised by the Commission is important. As is known, the common organizations of the market are intended, by means of a complete system of price guidance in the Community, to ensure a fair standard of living for the agricultural community. On this basis it can certainly not be permitted that the prices of imported goods should, as a result of the remission of levies, fall below the level provided for. This applies in any event if the goods go into free circulation in the Community, are available within the Community and are thus able to influence the level of prices. This is doubtless not altered, to limit the inquiry to the questions in the main action, if other imports come into the Community duty-free, that is, on the grounds that in such cases the principle of equality requires exemption and that there is no fear in such cases of the market's being influenced in the aforementioned manner. If some cases of incorrect classification have occurred which have led to levies not being charged, then if this practice were made general there would be a further danger to the domestic price level. Moreover, on principle in such cases there can be no unilateral action on the part of the Member States with all the dangers for the functioning of the organizations of the market arising from this, but intervention must be solely at a Community level, possibly in the form of a speedy harmonization of practice being attempted by the authorities responsible for classification.

Without exhausting the questions related to the national exemption from the obligation to make the levy in particular cases, it may be said in the present connexion that where the conditions mentioned by the Commission exist the system of Community law excludes use being made of provisions for exemption such as those contained in Netherlands law.

3. To summarize, the questions referred should be answered as follows:

a) Products obtained from the processing of maize and not strictly being the residues from oil extraction do not come within tariff heading 23.04 but can be classified under heading No 23.02 referred to in Annex A to Regulation

No 120/67. This applies also if the products in question arise from a processing stage which precedes the oil extraction from the maize.

b) Neither provisions of the Treaty nor the derived Community law empower the Member States to apply provisions on the exemption from the duty to pay the levy. If products coming under heading No 23.02 are imported and as a result of which they come into free circulation and are available in the Community, since such products are on principle liable to influence price formation in the Community, the Member States cannot grant exemption, from the levy on the basis of national rules for granting exemption, not even if in other cases similar imports have escaped the levy.