JUDGMENT OF THE COURT
23 MARCH 1972[1]

Günter Henck v Hauptzollamt Emden[2] (Reference for a preliminary ruling by the Finanzgericht Hamburg)

'Mixed forage'

Case 36/71

Summary

1. *Common Customs Tariff — Classification of goods — Criteria — Objective characteristics*

2. *Common Customs Tariff — Description of goods — Classification of a product under tariff headings 11.01 and 11.02 — Criteria*

3. *Common Customs Tariff — Description of goods — Classification of a product under tariff heading 23.07 — Criteria*

1. In the interest of legal certainty and of administration the characteristics and objective properties of products generally supply the decisive criterion for their classification in the Common Customs Tariff.

2. Products processed from maize and sorghum may be classified under tariff headings 11.01 and 11.02 if after processing they still contain the essential constituents of the basic product in proportions approximating to those of the product in its natural state.

3. Heading 23.07 refers to products which have been finally processed or are the result of a mixture of different substances and which are only suitable for feeding animals and not to agglomerated products the basic materials or materials of which come, as such, under a specific heading, even if they contain a binder not generally exceeding 3% by weight.

In Case 36/71

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg (Fifth Chamber) for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.
2 — CMLR.

GÜNTER HENCK, Hamburg-Altona,

and

HAUPTZOLLAMT EMDEN,

on the interpretation of headings 11.01, 11.02 and 23.07 of the Common Customs Tariff,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and H. Kutscher, Presidents of Chambers, A. M. Donner, A. Trabucchi (Rapporteur), R. Monaco and P. Pescatore, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts and of the procedure

The facts which form the basis of the dispute and the procedure may be summarized as follows:

During the period from 7 April 1965 to 12 January 1966 the undertaking Günter Henck, Hamburg, the plaintiff in the main action, imported into the Federal Republic of Germany products which it described as falling under either tariff heading 23.04 ('Oil-cake and other residues (except dregs) resulting from the extraction of vegetable oils') or tariff heading 23.03 ('Beet-pulp, bagasse and other waste of sugar manufacture; brewing and distilling dregs and waste; residues of starch manufacture and similar residues'). Accordingly the former were exempted from import levies whilst on the latter a turnover equalization tax of 4% was levied. The principal customs office subsequently considered that the imported products should be classified respectively under subheadings 23.07 B I b 1, 23.07 B I c 1, 23.07 B L d 1, 11.02 A V a and 11.01 E I of the Common Customs Tariff which are applicable to mixed forage, maize groats and maize flour.

In pursuance of the provisions of Regulation No 19/62 (OJ No 30 of 20.4.1962, p. 933) products which came under tariff headings

— 11.01 'Cereal flours',

— 11.02 'Cereal groats, cereal meal; worked cereal grains, pearled, crushed, flattened (including flakes) except husked, glazed, polished or broken rice; germ of cereals, including flours thereof',

— 23.07 'Animal food preparations including sweetened forage; other preparations used in animal feeding (additives, etc.):
ex. B containing cereals or containing products covered by the present Regulation',

were made subject to a common system of levies (Articles 1, 2, 10 and 14 in conjunction with the annex to the said regulations) during the period when the imports were effected. The criteria to be borne in mind for the calculation of the levy had been laid down by Regulation No 141/64/EEC (OJ No 169 of 27.10.1964, p. 2666) with regard to products which come under headings 11.01 and 11.02 and by Regulation No 166/64/EEC (OJ No 173 of 31.10.1964, p. 2747) with regard to animal food preparations which come under tariff heading 23.07.

On 22 December 1966 the German customs office consequently requested the plaintiff to pay the sum of DM 2 696 964.50 in respect of the levy and the turnover equalization tax. The Henck undertaking lodged an objection to the notice of assessment; this was dismissed by the defendant in the main action by a decision of 24 November 1967 on the ground that in Belgium the products in question had been declared as mixed forage (tariff heading 23.07) or as maize groats (tariff heading 11.02).

In its application to the Finanzgericht Hamburg the plaintiff maintained that the figures resulting from the analyses carried out by the laboratory of the Ministry for Economic Affairs and Energy in Brussels did not relate to the imports at issue in the case and that the figures which should be accepted were rather those which resulted from the certificates furnished by the Oleotest Laboratory, Antwerp.

