OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 29 JANUARY 1970[1]

Mr President,
Members of the Court,

The questions with which we are concerned taday have been referred to us for a preliminary ruling on the interpretation of Regulation No 22 of the Council of 4 April 1962 on the progressive establishment of a common organization of the market in poultrymeat (OJ 1962, p. 959) and of the implementing Regulations No 77 and No 136 of the Commission issued in connexion therewith (which were respectively made on 23 July 1962 and 31 October 1962 and published in the Official Journal, 1962 on pages 1881 and 2625).

The first thing to note in these regulations is that Article 4 of Regulation No 22 makes imports of slaughtered poultry and poultry cuts originating in third countries subject to a levy. The amounts of the levy applicable to poultry cuts were fixed for the first time in Regulation No 77 of the Commission and took the form of conversion factors which were related to the amounts of the levies applicable to slaughtered hens and chickens and turkeys provided for in Regulation No 76. There were to begin with two conversion factors: a conversion factor of 1.25 for cuts of slaughtered farmyard poultry under heading ex 02.02 of the Common Customs Tariff and a conversion factor of 0.46 for 'edible offals' under the same tariff heading. Later Regulation No 136 of the Commission which entered into force on 12 November 1962 divided the hearing 'cuts of slaughtered farmyard poultry' into two sub-headings, 'backs and necks' (with a conversion factor of 0.75), and 'all other poultry cuts' (with a conversion factor of 1.25). Later on Regulation No 79/66 of the Commission of 29 June 1966 (although it has no direct relevance to the present proceedings) introduced another sub-heading of tariff heading 'poultry cuts'; it provided *inter alia* for a special conversion factor of 0.50 for 'backs, necks, backs with necks, rumps, wing ends'.

These regulations are of importance in connexion with the importation from the U.S.A. of a certain product which was submitted for customs clearance by Paul G. Bollmann of Hamburg, (hereinafter called 'Bollmann'), a firm of food importers, on 12 November 1962; more precisely, clearance was sought for what Bollmann described as 'edible turkey offals', these being called 'turkey rumps' in the invoice annexed to the customs declaration.

The Customs Office having jurisdiction first classified the goods, which according to the particulars submitted by Bollmann were intended for human consumption, under heading 02.02-6 of the German tariff of levies (that is to say, under a particular heading of the classification of all goods subject to the levy 'covered by the various common organizations of markets which had been carried out on the basis of the German law relating to the collection of levies (Abschöpfungserhebunggesetz of 13 August 1962). In accordance with this law the Customs Office assessed specific sums which were to be paid by way of general and supplementary levy and equalization tax. At a later stage the Customs Office amended its original decision as a result of information concerning the levy payable under the tariff which had come to light in the meantime, that is to say, it demanded payment of the levy on the basis that the goods declared were not to be regarded as edible offals but were to be classified under heading 02.02-B-II-6 as 'poultry cuts'.

An appeal against this decision failed. The decision was amended during the appeal in favour of the importer only to the extent that the principal Customs Office stated that only the general levy was payable. With regard to the important question of the tariff classification the result of Bollmann's appeal to the Finanzgericht (Finance Court) was to begin with favourable. In fact the Finanzgericht accepted the applicant's view and declared that according to the tariff applicable at the date of importation the

1 — Translated from the German.

goods in question must be regarded as 'edible offals'. Accordingly the only amount payable by way of levy was that originally assessed. This decision was based mainly on the explanatory notes to the German customs tariff, which, according to preliminary note to the tariff of levies, are also to be applied for the purpose of interpreting that tariff and which describe rumps as being only edible offals.

