OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 NOVEMBER 1970[1]

Mr President,
Members of the Court,

In May and August 1964 the plaintiff in the main action applied for customs clearance for frozen poultry imported from the USA described as 'Rock Cornish Game Hens' (hereinafter referred to as 'game hens'). The Hauptzollamt Lüneburg first classified this product under tariff heading 02.04-B 50 of the customs tariff, that is, 'Other meat and edible offals, fresh, chilled or frozen — of game', and accordingly levied *ad valorem* customs duty and turnover equalization tax. After the Oberfinanzdirektionen Hannover and Hamburg in October 1964 had come to the conclusion in binding customs tariff notifications that game hens should be considered as poultry and accordingly classified in a dead state under tariff heading 02.02 ('... and edible offals thereof ...'), the Hauptzollamt Lüneburg issued two corrective notices of assessment to the plaintiff in May 1965. Since tariff heading 02.02 is covered by Regulation No 22 on the progressive establishment of a common organization of the market in poultrymeat these notices of assessment prescribed the payment of a levy and thus of a corresponding additional sum.

However, the plaintiff was not satisfied with this. It lodged an objection claiming that the imported product could not be regarded as poultry but game. It relied on the view of experts that game hens were a product of breeding from various breeds of wild fowl. The fact that they were kept in enclosures did not make them domestic birds. An opinion of the Institute of Food Hygiene of the Free University of Berlin of 18 December 1964 also confirmed that game hens were a type of poultry that displayed no correspondence whatsoever with the frozen poultry examined for comparison but resembled more a pheasant examined for comparison and thus a game bird. However, the objection was dismissed. This was done with reference to relevant literature according to which the game hens were described as young, not yet fully grown hens of the farmyard poultry breed 'Cornish Game'. In addition the Hauptzollamt Lüneburg pointed out that taste tests carried out by the Customs Inspection and Training Department, Hamburg-Altona, and the Veterinary Inspection Office, Hamburg, had revealed no game taste but a typical taste of farmyard fowl.

The plaintiff then appealed to the Finanzgericht Hamburg. In support of its application for the annulment of the additional assessments the plaintiff submitted that the fact that the product was of American origin was important in judging the case. In America 'game hens' had been crossed with American prairie hens and thus the game character of Rock Cornish Game Hens was obtained in the best way possible. In the USA game hens were generally regarded as game, in particular by the Ministry of Agriculture, as can clearly be seen from the word 'game'. Similarly, the health authorities of the Free and Hanseatic City of Hamburg had confirmed the game characteristics of game hens in a letter of 15 July 1964. The product had at least to be described as a substitute for game birds. Since such a substitute was not covered by any tariff heading, this meant, according to the general principles of tariff classification, that in view of their resemblance to game, game hens had to be classified under the same heading as this comparable product. The defendant Hauptzollamt stands by its original viewpoint. It claims that the original form of game hens constitutes a cross breed in which only commercial breeds were involved. Even when it was crossed with a prairie hen the proportion of commercial breeds predominate. Therefore the only possible description is farmyard poultry. Game, on the other hand, must be understood as animals suitable for hunting. Game hens

1 — Translated from the German.

cannot be hunted because they were not found in free hunting grounds either in their original form or in the form of the American breed. Finally, with regard to the taste of game hens, although it differed from that of ordinary table fowl, it had not been possible to establish a typical game taste.

To solve the question of tariff classification the Finanzgericht Hamburg ordered two expert opinions. However, they came to contradictory conclusions on the question whether game hens were poultry or game. Having regard to the fact that the decision in the proceedings depends on the interpretation of the descriptions of products in Regulation No 22 (as you know, a levy can only be imposed if a product is poultry within the meaning of Article 1 of this regulation), the Finanzgericht, by an order of 6 May 1970, stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Are Rock Cornish Game Hens 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?'

Let us now examine what is to be said on this question in the light of the observations made by the Commission and by the plaintiff in the main action.

1. It must be stressed right away that in the present proceedings the Court of Justice clearly cannot determine whether game hens, that is to say, a particular species of bird, are to be regarded as poultry within the meaning of Regulation No 22. This would entail subjecting a concrete factual situation to a provision of Community law, that is to say, the *application of Community law* to a specific case. In fact the Court is not permitted to do this in proceedings under Article 177 of the EEC Treaty, for this is a task reserved to the court making the reference. All that the Court of Justice can do in the present proceedings is to interpret the term 'poultry' within the meaning of Regulation No 22, that is, to give the solution of a question of law by elaborating the necessary criteria for tariff classification. The question put must be interpreted in this way (as has already happened in other proceedings for a preliminary ruling) and of course seen in this way no problems of admissibility arise. Moreover, it cannot be objected, against the admissibility of the reference, that the court making the reference may possibly have further questions of fact to determine. This frequently happens in proceedings under Article 177, quite simply because a proper decision on questions of fact is often not possible until questions of law have been decided, that is, when the legal path to the solution of a case is determined and it is thus clear which facts are relevant to a decision. If this were not allowed, and if a comprehensive elucidation of the facts was required in every case before the initiation of proceedings for a preliminary ruling, important consideration of procedural efficiency would certainly be ignored, and this is not demanded by any principle of the reference procedure. Accordingly it is irrelevant in the present proceedings whether the national court has already clarified all questions of fact, as the plaintiff claims, or whether further research is necessary.