The defendant objects that the test certificates furnished by the Oleotest Laboratory were based on samples which had been tampered with; furthermore, the reports on the composition of the goods which were drawn up by the producer undertaking confirm the accuracy of the tariff classification in dispute which also corresponds to the analysis data supplied by a customer of the plaintiff with regard to two other cases.

In its order for reference the Finanzgericht Hamburg points out that the outcome of the proceedings depends essentially on whether the findings as to the characteristics actually exhibited by the product which it will be required to reach in the course of the proceedings make it apparent that the tariff classification applied by the defendant is justified. It is impossible to resolve the question on the sole basis of the figures resulting from the analyses. The Explanatory Notes to the Brussels Nomenclature are of no assistance since they do not specify the dividing line between headings 23.03 and 23.04 which are exempt from the levy and the headings adopted by the defendant. Regulation (EEC) No 1434/69 of the Commission of 24 July 1969 (OJ, English Special Edition 1969 (II), p. 348), which lays down various 'analysis data' for the classification of maize products which come under tariff headings 11.01 and 11.02, only entered into force after the goods in question had been imported; the same applies to Regulation (EEC) No 823/68 of the Council of 28 June 1968 (OJ, English Special Edition, 1968 (1), p. 199) and Regulation (EEC) No 1216/68 of the Commission of 9 August 1968 (OJ, English Special Edition, 1968 (II), p. 421) which may be relevant with regard to the interpretation of tariff heading 23.07.

On the basis of those considerations the Finanzgericht Hamburg, by an order of 3 June 1971, which was received in the Court Registry on 30 June 1971, requested the Court of Justice to give a preliminary ruling on the following questions:

'1. May a product be classified under heading 23.07 of the Common Customs Tariff and therefore made subject to the levy in application of Regulation (EEC) No 19/62 of the Council of 4

April 1962 (OJ No 30, p. 933) (see Article 1 of Regulation No 19/62 in conjunction with the annex to that regulation) on the sole basis of objective characteristics, that is, without regard to the manner in which it is produced or obtained and in particular irrespective of whether or not it is an intentional mixture?

2. To what factual criteria must the composition of the product conform and in particular what must be its content in constituents such as, for example, starch, proteins, fats, etc. (see schedules annexed) in order that it may be classified:

   (a) under heading 11.01 of the Common Customs Tariff,

   (b) under heading 11.02 of the Common Customs Tariff,

   (c) under heading 23.07 of the Common Customs Tariff?

3. Does a mixture, intentionally produced, come under heading 23.07 of the Common Customs Tariff if it is composed:

   either

   (a) of 78% sorghum
   9% sorghum gluten
   and, as to the remainder, of molasses, maize husks and bran,

   or

   (b) of 4.9 % maize gluten
   80.08% sorghum gluten
   and, as to the remainder, of molasses, maize husks and bran?'

The Henck undertaking, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted written observations under Article 20 of the Protocol on the Statute of the Court of Justice annexed to the EEC Treaty.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without a preparatory inquiry.

The parties in the main action and the Commission presented oral argument at the hearing on 23 November 1971.

The Henck undertaking was represented by Mr Modest and Mr Röll of the Hamburg Bar, the Government of the Federal Republic of Germany by Mr R. Morawitz, Mr H. Lauberau and Mr H. Karbe, Advisers at the Federal Ministry for Economic Affairs and Finance and the Commission of the European Communities was presented by its Legal Adviser, P. Kalbe. The Advocate-General delivered his opinion at the hearing of 8 March 1972.

