JUDGMENT OF THE COURT
8 DECEMBER 1970[1]

Kommanditgesellschaft in Firma Otto Witt v Hauptzollamt Lüneburg[2] (Reference for a preliminary ruling by the Finanzgericht Hamburg)

Case 28/70

Summary

1. *Preliminary rulings — Jurisdiction of the Court — Limits (EEC Treaty, Article 177)*

2. *Common Customs Tariff — 'Poultry' — Scope of application (Regulation No 22 of the Council, Article 1)*

1. Within the scope of its powers under Article 177, the Court has no jurisdiction to apply the Treaty to a specific case.

   It must confine itself to extracting from the wording of the question formulated by the national court those matters only which pertain to the interpretation of Community law, having regard to the facts submitted by the latter.

2. The description 'poultry' under tariff headings 01.05 and 02.02 of the Common Customs Tariff applies to those species of poultry reared for use or slaughter, in particular for the production of foodstuffs.

In Case 28/70

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

KOMMANDITGESELLSCHAFT IN FIRMA OTTO WITT, Stelle über Winsen-Luhe

and

HAUPTZOLLAMT LÜNEBURG,

on the interpretation of Regulation No 22 of the Council of the EEC of 4 April 1962 (OJ No 30, 1962),

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

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Issues of fact and of law

The facts and procedure may be summarized as follows:

1. In May and in August 1964 the limited partnership Otto Witt imported from the United States consignments of frozen 'Rock Cornish Game Hens' (hereinafter referred to as 'game hens').
The German customs administration had originally applied headings 02.04-B 50 of the customs tariff to this poultry, but after the Oberfinanzdirektionen (Regional Finance Offices) of Hanover and of Hamburg had issued on 5 and 9 October 1964 respectively binding customs tariff notifications (verbindliche Zolltariffauskünfte) which stated that the game hens came under heading 02.02-(A)-I-c of the customs tariff, the Hauptzollamt (Principal Customs Office) Lüneburg addressed to Otto Witt on 6 May 1965 two corrective notices of assessment applying heading 02.02-(A)-I-b of the tariff of levies to the products.
On 19 May 1965, Otto Witt KG lodged an objection against these two notices of assessment with the Hauptzollamt, which dismissed the objection in a decision of 22 June 1965.
This tariff classification is the subject of the case at present pending before the Finanzgericht (Finance Court) Hamburg. That court held that the charge of the levy on poultry was laid down by Regulation No 22 of the Council of the EEC of 4 April 1962 and that at the date of the imports in question there were no rules of interpretation issued by the competent authorities, and it decided by an order of 6 May 1970 to stay the proceedings and to refer to the Court of Justice, under the first and second paragraphs of Article 177 of the EEC Treaty the following question:

> 'Must "Rock Cornish Game Hens" be considered as poultry within the meaning of Article 1 of Regulation No 22 of the Council of the EEC on the progressive establishment of a common organization of the market in poultry meat?'

2. The order for reference reached the Court Registry on 21 June 1970.
Otto Witt and the Commission of the European Communities submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice annexed to the EEC Treaty.
Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-

General the Court decided that a preparatory inquiry was not necessary.
Otto Witt and the Commission of the European Communities presented their oral observations at the hearing on 28 October 1970.
The Advocate-General delivered his opinion at the hearing on 11 November 1970.

II — Observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice

The observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

A — *Observations submitted by Otto Witt*

Otto Witt considers that the game hens cannot be classified in the same category as ordinary table fowl, but that they come under the tariff heading for wild fowl raised in captivity. It adds that the following points are not disputed by the parties to the main action:

— the external appearance, the taste and the price of the imported game hens differ from those of typical farmyard poultry;

— these products were resold in Germany as wild fowl;

— some years before this case, the Oberfinanzdirektion Düsseldorf issued a binding customs tariff notification (verbindlich Tarifauskunft) whereby the game hens were to be subject to the tariff applicable to wild fowl;

— at the request of the importer, the Hauptzollamt informed them that the game hens should be given customs clearance as wild fowl and matters had proceeded on this basis for one year;

— it appears from its reply to the Finanzgericht Hamburg of 4 December 1969 that the Hauptzollamt itself thought that game hens were substitute products for game. According to the handbook of the explanatory notes to the German Customs Tariff, no tariff heading covers these products, but they should be subject to the same tariff as is applied to the goods which they resemble most.

In support of its view, Otto Witt submits information and experts' reports annexed to its statement of case. For the details and a closer consideration of the matter, it refers to the arguments and offers of proof in its pleadings of 16 September and 13 November 1969 and 26 January 1970 which it reaffirms *in toto*. Photocopies of those pleadings are produced as a schedule to these written observations.

