5. The phrase 'kibbled millet grain' used in Article 1 (d) of Regulation No 19/62 and mentioned under tariff heading ex 11.02 A III (b) in the annex to that regulation must be interpreted as including products chiefly consisting in unworked fragments of grain, similar to those of kibbled milo grain which may in addition include numerous lumps of varying sizes formed by the agglutination of particles of milo. This product comes under the abovementioned tariff heading where some of its constituent elements have been removed if it still contains the essential constituents of milo in such proportions that the quantity of those constituents is not smaller than the normal values of the natural contents of milo.

In Case 14/71

Reference to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof, Seventh Chamber, for a preliminary ruling in the action pending before that court between

GÜNTHER HENCK, Hamburg-Altona,

and

HAUPTZOLLAMT EMMERICH

on the interpretation of certain provisions of Regulation No 19 of the Council of 4 April 1962,

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 — Summary of the facts and procedure

The facts which form the basis of this case may be summarized as follows:

1. On 4 March 1964, the Günther Henck undertaking obtained customs clearance for the release to the market of two consignments of a commodity described in the customs declaration as 'An English product consisting in dry sorghum pulp, a residue of starch manufacture'. In accordance with the customs declaration, the customs office classified

the commodity in question under tariff heading 23.03 of the German customs tariff, which corresponds to the Common Customs Tariff, which did not provide for the payment of customs duties. Subsequently, on the basis of reports from the Zolltechnische Prüfungs- und Lehranstalt, Cologne, the customs authorities decided to classify the abovementioned product as 'kibbled sorghum grain' under heading 11.02 A III (b) of that tariff which provides for the application of a levy.

When the final appeal in the proceedings relating to this tariff classification had been brought before the Bundesfinanzhof, the latter decided to stay the proceedings and referred the following question to the Court in application of Article 177 of the EEC Treaty:

> 'Must the expression "kibbled millet grain" referred to in Article 1 (d) of Regulation No 19/62 of the Council of the EEC in conjunction with the annex to that regulation (No 11.02 ex A ex III (b) of the Common Customs tariff) be interpreted as meaning that it covers a product which consists chiefly in unworked fragments of grains which are similar to those of kibbled sorghum ("millococo" or "Miloschrot") and which in addition include many lumps of varying sizes formed by the agglutination of particles of sorghum, given that in addition, even where some of their constituent elements have been removed, these products still contain 64.3% or 66.4% starch (when this content has been determined according to the EEC procedure), 10% or 9.7% crude albumen and 3% or 3.6% fat or must certain other constituent elements be required in addition to reach certain maximum or minimum levels?'

2. The order for reference was received at the Registry of the Court of Justice on 19 March 1971.

The Günther Henck undertaking 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.

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

The Günther Henck undertaking, represented by Fritz Modest and Claus Brändel and the Commission of the European Communities, represented by its Legal Adviser Peter Kalbe, acting as Agent, submitted oral observations at the hearing on 30 June 1971.

The Advocate-General delivered his opinion at the hearing on 7 July 1971.

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

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

Admissibility

A — According to the *Henck undertaking*, the Bundesfinanzhof is not seeking the interpretation of the expression 'kibbled millet grain' but rather the application of Article 1 (d) of Regulation No 19/62 in this case. But questions of interpretation which are referred for a preliminary ruling may only be posed generally and in the abstract. The application of Community law to actual cases does not come within the jurisdiction of the Court under Article 177 of the Treaty.

Moreover, the court making the reference, in wording its question, failed to take into consideration that Regulation No 19/62 was replaced from 1 July 1967 by Regulation No 120/67. Since the law applicable to the imports in question was that in force when the goods were imported, that is in 1964,

the interpretation requested must solely inquire into what the contents of the Community law applicable were at that time. The question put by the German Court can therefore only be admitted in so far as it asks:

> 'What was the meaning of the expression "kibbled millet grain" within the meaning of Article 1 (d) of Regulation No 19/62 for the period from January to March 1964, having regard to the annex to that regulation?'