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

The observations submitted pursuant to Article 20 of the Protocol on the Statute on the Court of Justice may be summarized as follows:

The *Henck undertaking*, the plaintiff in the main action, points out first of all that the tendency, which the Court has displayed in its judgments in Cases 74/69, 12/71, 13/71 and 14/71, to take account, for the purpose of interpreting a tariff heading, not only of the purely customs function of the latter but also of the requirements of the system of organization of the markets, with the consequence that according to the needs of that organization the descriptions of goods in the Common Customs Tariff are sometimes interpreted in a narrower sense than their original meaning and sometimes given a wider or even divergent interpretation, has resulted in the same descriptions in the Brussels Nomenclature being variously interpreted and applied in the Member States of the Community on the one hand and in third countries on the other. The Henck undertaking recalls that the Brussels Nomenclature preceded the Community organiza-

tions of the agricultural markets by ten years and that it is applied by many other States in addition to the countries of the Community and states that the tendency appearing in the said judgments of the Court may well destroy the consistent principles based on practice which have become established with regard to the essential aspects of the interpretation and application of the descriptions of goods appearing in the tariff headings. This method of interpretation upsets the relationship between the customs tariff and the organization of the market and is incompatible with the principle of legal certainty, in particular since it retroactively affects a legal position acquired by a citizen who considered in good faith that a description of goods in the Common Customs Tariff would only be interpreted in accordance with the Brussels Convention on the Nomenclature for the Classification of Goods in the Customs Tariffs. The tendency of the Court and of the Commission runs contrary to the natural law of economics according to which a purchaser rejects a particular product in favour of a cheaper one when the latter enables him to achieve the same result. If, in an economy which wishes to be free it appears necessary to avoid a swing in favour of products which may be substituted for other products which are subject to a levy, the sole lawful method of achieving this result is to incorporate the former products into the organization of the agricultural markets and likewise to impose a levy on them.

The first question

The *Henck undertaking* observes that it is clear first of all from the wording of heading 23.07 (forage preparations and other preparations of a kind used in animal feeding) that this heading only refers to mixtures intentionally prepared from at least two different constituents. This is confirmed by a judgment of the Bundesfinanzhof of 29 May 1969 (VII B 182/67) as well as by a series of technical considerations concerning heading 23.02. The Henck undertaking sets out those considerations and draws the conclusion therefrom that mixtures the production of which necessitates manufacturing techniques or which are composed of products coming under the same tariff heading do not constitute intentional mixtures in the sense of heading 23.07.

Bearing in mind the meaning currently placed upon forage 'preparations' in the relevant circles in the countries of the Community, the Henck undertaking considers that heading 23.07 refers to feedstuffs made up for animals, prepared from products appearing under various tariff headings by a process specifically designed to achieve a certain nutritional result through the various constituents of which they are made up and which, owing to their individual effectiveness as feedstuffs, represent a new product distinct from their constituents. To this definition there must be added the information which emerges from Article 1(d) of Regulation No 19/62 and which, in conjunction with the annex thereto, establishes that heading 23.07 refers to animal food preparations containing products which are subject to a common organization of the markets. This result is confirmed by the Explanatory Notes to the Brussels Nomenclature, by the general scheme of the application of the customs tariff which emerges from the general rules for the interpretation of the nomenclature of the Common Customs Tariff and, in part at least, by the principles of interpretation laid down by the Court of Justice in Cases 74/69, 12/71, 13/71 and 14/71 to the extent to which the latter do not conflict with the basic reservations which the Henck undertaking explained at the beginning of its observations.

If account were taken of the purely customs function of the Common Customs Tariff, products classified under a certain tariff heading would remain there even after they had been subjected to chemical treatment in order to remove from or add to them certain constituents, provided that they still contain their essential elements in the proportion corresponding to the percentage normally existing in the final product. For the purpose of deciding what must be considered as 'essential' constituents of a specific product and as a normal fluctuation in its natural content

in those constituents, the sole factors which may be taken into account are the Common Customs Tariff and the concepts generally accepted in connexion with the latter. In those circumstances the ruling of the Court that the classification of a product under a certain tariff heading is 'principally' on the basis of the structure and use of that product cannot preclude the method of manufacture from likewise being of a varying degree of importance in this respect. Any ruling going beyond this would be in open contradiction with Chapter 23 of the Customs Tariff which adopts the method of manufacture as the sole valid criterion. Tariff heading 23.07 would be robbed of the specific nature conferred upon it by the authors of the Customs Tariff if the method of manufacture were not taken into account.