2. As for the actual question of tariff classification to which we can turn immediately after these preliminary remarks, it is first of all of importance, for the purposes of the interpretation of the product description 'poultry' as used in Article 1 of Regulation No 22, that the provision expressly adopts certain tariff headings of the Common Customs Tariff and that these are in turn based on the Brussels Nomenclature. This is significant in relation to the German version of the text where the term 'Hausgeflügel' (poultry) is followed by the enumeration 'fowls, ducks, geese, turkeys and guinea fowls' solely in tariff heading 01.05, which covers live poultry, but not in tariff heading 02.02, which is confined to dead poultry. That this does not really signify a difference in scope is certainly shown by the French version uses the term 'volaille de basse-cour' for both tariff headings; this becomes even clearer when one looks at the English text of the Brussels Nomenclature, which is

equally binding, and the Explanatory Notes relating to tariff heading 02.02. It must therefore be accepted that the concept 'poultry' must be defined in the same way for both tariff headings, that is, regardless of whether the poultry in question is live or dead.

Moreover it must also be stated right away, as the Commission once again has stressed, that the abovementioned list of the species of poultry in the German version is not exemplary but exhaustive. This is clear from the explanatory notes to the Common Customs Tariff issued by the Commission, the Brussels Explanatory Notes to tariff heading 01.05 of the Brussels Nomenclature and its English version, which corresponds to the German version. Levies are thus charged solely on the species of poultry mentioned and not on any other species, and this is also confirmed by the Commission regulations fixing the various levies. Nevertheless, all this does not yet help us very much towards the solution of the present problem and it may be said that the real difficulties of interpretation still lie before us. This becomes particularly clear when one realizes that Regulation No 22 and the Common Customs Tariff contain no more detail regarding the terms 'poultry' and 'hens', the only terms which now call for consideration.

If one starts with the wording of these provisions, which, as is well known, is the procedure primarily to be adopted according to the general principles of tariff classification under the Common Customs Tariff, firstly, the component 'Haus-' (domestic) provides an important indication. From this word it must be clearly domesticated animals, that is, animals which in their typical living habits are attached to the household of human beings. This may be said, for example, of the fowls traditionally bred and kept for use on farms. However, this is obviously also of significance for the main action since the game hens here at issue are, as products of breeding, only kept in enclosures and thus are not found in free hunting grounds, and must therefore certainly be regarded as domesticated.

Nevertheless, this characteristic is certainly not sufficient since only quite specific animal species, defined with the aid of zoological terms, are covered by the tariff headings in question, whereas other species, even if they are raised in enclosures and regarded as products of agriculture, do not come under the tariff headings of Regulation No 22. Thus further criteria are necessary to make the differentiation, particularly in cases such as the present involving the product of a crossing of typical farmyard fowls with species of fowl that live in a wild state and so are animals that must certainly be regarded as 'game' for the purposes of tariff headings 01.06 and 02.04. (On this point, I would refer, on the one hand, to the American legal definition of 'Rock Cornish Game Hens' which is set out on page 10 of the Commission's written observations and on the other hand, as regards the element of game, to the vigorous contentions of the plaintiff. It should be clear right away, as the Commission rightly stresses, that the name or the description of the product in the trade can certainly not be the conclusive factor for the purposes of the differentiation. In this respect reference may be made to the relevant case-law, namely, the two manioc flour Cases, 72 and 74/69. But the deciding factor is above all that the naming may be controlled by commercial interests with the purpose of determining the customs tariff classification. Moreover, it must be borne in mind that in the present case there is obviously a dispute as to whether the word 'game' really refers to wild fowl or to a fighting cock (which may, in certain circumstances, be a domestic fowl).

Nor does the market price of game hens which is alleged to be considerably higher than that of the usual domestic fowls seem to me to provide in the present case a reliable criterion for establishing a differentiation. This is particularly so as it is not certain whether this is a relatively constant quantity dependent on the cost of selected feedstuffs or a value which can be explained by the relative scarcity of the product and which might be adjusted to the price of farmyard fowls if production were expanded (so that a competitive relationship might then become evident which could justify the inclusion of game

hens in the scope of application of Regulation No 22 by reason of the protective purpose of that regulation).

Finally, in this connexion, the weight must also be left out of consideration. In fact it is not necessarily determined by the species but by age, treatment and feeding. A reliable tariff classification certainly cannot be made on the basis of such an uncertain quantity.