These objections raise, according to the Henck undertaking, a problem which appears insignificant but which is in fact very important; that of an interpretation given by a court almost ten years after the dispute arose and which attributes to the applicable law a meaning which the parties could not have taken into consideration when the dispute emerged. The Henck undertaking points out in particular that because of the length of the national proceedings and the relatively short duration of Community rules, which are often replaced and amended, the German courts are no longer able to follow the developments in Community legislation and case-law and are therefore no longer even in a position to ensure the certainty of the law in cases to come. Having made these remarks as to the meaning and significance in this respect of the judgments of the Court in Cases 72/69 and 74/69, it deals with the problem of 'the retroactive effect of decisions made by courts' which, although it does not arise as often as that of the retroactive effects of the law, is however not new. It puts forward many arguments on this subject based both on national practice and Community practice with regard to regulations and it claims that it follows from those that the retroactive effect of legal provisions represents a quite exceptional and limited phenomenon. It concludes by recalling the need to avoid the application of the law in general and of Community law in particular injuring the legal protection of those subject to the law by weakening the certainty of the law in legal relationships.

At the end of these observations, it summarizes its position in the matter as follows:

— the Henck undertaking imported the product in question when Regulation No 19/62 was in force;

— the German customs authorities did not consider that this product came within the common organization of the agricultural market at the time when it was imported;

— the German customs authorities changed their mind about the classification of this product after the latter had been marketed;

— the Henck undertaking had not been able to protect itself against the amendments made *a posteriori* to the tariff classification by the German customs authorities by applying in particular to the latter for a binding tariff assessment in accordance with Paragraph 23 of the German Customs Law, since such assessments are, according to the case-law of the Court, of no effect in the Community sphere;

— in spite of the fact that at the time when the goods were imported the German customs authorities agreed with the plaintiff in the main action in classifying the goods in question under tariff heading 23.03 and in spite of the fact that it could not be foreseen that there would be a dispute with the customs authorities on this point, the plaintiff has now, after seven years, to accept a decision to be made on the classification which was applicable at that time;

— for these reasons, the Henck undertaking is of the opinion that the interpretation of Article 1 (d) of Regulation No 19/62 must now be sought exclusively on the basis of the sources of information and the means of interpretation at the disposal of the parties and the German customs authorities at the beginning of 1964. In other words, the interpretation of

the abovementioned provisions of Community law must be sought by the Court of Justice by referring to the time when the product in question was imported.

Subject to these observations, the Henck undertaking leaves it to the Court to determine the admissibility of the question which has been referred.

Moreover it observes that it follows from the grounds of the order for reference that the essential subject-matter of the dispute concerns the distinction between tariff heading 11.02 and tariff heading 23.03. But tariff heading 23.03 was only put under the Common Customs Tariff by Regulation No 950/68 of the Council and therefore did not come within the common organization of the agricultural market either in 1964 or subsequently. The Court of Justice therefore has no jurisdiction in the present case to interpret it, since the power of interpretation given it by Article 177 of the Treaty only exists in respect of tariff headings which come within Community law.

B — The *Commission of the European Communities* does not raise any objections as to the admissibility of the question which has been referred. It points out that the common organization of the market established by Regulation No 19/62 extends to millet and to sorghum referred to in tariff heading 10.07 and to their secondary products within the meanings of headings 11.01 and 11.02 and that Article 5 of Regulation No 55/62 provides for the application of a levy on (c) 'cereal groats and cereal meal' and on (g) 'kibbled sorghum'. On the other hand, 'residues of starch manufacture' within the meaning of tariff heading 23.03 were not subject to Community regulations at the time when the goods in question were imported.

Since the question which has been referred relates to a product which is precisely described as to its composition and nature it is not at all necessary to define the whole extent of the field of application of that heading in this case.

As for the correct identification of the imported product because of its composition and nature and as to the application thereto of criteria established by the Court in connexion with that heading, both come solely within the jurisdiction of the national courts.

The substance of the case

A — The *Henck undertaking* considers that according to both Community law and national law and the 'Explanatory Notes to the Brussels Nomenclature', two criteria were decisive for the definition of the concept 'kibbled grain' at the beginning of 1964:

— from the point of view of its *composition,* the product must show all the essential elements of grain in the natural state: the combination of these constituent elements must not be altered in any way;

— from the point of view of its *structure* the product must consist in coarse irregular fragments of kibbled grain.

No other criteria have been established since the beginning of 1964 either by Community law or by German law either because of commercial practices or finally through uniform administrative practice by the six Member States.