Furthermore, whilst it is true that the removal of a very small part of certain constituents from a product is incapable of altering in any way its classification under a specific heading, it follows that the reverse is also true; consequently, prepared animal fodder may not be classified under heading 23.07 if the quantities of an essential constituent have been added to a product in such small quantities that they have not conferred upon the mixture as such a greater nutritional value than that resulting from its original constituents, that in other words the mixture does not constitute a new product according to the concepts which are generally accepted. The correctness of this view is confirmed by the Explanatory Notes to the Brussels Nomenclature which state that a particular product constitutes sweetened forage within the meaning of heading 23.07 if its content in molasses or in glucose exceeds 10%.

Consequently, if the criterion is adopted that a product is classified under a specific tariff heading essentially on the basis of its structure and method of use, it is necessary to modify the principle provisionally put forward above to the effect that heading 23.07 also encompasses mixtures fortuitously obtained where their composition is similar to that ascribed by commercial practice to an animal feedstuff obtained by mixing.

The plaintiff in the main action consequently suggests that the answer to question 1 should be as follows:

'Tariff heading 23.07 encompasses animal food preparations which contain products subject to a common organization of the market and manufactured from products coming under different tariff headings through an operation intended to obtain a specific nutritional result on the basis of their various constituents, and which constitute, as such, a new product since they are endowed with an individual nutritional value distinct from that of their various constituents.

Heading 23.07 also encompasses mixtures obtained unintentionally where their composition is analogous to that generally found in the trade in the case of animal food preparations obtained by mixing'.

The *Government of the Federal Republic of Germany* observes that the animal or vegetable substances used as animal feedstuffs come under a large number of headings of the Common Customs Tariff, such as, for example, headings 11.05, 12.09, 12.10, 23.02, 23.03 and 23.04 with regard to substances of vegetable origin and headings 05.08, 05.015 and 23.01 with regard to substances of animal origin. The German Government states that it may be said as a general proposition that those substances used as animal feedstuffs come under those headings not only in their raw state but also after simple processing. Consequently, milling, preparing or preserving forage preparations does not in general entail its classification under heading 23.07 as 'animal food preparations'. However, this is not so if such substances have been subjected to more radical treatment or when products of various types used as animal feedstuffs are mixed together. In that case they constitute 'animal food preparations' within the meaning of heading 23.07. This generally applies when a mixture is made from forage substances which, individually considered, come under different headings of the Common Customs Tariff. On the other hand mixtures of various residues from the same manufacturing process which, individually considered, come under

the same tariff heading, continue to fall under the original tariff heading. The determining factor for the purpose of ascertaining whether they constitute animal feedstuffs is not the particular intended use in a given case but solely the objective properties and qualities of the products which render them suitable only for feeding animals and unfit for human consumption. For this reason mixtures of cereal grain, for example, or of cereal flours or flours of leguminous vegetables are generally excluded from heading 23.07 even if the intention was to produce an animal feedstuff.

As a matter of principle the method of obtaining the mixture is not essential because the Common Customs Tariff relates to the product in its form at the time of importation into the new economic territory. It must be possible to make an assessment of this product from the point of view of the duty to be levied in the form in which it presents itself as competing with comparable domestic products. For this reason the essential factors are the objective characteristics when the goods are classified for tariff purposes and not the method of production. It is unimportant whether the mixture was obtained intentionally or by chance. Within the framework of the market in cereals and in order to protect the Community processing industry, Regulation No 19/62 deliberately adopted as the sole criterion for the imposition of the levy the objective characteristics of the product and not the method of production or of obtaining the processed products. This criterion is also in accordance with the opinion of the Customs Cooperation Council, Brussels.

In conclusion, the German Government considers that the reply to the first question should be that only the objective characteristics of the product are to be taken into consideration for the purpose of classifying an animal feedstuff under heading 23.07.

The *Commission of the European Communities* considers that a mixture invariably constitutes a forage preparation within the meaning of heading 23.07 if, in view of its particular nature or of the proportion of its constituents, it must be considered as an animal feedstuff as defined in the Brussels Nomenclature, regardless of whether the mixture was produced intentionally or not. This is justified because it is impossible retroactively to ascertain with the necessary certainty factors of such a subjective nature and because of the requirement inherent in all the common organizations of the market, that products which may be used for the same purposes as those coming under such organization must be subject to the same import charge, as the latter is intended to regulate prices.