B — *Observations of the Commission*

The *Commission* recalls first of all the rules applicable for the interpretation of the nomenclature of the Common Customs Tariff and then goes on to try to determine the exact scope of the question.
It maintains that tariff headings 01.05 and 02.02 of the Common Customs Tariff, relating to the poultry referred to in Article 1 of Regulation No 22, apply to the same poultry, in the live state and in the dead state respectively, in other words, that the expression 'poultry' under heading 02.02 has the same scope as that under heading 01.05.
From this interpretation, as confirmed by the French and English texts of the tariff and by the 'Explanatory Notes to the Brussels Nomenclature', it follows therefore that the question whether the game hens fall within 'dead poultry' under heading 02.02 depends solely on whether in their live state these products can be classified under live poultry under heading 01.05.
The German text of heading 01.05 confines the expression 'poultry' to a small number of species 'fowls, ducks, geese, turkeys and guinea fowls'.
Far from being purely exemplary, this list excludes the application of heading 01.05 (and thus of heading 02.02, as regards dead

poultry) to any other species of poultry. The French text of the Common Customs Tariff, the 'Explanatory Notes to the Customs Tariff of the European Communities' and the English text of the Brussels Nomenclature confirm this conclusion.
Therefore the only question to be answered in this case is whether:

(a) the game hens should be considered as 'poultry',

(b) belonging to one of the species listed under heading 01.05.

In this respect the Commission makes the following observations:

(a) As regards the first point the expression 'poultry' refers to all species of poultry which man has domesticated but especially those which are traditionally raised for utilitarian purposes in agriculture and which supply part of agricultural production. In particular species and birds which do not result from natural evolution but from selective breeding intended to combine or improve by crossing certain economically useful characteristics of the various species or breeds, belong to this type of bird.
This condition of domestication is without a doubt satisfied in the case of the game hens.

(b) As regards the second point, it follows from a comparison of the term 'Hühner' (fowls) with that of 'Hausgeflügel' (poultry) that, of all the existing species of fowls, only those which are commonly regarded as domestic fowls ('Haushühner') are here referred to. Generally this term covers particularly those which are commonly used for agricultural purposes, and it is precisely because of the economic importance which they may have, that they need to be classified under a special heading of the customs tariff in order to protect internal production by means of special levies.
From their zoological characteristics, breeds used in agriculture are fowls of the genus 'Gallus' and in particular of the species 'Gallus gallus' and of their descendants. This genus is defined by certain zoological characteristics and is distinguished from other genera of fowl but there are no criteria making it possible to distinguish between certain breeds within this genus.
The Commission then examines the question whether game hens which are the result of a cross with Cornish hens which are certainly domestic fowl with hens of other breeds may be classified in the above-mentioned genus. It believes that a precondition for the solution of this problem is a closer examination of the particular zoological characteristics, qualities and peculiarities of these fowls. The fact that there is cross-breeding with other species of hen does not exclude such a classification *a priori*. The subject-matter of the dispute is essentially a question of what characteristics predominate game hens and of determining their tariff classification.
In this particular case the Commission believes that the game hens are clearly domestic hens. It bases its conclusion in particular on two letters, issued by the Consumer and Marketing Service and the Agricultural Service of the Ministry of Agriculture of the United States and dated 21 March and 16 April 1964 respectively, and on the expert opinion, all of which are annexed to the file on the case.
Moreover, in the opinion of the Commission, the question whether the game hens in fact correspond to the conditions stated above, their zoological classification and the examination of their specific characteristics is not a question of interpretation of Community law, but solely a question of fact falling within the jurisdiction of the Finanzgericht dealing with the case.
The Commission goes on to examine the relevance of certain facts and observes:

— that the fact the once game hens are killed they are marketed as 'game' does not rule out their being classified as domestic hens. The name 'game hens' certainly gives rise to the idea of feathered game, but is not a criterion for objective classification. Since feathered game can fetch higher prices, the choice of name will be influenced by the commercial interests of the producers and dealers;

— since the definition refers to the live bird, the particular characteristics, determined by commercial considerations, of the slaughtered birds do not constitute good criteria for judging the issue (this applies in particular to the usual price of the game hens when slaughtered, the taste or the appearance of the meat and its suitability for cooking or roasting);

— the zoological classification of the birds does not depend on whether or not they are caught by hunting;

— moreover, because of the structure of the nomenclature of the customs tariff, it is not possible to decide the classification of the game hens by making a direct comparison between the terms 'poultry' and 'game'. The latter term in fact appears in a subheading (paragraph b) of heading 02.04, which also covers other sorts of meat whilst the first term covers the *whole* of headings 01.05 and 02.02. However in cases of tariff classification, it is not possible to make a direct comparison between a tariff *heading* and a subheading coming under another heading. Only tariff headings are directly comparable and it is only where a product must be classified under one heading that one can go on to determine its subheading.