The Henck undertaking emphasizes that the subject-matter of the action concerned with the question where the demarcation line between the tariff headings 11.02 and 23.03 lies and points out that the latter heading covers residues analogous to those derived from the working of cereals and is thus similar to heading 23.02. Because of this resemblance, the criteria which enable the distinction between heading 11.02 and heading 23.02 to be made must apply by analogy to the products covered by tariff heading 23.03;

(a) with regard to the distinction between 'flour' and 'bran', the ash content is determinative: the higher the ash content, the lower the quality of the flour;

(b) with regard to the food value of the worked cereals, the starch content is determinative: but this content is not the only decisive criterion for the classification of a product under tariff heading 11.02 or 23.02.

The Community legislature, although it could have placed the product under heading 23.03 under the common organization of the market, did not avail itself of that power in Regulation No 19/62, or, later, in Regulation No 120/67. This attitude on the part of the legislature cannot be evaded by interpreting the phrase 'kibbled grain' in a completely unjustified way so as to include therein farinaceous residues of starch manufacture. This would be opening the door to arbitrary decisions.

The Henck undertaking summarizes its attitude to the matter thus:

(a) According to the feedstuff industry and commercial practice the phrase 'kibbled grain' has for a long time described the product derived from a method of grinding during which it was prohibited under paragraph 19 of the regulation of 21 July 1927 implementing the Law on Feedstuffs to alter the natural state of the product by removing or adding constituent elements.

(b) At the beginning of 1964, neither the applicable Community law nor national tariff law contained a definition differing from that based on the legislation on feedstuffs.

(c) It follows from Article 11 of Regulation No 55/62 of the Council that the starch content cannot be a bar to the classification of the product under tariff heading 23.02. The same applies as regards products to be classified under tariff heading 23.03. There did not exist any provision of Community law or provisions of national law or, finally, any directives laying down a maximum starch content for residues of starch manufacture referred to in tariff heading 23.03.

(d) It emerges from the distinction between 'flour' and 'kibbled grain' re-enacted in Community law that the structure of the product was also significant for its classification under tariff heading 11.02. In the absence of implementing provisions of Community law, the 'Explanatory Notes to the Brussels Nomenclature' on tariff heading 11.02 should also be taken into consideration, since those notes particularly emphasize the criterion for making the distinction which is based on the structure of the product.

At the end of these considerations, the Henck undertaking concludes as follows:

(a) The phrase 'kibbled millet grain' within the meaning of Article 1(d) of Regulation No 19/62 in conjunction with the annex to that same regulation must be interpreted to the effect that from January to March 1964 it included products derived from the grinding of millet grains which had been coarsely kibbled and displayed the natural characteristics of those grains to which ingredients should not have been added or from which they should not have been removed.

(b) Costs are reserved until the judgment of the Bundesfinanzhof which will decide the result of the main action.

B — The *Commission of the European Communities* recalls first of all that, of all the kinds of millet, 'sorghum' is a kind which is rich in starch and which according to its use and its processing, is very similar to maize and may sometimes be used as a substitute for the latter. Its use as a foodstuff is very limited in Europe; on the other hand, it is widely used for feedstuffs and starch manufacture. As in the case of maize, kibbled grain, groats, meal, flour and flakes may be obtained as primary products through dry-milling of the sorghum. Secondary products, which are used as animal feedstuffs and the composition of which

varies according to the process which is used, especially pulps, glutens, flours etc., are the result of starch extraction. The Commission refers to the observations which it put forward in Case 12/71 for further considerations of a technological nature.

With regard to the tariff, the Commission recalls that residues of starch manufacture within the meaning of heading 23.03 were not subject to the Common Customs Tariff when the goods in question were imported and points out that, as in the case of maize, experience shows in the case of sorghum, too, that of the various secondary products which are the result of starch manufacture, products which are rich in starch and have a relatively high value are often declared as 'residues' within the meaning of tariff heading 23.03 when they are imported. It deduces from this that tariff heading 11.02 applies not only to what are properly speaking primary products which are obtained from the dry milling of the cereals (in this case sorghum) but also to products which are added to residues within the meaning of heading 23.03 and are, as regards their value, their composition and their use, similar to genuine products which are the result of sorghum milling.

It follows that true residues within the meaning of tariff heading 23.03 are products which are derived from a process which enables all the starch which can be obtained in an economically profitable way to be extracted from the raw material by modern techniques.