The second question

The *plaintiff in the main action* considers that the second question is certainly admissible as regards paragraph (c) thereof; on the other hand, paragraphs (a) and (b) are only admissible to the extent to which the reply to be given to them relates to the maize and sorghum products referred to in headings 11.01 and 11.02: in fact this reply is only decisive for the outcome of the dispute to the extent to which it refers to those products.

With regard to question 2(b) the Henck undertaking maintains that in connexion with the structure of the products coming under tariff heading 11.02, both the wording of that heading and the Explanatory Notes to the Brussels Nomenclature show that it includes maize groats and meal and hulled, pearled, kibbled or rolled maize and sorghum (including flakes) and germ of cereals, whole, rolled, flaked or ground. With regard to the content of such products in constituents such as starch, proteins, fats, crude fibres, and ash, tariff heading 11.02 did not expressly prescribe any restriction in that respect at the date relevant to the present case. The same applies to the Explanatory Notes to the Brussels Nomenclature. In this respect, the plaintiff in the main action declares that it concurs with the Court that the classification of a product under a particular tariff heading is determined *inter alia* by its essential constituents and that for that product to remain under this heading it must, after extraction of certain of its constituents, still contain its essential

constituents in a proportion corresponding to the normal variations in the natural content of the original product in these constituents and be fit for use for comparable purposes. Unlike the Court, the plaintiff however considers that the concepts of 'essential constituents', 'normal variations in the natural content' and 'comparable uses' must be defined not in terms of the requirements of organizations of the market but simply in accordance with the customs function of the customs tariff. According to the findings of scientific studies on the subject not only the starch content but the ash content, that is to say, the content in mineral substances, assumes decisive importance in determining the nature and use of a cereal product.
Consequently, according to the Henck undertaking, the starch and the ash contents constitute the sufficient requirement for the correct appraisal of the degree of the processing and, consequently, of the nature and use of cereal products. As Regulation No 5/63 of the Council of 28 January 1963 (OJ, 1963, p. 189) and the preamble to Regulation No 20/63 of the Commission of 27 February 1963 (OJ, 1963, p. 145) make the ash content a decisive factor in distinguishing flour from bran the citizens of Member States must necessarily have deduced from this that the European legislature was acquainted with this scientific fact. Regulation No 1052/68 of the Council of 23 July 1968 (OJ, Special Edition, 1968 (II), p. 323) sets out the scientific facts accepted at the relevant time to the proceedings and those are the facts which must be considered in drawing up the definitions to be borne in mind in the present case.
With regard to the question of the maximum or minimum starch or ash content necessary at the relevant time for a product to be classified under heading 11.02, the Henck undertaking states that, according to accepted scientific knowledge at that time the content of maize in nitrogen-free substances fluctuated according to the origin of the product between 67.1% and 76.5% and its ash content between 1.2% and 1.9%.
According to scientific knowledge at that time the non-nitrogenous content of commercial varieties of millet fluctuated between 64.1% and 72.8% and, in particular, in the case of sorghum between 70.6% and 71.3%; their ash contents varied between 1.1% and 2%.
The plaintiff in the main action accordingly suggests that the reply to question 2(b) should be as follows:

'During the years 1965 and 1966 tariff heading 11.02 included the maize products and sorghum products therein mentioned when the latter had a starch content exceeding 50% and an ash content not exceeding 2%'.

As to question 2(a) the plaintiff in the main action observes that goods which come under tariff headings 11.02 and 11.01 only differ in their structure; otherwise, the definitions set out above are applicable to them. Although at the relevant time Community law did not provide any express definition of the concept of flour, it must be recalled that the Explanatory Notes to the Brussels Nomenclature on tariff headings 11.02 and 11.01 define flour as the 'pulverized' form of cereals. This distinction between headings 11.01 and 11.02, made solely in terms of the structure of the product, corresponds, furthermore, to the concept generally accepted at that time in the circles concerned.
The plaintiff consequently suggests that the reply to question 2(a) should be as follows:

'During the years 1965 and 1966 tariff heading 11.01 referred to pulverized products obtained *inter alia* by the milling of maize and sorghum where those products had a starch content in excess of 50% and an ash content not exceeding 2%'.