The Hauptzollamt (Principal Customs Office) on the other hand did not agree with the judgment of the Finanzgericht. It therefore lodged an appeal with the Bundesfinanzhof (Federal Finance Court), which is still pending. In the further appeal proceedings the Hauptzollamt submitted that the expression 'edible offals' in tariff heading No 02.02 of the German customs tariff and of the tariff of levies has the meaning given to it in tariff heading 02.02 of the Common Customs Tariff. The explanatory notes on the German customs tariff (Chapter 2, paragraph 1, subparagraph 3) referred to by the Finanzgericht according to which rumps are edible offals only in fact covered those parts of the animal's body which are left over when it is slaughtered, of which ox tails are the chief example. Turkey rumps on the other hand are parts of a product known in the trade as 'backs and necks', i.e. they are regarded as 'poultry cuts'. The Bundesfinanzministerium (The Federal Ministry of Finance), which intervened in the appeal, also took the view that turkey rumps are not edible offals. In its opinion any other view would in particular conflict with Regulation No 79/66 of the Commission of 29 June 1966 (Official Journal, page 2176) which I have already mentioned. As against this the respondent to the appeal takes the view that the later regulations made by the Commission of the European Communities — meaning Regulation No 79/66 — are not relevent to its case. If nevertheless reference is made to them the indirect conclusion can be drawn that turkey rumps by reason of their low commercial value must be regarded as edible offals. Moreover, since they are tails within the zoological meaning of this word the before-mentioned explanatory notes to customs tariff heading No 02.02-C are applicable to them and provide a definition which has to be applied, because there was no definition of edible offals in the tariff of levies in force at that time.

Therefore the question which the Bundesfinanzhof has to decide is how Community law must be interpreted in this case. The answer to this question will determine the amount of the levy and thereby the solution of the problem. Since under the third paragraph of Article 177 of the EEC Treaty the Bundesfinanzhof does not have jurisdiction to interpret Community law it stayed the proceedings by order of 30 July 1969 and referred to the Court for a preliminary ruling the following questions:

'1. Is Article 14 of Regulation No 22 of the Council of the EEC of 4 April 1962, according to which Member States shall take all steps to adapt all their laws, regulations and administrative provisions in such a way that the provisions of that regulation, unless thereby otherwise expressly provided, may be effectively implemented as from 1 July 1962, to be understood as meaning that Member States may and are under a duty to specify more closely by means of national legal measures which goods are subject to the levy (Article 1 of the Regulation) and to differentiate between them?

2. Should question 1 be answered in the negative:
Is Article 1 of Regulation No 22 of the Council which mentions some of the goods listed in the Common Customs Tariff to be construed as meaning that national legislatures may interpret the terms by which these goods were described, since the terms by which goods in a customs tariff are described of necessity require interpretation?

3. Should question 2 be answered in the negative:
Are turkey rumps to be classified as backs (parts of backs) or other poultry parts within the meaning of Article 2 of Regulation No 77 of 22 July 1962 of the Commission of the European Economic Community (as amended by Article 1 of Regulation No 136 of 31 October 1962 of the European Economic Community) or are they edible offals

within the meaning of Article 3 of this regulation?'

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community the respondent to the further appeal, the Government of the Federal Republic of Germany and the Commission of the European Economic Communities submitted their written observations. These parties have in addition also made detailed submissions during the oral procedure.

Let us now see which answers seem to be appropriate in the light of the observations which have been put forward.

The answers to the questions referred

1. I will deal with the first two questions together as the Federal Government and the Commission and, as regards essentials, Bollmann also, have done.

You will recall the divergent views which have been put forward. The *Federal Government's* view is in essence that Member States have jurisdiction to clarify the relevant Community regulations in this case because they are not sufficiently clear and the Community has apparently not so far made full use of its legislative powers in relation to tariff classification. Apart from this it is clear that the descriptions of goods in Regulation No 22 referred to the Common Customs Tariff and the principles for its application, that is to say, also to the practice adopted of necessity by Member States for the purposes of explanation.