Then the Commission sets forth its opinion on the concept of 'kibbled millet grain': it claims that the latter are broken or cut fragments which are the result of the rough grinding of the sorghum and which have the basic composition of that product.

The Commission illustrates the average composition of sorghum in contrast to other kinds of millet and maintains that the various starch, protein and fat contents pointed out by the Bundesfinanzhof are normal variations in the composition of millet and sorghum. According to their composition, the products in question therefore correspond to 'kibbled millet grain' and must be classified under tariff heading 11.02. On the one hand, the presence of fragments of unworked sorghum is no bar to that classification; on the other, the existence of lumps formed by the agglutination of particles of sorghum does not make that same classification impossible. It may occur that such a commodity no longer corresponds to the definition of 'kibbled grain' accepted by German law on feedstuffs; but the specific definition of kibbled grain laid down by the law of a single Member State is not necessarily suitable for re-enactment in the sphere concerning the whole of the Community. Moreover, the agglutination of the natural kibbled fragments may be explained by the action of moisture because of ineffective processing or storage. Such agglutination may also be caused by the disintegration of oil in the product which has been superficially degermed and which is therefore rich in fats. It claims that in none of these cases is there a process whereby residues of starch manufacture are produced within the meaning of tariff heading 23.03.

Finally the Commission points out that where the kibbled grain is added to a residue or vice versa, when the resulting product is similar in its composition, use and fat content to normal kibbled grain, the fact that such mixing has taken place cannot in any way alter the classification of that product under tariff heading 11.02. It concludes as follows:

> 'A floury sorghum residue of the type indicated must be considered as "kibbled millet grain" which comes under tariff heading 11.02 and must therefore be subjected to the levy laid down in Article 5 (1) (g) of Regulation No 55. This product is described sufficiently by the information supplied by the Bundesfinanzhof. The

maximum or minimum content in other constituents is not necessary in this case for the purposes of the distinction between the products in tariff heading 11.02 and residues within the meaning of tariff heading 23.03.'

Grounds of judgment

By order of 12 January 1971 received at the Court Registry on 19 March 1971, the Bundesfinanzhof of the Federal Republic of Germany referred under Article 177 of the Treaty establishing the EEC, a question on the interpretation of Article 1 (d) of Regulation No 19 of the Council of 4 April 1962 (OJ 1962, No 30).

The jurisdiction of the Court

Whilst requesting the Court to define the scope of Article 1 (d) of Regulation No 19/62 with regard to certain products, the Bundesfinanzhof gives details as to the composition of this product. The Günther Henck undertaking maintains that because of these details, the question which has been referred does not in fact request the Court to define the meaning and the scope of the abovementioned provision but to apply that same provision to the case in question.

Although Article 177 of the Treaty does not allow the Court to give a ruling on a specific case when it is called upon to interpret Community law, the need, however, to reach a helpful interpretation of the provisions in question justifies the statement by the national court of the legal context into which the interpretation sought must be placed. The details contained in the question which has been referred enable the category of products which may come within the provision in question to be ascertained in a general and abstract way.

Moreover, since Regulation No 19/62 was repealed and replaced from 1 July 1967 by other provisions of Community law, the Günther Henck undertaking maintains that the Court cannot give a reply to the question which has been referred on the basis of legal rules which were not applicable at the time of the imports in question.

The principle of legal certainty makes it necessary to refer to the state of the law in force when the regulation in question was applied. The wording of the question which has been referred does not prevent the interpretation requested being sought whilst complying with that principle.

On the substance of the case

6 In its question, the Bundesfinanzhof requests the Court to rule whether the expression 'kibbled millet grain' used in Article 1 (d) of Regulation No 19/62

of the Council and mentioned under tariff heading ex 11.02 A III b in the annex to that regulation must be interpreted as including unworked fragments of grain similar to those of kibbled milo grain which include in addition many lumps of varying sizes formed by the agglutination of particles of milo, given, moreover, that even where some of their constituent elements have been removed this product still contains 64.3% or 66.4% starch, 10% or 9.7% crude albumen and 3% or 3.6% fat. Furthermore, the Bundesfinanzhof asks whether other constituents such as proteins or raw fibres must be required to reach maximum or minimum levels with regard to that product.