With regard to question 2(c) the Henck undertaking declares that tariff heading 23.07 serves as a 'catch-all' for forage preparations, regardless of the starch or ash content etc., and that its specific nature and the distinction between it and other headings may only be determined on the basis of the criteria set out for the purposes of the reply to question 1.
The plaintiff in the main action con-

sequently suggests that the reply to question 2(c) should be as follows:

'Without prejudice to the reply given to question 1, in order to classify goods under heading 23.07 it was unnecessary during the years 1965 and 1966 to ascertain the existence of specific contents in starch, ash, etc.'.

The *German Government* observes that since only the classification of maize bran or flour is at issue in the present case it is sufficient to take only those products into consideration.
It recalls that, within the framework of a general distinction between headings 11.01 and 11.02 and heading 23.02 of the nomenclature, the Customs Cooperation Council, Brussels, decided with regard to the classification of products of the milling industry extracted from maize that products with a starch content exceeding 45% by weight and an ash content not exceeding 2% by weight must be classified under headings 11.01 and 11.02; this decision was based on the notion that headings 11.01 and 11.02 must encompass all products of the milling industry known by experience to be used for human consumption. True residues of the extraction of starch from maize have a starch content not exceeding 20% when the various constituents of maize grain are separated by a less advanced method. Processed maize products having a higher starch content more closely resemble products of the milling industry with the same starch content with which they are, moreover, in competition in the Community.
Since modern methods for manufacturing starch from maize are based on breaking down the grain into its constituents as far as possible and on separating it in the course of several processes it is inconceivable from an economic point of view that a starch manufacturer would process maize or other suitable cereals into starch industrially so that the outcome of all the processes carried out was to obtain flour, groats or kibbled grain the starch content of which was scarcely altered and, as mere secondary residues, starch and pastes which are valuable products. Case 74/69 on the words 'residues from the manufacture of starch' constitutes the decisive factor in this case. It is clear from this judgment that only the starch content constitutes a decisive criterion for the distinction between residues derived from the manufacture of starch within the meaning of heading 23.03 and flours and groats referred to in headings 11.01, 11.02 or 11.06.
In addition the German Government refers to the considerations which it set out regarding the first question.
The *Commission of the European Communities*, referring first to the products of the milling industry mentioned under headings 11.01 and 11.02, observes that those products, which are obtained from the milling of various kinds of cereals, exhibit the composition of the cereal to be processed and having regard to the relevant processing operations. It is clear from the case-law of the Court with regard to heading 23.03 that if only a small quantity of starch is extracted from the basic cereal the products thus obtained still come under their initial tariff heading, 11.01 or 11.02. The starch content of residues from the manufacture of starch is generally in the region of 35%.
With regard to the distinction between products coming under headings 11.01 and 11.02 and the products referred to in heading 23.04, the Commission considers that, by analogy with the criterion applicable to residues from the manufacture of starch established by the Court in respect of heading 23.03, this must be based on their oil content which, according to specialist works, should not generally exceed 8% in the case of maize residues.
Although such criteria are valid in distinguishing the relevant products in their pure state, more numerous and complex problems nevertheless arise regarding the tariff classification of mixtures containing very widely differing residues and other processed cereal-based products. The Commission emphasizes that manufacturers are today in a position to make those products with practically any composition and any characteristics desired and that the range of possibilities is so vast that there are always differences of opinion regarding the accuracy of the tariff classification of a

product of this nature, despite the existence of very detailed tariff classifications. Having said that, the Commission, however, endeavours to lay down some theoretical criteria for their assessment. When, because the residues have been mixed, it is virtually impossible to determine *a posteriori* whether this is a product which originally came under Chapter 11 or whether it constitutes a mixed residue, the purpose of the common organization of the markets requires that products of identical or similar composition, value and possible uses should be subject to the same levy the aim of which is to equalize prices.
The Commission supplies technical information on the possible production and composition of by-products of the extraction of maize oil and, with reference to the results of work carried out by specialized organizations, states a number of criteria and conditions upon which it claims it is advisable to base the classification of those products under heading 23.04 (for example, the presence of maize germ tissue, maximum fat content, protein content, nutritional value, etc.).
With regard to heading 23.07 the Commission observes that its field of application is enormous and encompasses a large number of different products which, apart from the fact that they are intended for animal feeding, have only one common denominator, namely, that they constitute preparations the composition and characteristics of which may both vary to such a degree that they resist any uniform definition on the basis of the maximum or minimum percentages common to certain ingredients; for this reason the current edition of the Explanatory Notes to the Brussels Nomenclature does not define the relevant products in terms of the proportions of their chemical constituents but on the basis of the nature and effect of their chemical constituents and their particular intended use.
On the basis of such criteria the Commission considers that preparations which may equally be used for animal feeding or for human consumption must be excluded from heading 23.07. Heading 23.07 contains only products which may be used exclusively for animals.