Bollmann counters this argument by proceeding on the basis that even during the transitional period the Community alone had sovereignty in the field of tariffs over goods covered by market organizations. It is therefore clear that the jurisdiction to explain tariff questions was also reserved to the Community. Further the existing Community provisions for classifying tariffs are adequate; in particular Article 1 of Regulation No 22 does not require clarification. If the problem is considered in this light Member States cannot be deemed to have the power to make *new* rules of tariff classification which would endanger legal uniformity. In any case when the common market organizations entered into force existing national explanatory notes continued to be applicable to the extent to which they were compatible with EEC law.

Finally the *Commission's* view is nearer to that of Bollmann, although without being entirely on all fours with it. The Commission does in fact regard as admissible measures taken by national legislatures for facilitating the application of Community law and consequently national rules for interpreting Community descriptions of a general nature. It stresses however that Member States do not have the freedom and the discretionary powers to assign specific goods to a particular tariff heading.

If endeavours are made to find an answer to the questions referred by examining this wide range of opinions it is necessary to lay emphasis at the outset on an essential principle. It is in fact abundantly clear that the common market organizations can only fulfil their functions if their uniform application throughout the whole of the Community is guaranteed. In particular there can be no departure from the principle that in every Member State the same rates of levy must be applied to the same goods. If this principle were not adopted, there would be every reason to expect that mechanisms of market organization would run into serious difficulties and that there would in particular be the danger of diversions of trade with third countries — it is a third country which is involved in the main action. This appreciation of the problem certainly does not call in question the validity of the view put forward by the Bollmann firm and the Commission, namely that sovereignty in tariff matters relating to goods covered by a market organization has been transferred to the Community. If this view is right, it is however at the same time clear that in principle Member States no longer have an independent discretionary power to make binding rules in this field. Any such relevant questions of classification for tariff purposes are rather to be decided by the Community — Bollmann has called attention to this in its statement of case — as it has done in numerous legislative measures since 1962.

On the other hand we are also faced with

the fact that tariffs — including tariffs of levies — commonly include standard descriptions of goods which again and again give rise to doubts about their interpretation and to difficulties in their application. These difficulties appear to arise also in relation to the list of goods in this case as is shown by the facts in the main action. So the question can properly be asked whether it can be assumed, notwithstanding the sovereign power which the Community has in principle in tariff matters, that Member States have powers of clarification and definition at least so long as these are no detailed and accurate Community rules. As we have seen this is the Federal Government's argument. It can however easily be shown that it has no foundation. In fact it emerges from an examination of the entire system applicable to this case that in spite of the general nature of the description of goods in Regulation No 77 Community law itself clearly states in the final analysis how the goods in question are to be classified. On this point it is significant that the list of goods in Regulation No 22 and Regulation No 77 adopts the nomenclature of the Common Customs Tariff, which, as everyone knows, is based on the Brussels Nomenclature. As the Commission has explained a valuable aid to interpretation can therefore be found in the explanatory notes on the Brussels Nomenclature. Further the Decision of the Council of 13 February 1960 contains provisions for classification and interpretation relating to the Common Customs Tariff. Finally Article 8 of Regulation No 77 is itself a special provision relating to the classification of goods for tariff purposes and I will refer to this again in another connexion. All this in fact permits the conclusion to be drawn that Community law is wholly and comprehensively applicable to the present question of tariffs and, to use Bollmann's expression, 'self-executing'. Although there is no separate detailed treatment of the classification of goods for tariff purposes in Community law, Member States clearly do not retain any national discretionary power to classify goods subject to the tariff, which the German Government claims it has by likening Community law to a wide-meshed net, that is to say, any discretion to issue binding provision of national law in the matter.