7 Neither Regulation No 19/62 nor Regulation No 55/62 define 'kibbled millet grain' within the meaning of the abovementioned tariff heading ex 11.02. In the absence of provisions of Community law on the subject, the Explanatory Notes and Classification Opinions laid down by the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs are authoritative as a valid means of interpreting headings in the Common Customs Tariff. It appears from those notes concerning the headings in Chapter 11 of the Tariff that fragments or floury kernels obtained by the rough grinding of milo which have the essential characteristics of the original product with regard to their composition must be considered, also taking into consideration the practice in the milling of milo and in the milo trade, as 'kibbled millet grain' within the meaning of tariff heading ex 11.02. Since any agglutination of this grain into numerous lumps of varying sizes does not involve an alteration in its natural composition, it is not the factor which determines its exclusion from the above defined category of 'kibbled grain'.

8 The national court asks whether the fact that this product has undergone starch extraction can affect its classification in the category of kibbled millet grain within the meaning of tariff heading ex 11.02.

9 The interpretation of a tariff heading must in doubtful cases take into consideration both the function of the customs tariff in view of the needs of the system or organization of the markets and of its purely customs function. Although Regulation No 19/62 includes kibbled millet grain within the meaning of heading ex 11.02 in the system of the common organization of the market in cereals and made it liable to the levy system by Regulation No 55/62, this was mainly because of its structure and use and not because of the treatment which it underwent. It follows that kibbled millet grain which has undergone processing enabling certain constituents to be extracted therefrom continues to come under tariff heading ex 11.02 if it still contains the essential constituents of milo in quantities corresponding to normal variations in the natural content of those constituents in the original product.

10 Furthermore, the abovementioned explanatory notes to the headings in Chapter 11 do not rule out the possibility that cereals, including millet, which

have undergone such proceeding may belong to the chapter in question. Moreover, it appears from the customs tariff which was applicable at that time that only in so far as they are waste do those cereals not come under that chapter but have to be classified amongst the 'residues from the manufacture of starch' within the meaning of tariff heading 23.03. Although the Court cannot interpret the said heading which was not included in the common organization of the market at the time when Regulation No 19/62 was in force but still came within national customs tariffs, it cannot, however, define the scope of tariff heading ex 11.02 without taking into consideration, in respect of products which have undergone starch extraction processing, the dividing line which must be drawn between those products and 'residues' as referred to in heading 23.03. The concept of 'residues' implies that kibbled millet grain which still contains 60% or more starch after undergoing a process of starch extraction may not be considered waste but must because of its starch content be placed under the same tariff heading as that applicable to kibbled grain which has not undergone the same process.

11 For those reasons, the expression 'kibbled millet grain' used in Article 1(d) of Regulation No 19/62 and mentioned under tariff heading ex 11.02 a III b in the annex to that regulation must be interpreted as including a product which chiefly consists in unworked fragments of grain similar to those of kibbled milo grain which may in addition include many lumps of varying sizes formed by the agglutination of particles of milo. This product comes under the abovementioned tariff heading if some of its constituent elements have been removed if it still contains the essential constituents of milo in such proportions that the quantity of those constituents is not smaller than the normal values of the natural contents of milo.

Costs

12 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable and since these proceedings are so far as the parties to the main action are concerned a step in the action pending before the national court, 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 oral observations of the Günther Henck undertaking 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 Articles 39, 40 and 177;

Having regard to Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the market in cereals;
Having regard to Regulation No 55 of the Council of 30 June 1962;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, 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 Bundesfinanzhof (Seventh Chamber) of the Federal Republic of Germany pursuant to the order made by that court on 12 January 1971, hereby rules:

The expression 'kibbled millet grain' used in Article 1(d) of Regulation No 19/62 and mentioned under tariff heading ex 11.02 A III b in the annex to that regulation must be interpreted as including a product which chiefly consists in unworked fragments of grain similar to those of kibbled milo grains which may in addition include many lumps of varying sizes formed by the agglutination of particles of milo. This product comes under the abovementioned tariff heading where some of its constituent elements have been removed if it still contains the essential constituents of milo in such proportions that the quantity of those constituents is not smaller than the normal values of the natural contents of milo.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 14 July 1971.

R. Lecourt
President

A. Van Houtte
Registrar

OPINION OF MR. ADVOCATE-GENERAL ROEMER

(See Case 12/71, p. 754)