The Commission recalls that according to point II C of the Explanatory Notes to the Brussels Nomenclature the following shall not be considered as forage preparations:

'Pellets made from a single material, or from a mixture of several materials which is classified as such in one specific heading, even with an added binder (molasses, starchy substances, etc.) in a proportion generally not exceeding 3% by weight (headings 07.06, 12.10, 23.01, etc.)'.

The Commission emphasizes that the tariff classification of forage preparations obtained by a simple mixture of various basic products gives rise to certain difficulties. It does not have any objections to considering simple mixtures too as preparations of the kind mentioned in heading 23.07, subject to the following considerations:

(a) according to the said Explanatory Notes simple mixtures of cereal grain (Chapter 10), cereal flours or flours of leguminous vegetables (Chapter 11) are not considered as forage preparations;

(b) not every product for the manufacture of which a processed cereal product has been mixed with a substance which it does not generally contain necessarily comes under heading 23.07.

In general, classification under the heading in question presumes that the basic products have been mixed in a certain proportion which renders each of them a decisive factor in the final preparation.

The third question

According to the *plaintiff in the main action*, question 3 is entirely inadmissible since it endeavours to obtain not an interpretation of Article 1 of Regulation No 19/62 but its application to two specific cases.
If the Court considers the question admissible the plaintiff observes that the reply to this question follows from that given to question 1. Question 3(a) must be answered in the affirmative since a

mixture produced intentionally and composed of 78% sorghum and 9% sorghum gluten is already a mixture made up of products coming under different tariff headings and that 9% sorghum gluten mixed with 78% sorghum results in a new product.
Question 3(b) must be answered in the negative since a mixture produced intentionally and composed of 4.9% maize gluten and 80.08% sorghum gluten is a mixture made up of products coming under the same tariff heading and on the basis of the statement that the product contains, moreover, molasses, husks and maize bran it is impossible to determine whether that mixture is a new product.
The *German Government* states that from the point of view of the customs tariff the two products referred to in this question come under tariff heading 23.07.
The *Commission of the European Communities* considers that the products mentioned in this question may be classified under heading 23.03 of the Common Customs Tariff since the addition of molasses indicates that this is a sweetened forage preparation.

Grounds of judgment

1 By an order of 3 June 1971 which was received at the Court on 30 June 1971 the Finanzgericht Hamburg has referred to the Court of Justice, pursuant to Article 177 of the EEC Treaty, three questions on the interpretation of certain headings of the Common Customs Tariff.

2 First, the Court is asked to rule whether a product may be classified under heading 23.07 of the Common Customs Tariff and therefore made subject to the levy in application of Regulation (EEC) No 19/62 of the Council of 4 April 1962 on the sole basis of objective characteristics, that is, without regard to the manner in which it is produced or obtained and in particular irrespective of whether or not it is an intentional mixture.

3 With reference to tariff heading 23.07 the Annex to Regulation No 19/62 defines the products in question in the following terms: 'Animal food preparations including sweetened forage; other preparations used in animal feeding (additives, etc.); ex B. containing cereals or containing products covered by the present Regulation'.

4 In the interests of legal certainty and of administration the classification of goods in the Common Customs Tariff is in principle carried out on the basis of their objective characteristics. The wording of heading 23.07 to which Regulation No 19/62 refers attributes decisive importance to the fact that the relevant products must be a 'preparation' and that it must be intended for feeding animals. 'Preparation' must mean either the processing of a product or a mixture with other products. The fact that the preparation is used for feeding animals constitutes an

objective factor enabling it to be ascertained whether it is suitable only for feeding animals. Accordingly, the objective characteristics and properties of the products which supply the decisive criterion for their classification under the said tariff heading.