At all events *one* limitation could be placed on the argument developed so far, which the Commission advocates but which is contrary to the view of Bollmann. Administrative requirements make it quite impossible to dispense with accurate and detailed rules, because they secure and facilitate administrative uniformity. Having regard to this necessity it seems defensible to accept that Member States have the power to issue explanatory notes on the tariff of levies which go beyond what can be directly inferred from the Community provisions. It is true that such notes — and this fact is decisive — cannot be final, binding measures, no matter when they were or will be made, but they are subject to the reservation that they must be compatible with the classification principles of Community law which take precedence. Subject to this essential limitation it must be recognized that Member States have the power to explain tariff rules, because this power does not represent a threat to the uniformity of administrative practice in the Community or offer any opportunity for manipulating the national tariff, which would be a danger which could not be discounted if questions concerning the classification of goods for tariff purposes were left to be decided by Member States exercising genuine discretionary powers. This proposition can moreover be all the more readily accepted, because apparently it is the practice of the Member States before issuing any such explanatory notes to reach agreement with each other and the Commission's experts. It seems to me indeed doubtful whether the court making the reference when it settled its questions had in mind such declaratory explanatory notes. Although the notion of the sovereign power of the Community in tariff matters, as I have described it so far, is to be inferred from the system provided by Regulations Nos 22 and 77 or — if you like — from the way in which Article 1 of Regulation No 22 sets out the list of goods in question, it must now still be shown that another result cannot be reached on the basis of *Article 14* of Regulation No 22 (to which the Bundesfinanzhof also referred). Article 14 of

Regulation No 22, as we know, provides that 'Member States shall take all steps to adapt their legislative and administrative provisions and regulations in such a way that the provisions of the present Regulation, unless hereby otherwise expressly provided may be effectively implemented as from 1 July 1962'. In fact in order to understand its actual meaning the best thing to do is to adopt the Commission's interpretation. This is that Article 14 and other similar provisions, which as a matter of routine were incorporated in all market organizations, are primarily intended to supersede the systems which existed before, that is to say, to draw the attention of Member States to the need to repeal conflicting national laws. In addition Article 14 — the Commission argues — has an important part to play in the context of the necessary co-operation between Member States and Community institutions under the system of the common market organizations, that is to say, in the sharing of tasks which is essential to the market organizations. In fact these organizations are run on the basis that the necessary *central* decisions are made by the Community institutions whilst the administrative implementation is the responsibility of Member States. If Article 14 of Regulation No 22 is regarded in this light, it and other similar provisions refer primarily to the creation of the administrative conditions for putting into effect market organizations. They include measures such as the designation of the competent authorities, the fixing and computation of certain prices, the grant of licences, the conversion of the levy rates expressed in units of account, their calculation by means of specific conversion factors, etc. On the other hand there does not appear to be any justification for the assumption that Article 14 authorizes the adoption of tariff measures, that is to say, provisions which go beyond what is to be regarded as permissible classification and explanation of tariff headings in order to facilitate administration in the way I have mentioned above.

With regard to the first two questions referred by the Bundesfinanzhof the following is therefore a summary of my submission. Sovereignty in tariff matters relating to the goods described in Regulation No 22 was transferred to the Community where that regulation entered into force. The question under which tariff heading goods are to be classified is governed solely by Community law. Member States have no jurisdiction to issue binding, explanatory notes. Subject to this reservation national explanatory notes can however be issued in order to facilitate administrative tasks.

2. Having regard to this result, namely the conclusion that the classification of the disputed goods for tariff purposes is determined ultimately not by national explanatory memoranda but by Community law, the third question has also to be answered. In doing so it will become apparent — as it were incidentally — whether the information relating to the tariff of levies mentioned in the order for reference, which was issued after the goods were imported, is compatible with Community law or whether, as the explanatory notes to the Common Customs Tariff referred to by Bollmann suggest, the tariff classification is correct. In short, I repeat that the Bundesfinanzhof wishes to know whether 'turkey rumps' are 'backs' 'other poultry cuts' or 'edible offals'. These are the three headings which had to be considered under Article 2 of Regulation No 77 as amended by Article 1 of Regulation No 136 and under Article 3 of Regulation No 77 in the case of the imported goods on the date when they were cleared by the customs. The conversion factors applicable to these three headings were 0.75 ('backs and necks'), 1.25 ('other poultry cuts') and 0.46 ('edible offals'). According to these conversion factors the levy was determined with reference to the amounts of the levy fixed for slaughtered turkeys. The views of the three parties to the proceedings on the third question can easily be summarized: Bollmann regards turkey rumps as edible offals, the Commission and the Federal Government on the other hand consider that the heading 'backs and necks' applies.