On the basis of these arguments, the Commission reaches the following conclusions:

1. If 'live' 'Rock Cornish Game Hens' come under heading 01.05 of the Common Customs Tariff, then they must, when 'dead', be classified under heading 02.02.

2. 'Poultry' within the meaning of heading 01.05 and of Article 1 of Regulation No 22 covers the domestic forms of the species there listed.

3. The birds produced by crossing these hens with other species of fowl are 'domestic fowl' if these characteristics of the latter predominate.

Grounds of judgment

1 By an order dated 6 May 1970, the Finanzgericht Hamburg prusuant to Article 177 of the EEC Treaty referred to the Court of Justice the question whether reared poultry described as 'Rock Cornish Game Hens' must be considered as poultry within the meaning of Article 1 of Regulation No 22 of the Council of the European Economic Community of 4 April 1962 on the progressive establishment of a common organization of the market in poultrymeat.

2 Within the scope of its powers under Article 177 of the EEC Treaty the Court has jurisdiction to give a ruling on the interpretation of the Treaty and on acts of the institutions but may not apply the Treaty to a specific case. The Court must confine itself to extracting from the wording of the question formulated by the Finanzgericht Hamburg those matters only which pertain to the interpretation of the Treaty and to Regulation No 22, taking into account the facts communicated by that court. Accordingly the question put by the Finanzgericht must be regarded as designed to ascertain what criteria govern classification under the category of 'poultry' within the meaning of Article 1 of Regulation No 22.

3 Article 1 of Regulation No 22 refers to tariff headings 01.05 and 02.02 of the Common Customs Tariff. These headings deal respectively with 'live poultry' and 'dead poultry and edible offals thereof (except liver), fresh, chilled or frozen'. Although tariff heading 02.02 does not contain the enumeration set out in heading 01.05 both headings must undoubtedly be interpreted so that they apply to the same poultry in a live or dead state as the caes may be. This is confirmed by the Explanatory Notes to the Brussels Nomenclature issued by the Customs Cooperation Council which expressly indicate, with regard to tariff heading 02.02, that the poultry under this heading is that covered by tariff heading 01.05. It is therefore sufficient to examine the question in relation to tariff heading 01.05.

4 This heading lists a number of species: fowls, ducks, geese, turkeys and guinea fowls. The question submitted comes down to whether the category 'poultry' more specifically defined by the term 'fowls', can include a product of breeding which has originated from a cross between a phasianida of the species 'Gallus gallus' and a tetraonida.

5 The description 'live poultry' can only cover those species raised in agricultural or industrial concerns for use or slaughter, in particular for the production of foodstuffs. Thus this description covers types of poultry which are not the result of evolution or natural selection but are the product of a process of breeding or artificial selection which is intended to combine or improve certain economically exploitable qualities of various species. Even poultry derived from the crossing of wild species must be regarded as 'poultry' if it is produced by means of artificial selection for the purposes of slaughter and offered for sale in a way which may be suited to a market for competing or substitute products.

6 Considerations depending on the qualities of taste, the selling price or the zoological characteristics of the birds do not in themselves play any decisive role in this classification.

7 The description 'poultry' in tariff headings 01.05 and 02.02 of the Common Customs Tariff which are incorporated in Article 1 of Regulation No 22 of the Council of 4 April 1962 applies to those species of poultry which are reared for use or slaughter, in particular for the production of foodstuffs.

Costs

8 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable.

9 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Finanzgericht Hamburg, the decision on 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 Otto Witt 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, especially Article 177;
Having regard to Regulation No 22 of the Council of the EEC of 4 April 1962;
Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, 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 question referred to it by the Finanzgericht Hamburg under the order made by that court on 6 May 1970, hereby rules:

The description 'poultry' under headings 01.05 and 02.02 of the Common Customs Tariff which are incorporated in Article 1 of Regulation No 22 of the Council of 4 April 1962 applies to those species of poultry which are reared for use or slaughter, in particular for the production of foodstuffs.

Lecourt Donner Trabucchi

Monaco Metens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 8 December 1970.

A. Van Houtte R. Lecourt

Registrar President