In view of the difficulties described and of the fact that the tariff headings in question employ clearly zoological terms for the purposes of differentiation, it might accordingly be suggested that present problems of tariff classification be solved essentially on the basis of *zoological* characteristics. As you know, in the end this is what the Commission proposed. On this principle tariff headings 01.05 and 02.02 would certainly cover species of fowl which in ordinary speech are described as 'domestic fowls' and which are usually kept to an appreciable extent for agricultural purposes, that is to say, crested fowls of the species 'Gallus gallus' and their descendants commonly traced back to the red jungle fowl as the primitive form. In addition, intermediate forms that result from crossing with wild species (a process which is not unusual with modern breeds of domestic fowls) must be considered on the basis of their *predominant* generic characteristics. If this results in a preponderence of the characteristics of domestic fowl the tariff headings of Regulation No 22 would be applicable, otherwise another tariff classification would be indicated.

This does indeed seem convincing. However, I have doubts whether it is really possible to proceed in this way. My hesitations are based in the first place on practical considerations. It seems to me that to analyse the zoological characteristics and qualities of animals like the game hen would in fact give rise to considerable difficulties. This applies, first, to the analysis of the breeding process which according to the Commission enters into consideration. Where there is a long succession of generations it is certainly complicated, quite apart from the fact that it may not be possible because, as the plaintiffs stressed, the breeder will not disclose his methods for reasons of secrecy. However, this also applies to a comparison of the typical zoological characteristics of genus and species. It would in fact have to be undertaken with *live* birds, which, however is not possible because apparently live game hens are not marketed and so are not available for examination.

Moreover, the following considerations must be taken into account. The present case does not simply concern the differentiation between various tariff headings of the Common Customs Tariff but the determination of the scope of application of the common organization of the market in poultrymeat, as defined in Article 1 of Regulation No 22. The solution of our problem must therefore be derived above all from its system and its sphere of interest. The aims of this market organization are quite clear. It is intended by means of a system of levies to protect domestic production against cheap imports of comparable products, that is, against products that compete with the domestic products. That being so it would plainly seem to be indicated that in defining the products in question the essential consideration should be the view of the trade, or in other words, the judgment of the consumer whose choice is at issue. Viewed in this way it seems doubtful whether much can turn on *zoological* niceties. It would appear preferable to differentiate on the basis of *taste*. However it is conceivable that in such hybrid forms even with a preponderance of the proportion of domestic fowl and a small crossing of game blood, a taste could be obtained which is substantially different from that of the normal domestic fowl, and conversely it seems conceivable that despite a preponderance of game blood only slight differences of taste and quality could exist. For this reason, that is to say, on the basis of considerations which place the *purpose of Regulation No 22 to the fore*, the necessary differentiation should, in my opinion, be made not on the basis of zoological niceties, but primarily on the basis of differences of taste, and thus of the position of this product on the market. Here the plaintiffs' statements in particular should be borne in mind. They contended that the hens imported by them should be regarded

as a *game substitute*, that they were clearly a *game* dish with a distinct game flavour and that they should therefore be classified under a tariff heading that covered game. This perspective, that is, the juxtaposition of farmyard fowls with game fowls, should provide the criterion for the consideration of the facts in the present case. I am not persuaded that this approach to the question could give rise to uncertainty (as the Commission fears). At least such uncertainty is removed if, in the case of cross-bred products which are clearly domesticate and derived to some extent from domestic fowls, the classification is based not only on certain *nuances* of flavour but made dependent on whether there is a distinct game flavour from which the product in question obtains its individual characteristics and which precludes the possibility of competition as a substitute and thus the need for protection within the meaning of the market organization for poultry.

However, if the necessary differentiation is thus achieved by means of criteria of taste (which, as I have said, seems not only more practicable, but also more appropriate for the system of Regulation No 22) obviously we need not go into the disputed zoological origin of game hens which does not seem clear from the American legal definition and on which there is so far only a detailed expert opinion which is however challenged by the plaintiff. Moreover, it is then unnecessary to resort to the general principle of tariff classification whereby the classification is to be determined according to the greatest similarity to a product described in the Nomenclature. Moreover, since, as I have already mentioned, the Court may not itself undertake the relevant classification, the question whether the tariff classification at issue is in fact possible on the basis of the expert opinions contained in the file relating to the case or whether because the opinions are not explicit enough further examination is necessary, can also be left open in the present context. These are questions that must solely be decided by the court making the reference.

3. In conclusion, therefore, the question referred to the Court should be answered as follows:

(a) The determination of what is poultry within the meaning of Regulation No 22 must be undertaken in the same way for tariff headings 01.05 and 02.02, that is to say, irrespective of whether live or dead poultry is concerned.

(b) Solely the domesticated forms of the species of poultry listed in Article 1 of Regulation No 22 are poultry within the meaning of that article.

(c) Fowls within the meaning of this definition are the domestic fowls of the genus Gallus and their descendants.

(d) Cross-breeds of these fowls with other species of fowl are also domestic fowls, unless they are clearly distinguished from farmyard fowls by a pronounced taste of game.