Let us examine in greater detail the arguments which the parties have put forward.

As Bollmann stresses, the first point to be considered is whether the Court has not been asked to *apply* the law, which is not permissible in proceedings under Article

177, instead of or in addition to giving an interpretation. This consideration could be relevant with reference to the Federal Government's observation that it is possible to imagine cases where a larger part of the back is cut off with the rumps, when therefore — in order to complete the observation — the goods are incorrectly described as 'rumps'. In fact we have no need to deal with the problem of identifying the goods; on the contrary it can be assumed in the present proceedings that the subject-matter of the main action is concerned with genuine turkey rumps within the meaning described by the importer and the meaning given in the expert's opinion which has been produced. Further — and this is the main point which the Bollmann firm had in mind — the Court is not entitled to apply the law by actually assigning turkey rumps to a tariff heading. This too appears in itself to be correct, because the only task in fact assigned to the Court is to interpret the Community concepts which call for consideration and to enable the national court to make a correct classification. However I would just like to say an excessive scrupulosity in this matter is misplaced. In my opinion there can be no objection if the Court resolves directly the subsumed question of classification (naturally stating its reasons) and therefore does not limit itself to giving a circumstantial and abstract definition of the concepts which have to be interpreted by means of which the national judge then proceeds to answer the larger question. I shall in any event proceed on this basis.

So far as the question of tariff classification in this case is concerned, which Bollmann submitted during the oral procedure is solved at least to this extent that turkey rumps are definitely 'edible goods', I recall that the Federal Government and the Commission came down on the other hand decisively in favour of classifying them under 'edible offals'. Placing emphasis on the literal meaning of this expression they consider that the following question must be asked; when poultry is slaughtered in the normal way which parts are usually left to be prepared for commercial use in addition to those parts of the bird which have been separated and put in a marketable condition. It is only the former parts which can be regarded as 'edible offals'. If this test is applied to this case they come to the conclusion in answering this question that rumps are not separated when turkeys are slaughtered and dressed in any of the Member States. They go on to argue that since it is the practice adopted inside the Community which is the conclusive factor, turkey rumps cannot be classified as offals. It is on the other hand irrelevant that there is another practice in the country of origin (the USA), where, according to Bollmann's submissions, because of the more refined consumer habits, turkey rumps apparently are normally detached from the body when poultry is slaughtered, that is to say, not only separated when the foreign importers give express instructions to that effect.

It cannot in fact be denied that this is a very appealing explanation. But in the final analysis it gives nevertheless the impression that the Federal Government and the Commission have placed too much emphasis on what happens when poultry is slaughtered and have ignored *the commercial meaning* (which the Commission also mentions). The same criticism can be made against the Commission's reference to the fact that Regulations No 76 and No 77 list as typical edible offals heads and feet of chicken but not rumps. In fact this enumeration of goods by way of example affords no yardstick for the classification of turkey rumps, for the very good reason, and I accept Bollmann's view on this point, that the deciding factor in determining the question is the commercial meaning.

If an endeavour is made to ascertain what this meaning is in the present case (by referring to the Community sector and not to the countries from which the goods are imported), in the final analysis — contrary to the astonishing view put forward by the Commission on this point — it is the opinion of the average ultimate consumer which is relevant. His evaluation of goods is reliably reflected in their market price. In this respect the figures produced by Bollmann whose accuracy has not been challenged are instructive. In addition the expert's reports also produced by Bollmann to the effect that turkey rumps at least

approximate to offals are instructive. Without any further examination these facts therefore enable us to conclude that the commercial view prevalent in the Community is that turkey rumps are offals.