5 This interpretation is confirmed by note (c) relating to heading 23.07 which appears at the end of the Explanatory Notes to the Brussels Nomenclature; the note excludes from that heading 'preparations which, when account is taken, in particular, of the nature, purity and proportions of the ingredients ... can be used indifferently for feeding animals or as human food'.

6 The second question seeks to ascertain 'to what factual criteria must the composition of the product conform and in particular what must be its content in constituents such as, for example, starch, proteins, fats etc. in order that it may be classified: (a) under heading 11.01 of the Common Customs Tariff, (b) under heading 11.02 of the Common Customs Tariff, (c) under heading 23.07 of the Common Customs Tariff'.

7 The third question seeks to ascertain whether 'a mixture intentionally produced comes under heading 23.07 of the Common Customs Tariff if it is composed either: (a) of 78% sorghum, 9% sorghum gluten and the remainder of molasses, maize husks and bran, or (b) of 4.9% maize gluten, 80.08% sorghum gluten and the remainder of molasses, maize husks and bran'.

8 It is desirable to answer both questions together.

9 Taking account of the problems brought before the German court those questions relate to processed maize and sorghum products and are designed to ascertain the distinction between those products and the residues referred to in headings 23.03 and 23.04 of the Common Customs Tariff. Heading 11.01 is accordingly worded 'Cereal flours' and heading 11.02 'Cereal groats, cereal meal; worked cereal grains, pearled, crushed, flattened (including flakes), except husked, glazed, polished or broken rice; germ of cereals, including flours thereof'.

10 The classification of a product under one of those two headings cannot be affected by the fact that it has undergone processing if the processed product thereafter contains the essential constituents of the basic product in proportions which do not substantially differ from the content in those constituents which the relevant product exhibits in its natural state.

11 With regard particularly to the distinction between headings 23.03 and 23.04 it must be noted that 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.

12 Heading 23.07 refers to products which have been finally processed or are the result of a mixture of different substances and which are only suitable for feeding animals. This general criterion must be supplemented in the light of the Explanatory Notes to the Brussels Nomenclature, heading II C of which excludes from the category of forage preparations 'pellets made from a single material, or from a mixture of several materials which is classified as such in one specific heading, even with an added binder (molasses, starchy substances, etc.) in a proportion generally not exceeding 3 % by weight (heading 07.06, 12.10, 23.01, etc.)'. Furthermore, the reference made in Regulation No 19/62 to tariff heading 23.07 does not encompass forage preparations which, whilst coming under this heading, do not contain products referred to as such by the provisions of the common organization of the markets laid down by the said regulation. With regard to the percentages, it is for the national courts to apply the law to the present case.

Costs

13 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities which submitted observations to the Court are not recoverable, and as these proceedings are, so far as the parties to the main action are concerned, a step in the action before the national court, the decision in costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community;
Having regard to Regulation (EEC) No 19/62 of the Council of 4 April 1962;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Finanzgericht Hamburg (Fifth Chamber) in accordance with the order of that court of 3 June 1971, hereby rules:

1. **For the purposes of the classification of a product under heading 23.07 of the Common Customs Tariff, account must be taken of its objective characteristics without its being necessary to consider whether the products referred to by that heading were prepared intentionally or not.**

2. (a) **Products processed from maize and sorghum may be classified under tariff headings 11.01 and 11.02 if after processing they still contain the essential constituents of the basic product in proportions which do not differ substantially from the content in those constituents which the relevant product exhibits in its natural state.**

   (b) **Heading 23.07 refers to products which have been finally processed or are the result of a mixture of different substances and which are only suitable for feeding animals, and not to agglomerated products the basic material or materials of which come as such under a specific heading, even if they contain a binder not generally exceeding 3% by weight.**

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 23 March 1972.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 8 MARCH 1972[1]

Mr President,
Members of the Court,

During the period from April 1965 to January 1966 the Henck undertaking, the plaintiff before the court which has referred certain questions to this Court under Article 177 of the EEC Treaty, imported into the Federal Republic of Germany under various descriptions processed cereal products from Belgium. In the course of customs clearance, in accordance with the

1 — Translated from the French version.