In addition the same indication is given by the before-mentioned explanatory notes on the Brussels Nomenclature (which agree word for word with the German explanatory notes), namely texts, in respect of which I said, when answering the first two questions, that they can be of help in interpreting Community law, because the Common Customs Tariff is based on the Brussels Nomenclature. In fact according to these explanatory notes tails are offals. Since turkey rumps are however tails in the zoological meaning of this word and since the said explanatory notes are apparently not based on outward appearances there is no reason why turkey rumps should not rank as offals in the same way as the tails of animals in which bone and gristle predominate.

If, however, any doubts about this interpretation still remained they could, moreover, be removed by reference to the rule of classification for tariff purposes contained in Article 8 of Regulation No 77, which was also mentioned when dealing with the first two questions. This provision reads as follows: 'The other products in Article 1 (1) of Regulation No 22 of the Council ... prepared or packed otherwise than in the forms covered by Articles 2-6, shall for the purposes of the present regulation, be assimilated to that type of presentation most nearly corresponding to the way in which they are prepared or packed'. In applying this provision — as the Bollmann firm suggests — the commercial value should properly be regarded as the main consideration. By proceeding on this basis there is not the slightest doubt that turkey rumps most nearly correspond to offals.

Finally this concept of turkey rumps is confirmed — although not conclusively — by Regulation No 79/66 of the Commission of 29 June 1966 (OJ 1966, p. 2176). As I have already mentioned this regulation introduced a more marked distinction in the case of the amounts of levy applicable to farmyard poultry, in particular to those concerned with the description 'other cuts'. So the result is that Article 2 (2) (f) provides for a conversion factor of 0.50 for the importation of 'backs, necks, backs with necks, rumps, wing ends', so that rumps are expressly mentioned. It could indeed be maintained that this regulation is an authority for the proposition that turkey rumps are definitely not to be counted as offals, but are classified under one particular heading with backs, necks, ... etc. However such an approach would be wrong in our case. As regards a period in which there was no express reference in the tariff to turkey rumps what is much more important is the fact that under the specific tariff now in force providing for a conversion factor of 0.50 for rumps, based on the rates applicable under Regulation No 77 read in conjunction with Regulation No 136, turkey rumps clearly correspond to offals (to which a conversion factor of 0.46 is applicable) than to 'backs and necks' to which a conversion factor of 0.75 applied. This may at least provide some confirmation for the view that it is correct to apply the tariff classification provision of Article 8 of Regulation No 77 in the way which was previously suggested. Without seeking to find a general definition of the expression 'offals' the third question can therefore be answered in this way, that under the tariff in force in 1962 turkey rumps, having regard to the trade meaning of this term and to their commercial value, which is lower than that of backs and necks, were to be regarded as 'edible offals'.

3. I can therefore summarize all the conclusions in my opinion as follows:

The answer to the first two questions referred by the Bundesfinanzhof is that Member States, having regard to the exclusive sovereignty of the Community in tariff matters relating to goods covered by market organizations, have no discretionary powers to issue binding tariff provisions and that Articles 1 and 14 of

Regulation No 22 did not grant them such powers. As long as the Community did not provide detailed explanatory notes Member States were certainly entitled, in order to facilitate the work of their administrations, to issue explanatory material of this kind for internal use. They had however to be subject to the condition that they were compatible with Community law which in tariff questions is comprehensive and takes precedence.

The answer to the third question would appear to be, having regard to the legal position in force at the date of the imports in question, that turkey rumps, in view of that term in the trade meaning, were to be considered as offals within the meaning of Article 3 of Regulation No 77.

As has been the case in all other cases referred until now the Court does not have to make a decision on costs. That will be a matter for the court making the reference.