value, they do not constitute offals within the meaning of subheading 02.02 C so long as they essentially consist of muscle or fragments of muscle comprising only a small proportion of tendons, fat and fibrous tissue.

4. In the absence of express provisions it would be inappropriate for the headings of the Common Customs Tariff to be applied differently for one and the same product depending on whether the classification is for the imposition of customs duties, the application of the rules of common organizations of the market or of the system of monetary compensatory amounts.

In Case 158/78

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Münster for a preliminary ruling in the proceedings pending before that court between

P. BIEGI HANDELSAGENTUR GMBH, Frankfurt am Main,

and

HAUPTZOLLAMT [Principal Customs Office] BOCHUM,

on the validity and temporal application of Commission Regulation (EEC) No 1669/77 of 25 July 1977 on the classification of goods under Common Customs Tariff subheading 02.02 B I and on the interpretation of certain subheadings of the Common Customs Tariff,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. M. Donner and G. Bosco, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. The point at issue in the present case is whether certain poultry meat should be classified in the Common Customs Tariff as "boned or boneless poultry cuts (excluding offals)" or as "edible offals".

On 2 March, 4 March and 13 April 1977 the commercial agency Biegi GmbH of Frankfurt am Main (hereinafter referred to as "Biegi") applied to the Zollamt [Customs Office] Gelsenkirchen for customs clearance into free circulation of three consignments of frozen turkey meat imported into the Federal Republic of Germany from the United States. The importer claimed that the goods should be classified under subheading 02.02 C of the Common Customs Tariff as poultry "offals".

The customs administration first applied that tariff classification and charged the sum of DM 3 276.90 by way of levies and monetary compensatory amounts. Following an examination of a sample of the goods, however, it classified the product in question under tariff subheading 02.02 B I as "Poultry cuts (excluding offals): Boned or boneless" and, by corrective assessment of 16 May 1977, it imposed the sum of DM 22 457.70 by way of import duties and taxes.

Such classification is also provided for in Commission Regulation (EEC) No 1669/77 of 25 July 1977 on the classification of goods under Common Customs Tariff subheading 02.02 B I (Official Journal L 186 of 1977, p. 23) which entered into force on 16 August 1977, that is, a date subsequent to that of the imports in question and the contested corrective assessment.

Article 1 of that regulation is worded as follows:

"Raw, frozen poultry-meat in particular turkey meat, obtained by scraping poultry bones from which the prime cuts have been removed or in any other way (for example, in the reduction of larger cuts to smaller size) and consisting of small, irregularly shaped pieces, sometimes with fibrous, gristly and fatty tissue attached thereto and individually weighing from 5 to 40 grams approximately, shall be classified in the Common Customs Tariff under:

02.02 Dead poultry (that is to say, fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), fresh, chilled or frozen:

B. Poultry cuts (excluding offals):

1. Boned or boneless."

2. The objection lodged by Biegi against the said corrective assessment was rejected by the Hauptzollamt Bochum and Biegi subsequently submitted an application to the Finanz-

gericht Münster which, by order of 27 April 1978, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

1. Is Commission Regulation (EEC) No 1669/77 of 25 July 1977 on the classification of goods under Common Customs Tariff subheading 02.02 B I (Official Journal L 186, p. 23) invalid because it does not specify the content of tariff subheadings 02.02 B I and 02.02 C but amends them and therefore goes beyond the powers conferred by Regulation (EEC) No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special Edition 1969 (I), p. 12)?

2. If Question 1 is answered in the negative:

   Does Regulation (EEC) No 1669/77 have retroactive effect in the sense that courts and authorities in the Member States are to apply it to imports carried out before its entry into force?

3. If Question 1 is answered in the affirmative or if Question 2 is answered in the negative:

   According to what criteria was the distinction to be drawn between tariff subheading 02.02 B I — "Poultry cuts (excluding offals) boned or boneless" — and subheading 02.02 C — "Offals" — before the entry into force of Regulation (EEC) No 1669/77? Were the shape, size, weight and quality of the goods, the way in which they were produced, the use to which they were to be put and/or their commercial value the decisive factors?

   In this particular case:

   In the period from 2 to 13 April 1977 did pieces of turkey meat without bones, of irregular shape, individually weighing approximately 20 grams, with certain pieces however weighing up to 60 grams, 10 to 15% of which consist of fat, skin and fibrous tissue and the remainder of which is muscle with a small proportion of veins and glands, obtained by scraping poultry bones from which the prime cuts have been removed and which are only suitable for the production of sausage and pies with the addition of other types of meat and the market price of which in the first half of 1977 was DM 4.40 to 4.80 per kilogram fall within tariff subheading 02.02 B I or 02.02 C of the Common Customs Tariff?

4. What answer is to be given to Questions 1 to 3 with regard to the tariff classification for the purposes of the imposition of levies and monetary compensation?"

3. The order referring the questions to the Court was received at the Registry on 26 July 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the plaintiff, P. Biegi Handelsagentur GmbH, represented by Dietrich Ehle und H. Kerst, and by the Commission of the European Communities, represented by its Legal Adviser, Peter Kalbe.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to assign the case to the First Chamber, in

accordance with Article 95 of the Rules of Procedure, and to open the oral procedure without any preparatory inquiry.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. Biegi first sets out the factual and legal considerations underlying the case. It observes in particular that the tariff classification under subheading 02.02 C which it seeks, is founded on:

— The case-law of the Bundesfinanzhof [Federal Finance Court] which, before the entry into force of the Common Customs Tariff, ruled that products such as those in question are "edible offals" as the meat, which the plaintiff describes as "Knochenputz" [bone scrapings] is removed from the carcass and separated from the tendons only after the turkeys *have been boned* and therefore the prime cuts of meat have been removed. The pieces of meat obtained in this way, which are in part of *inferior quality,* cannot be given a value higher than that of pieces of meat and offals . . .;

— German administrative practice as applied by the Oberfinanzdirektion München [Regional Finance Office Munich], which, on the basis of a service instruction of 1 March 1968, took the view *inter alia* that pieces of meat removed from a turkey carcass ("turkey pieces") must now be classified under tariff subheading 02.02 C.

The products in question are precisely pieces of meat which can be used as offal because of their small size, their irregular shape, the presence of tendons, skin, gristle, fat, etc. They are basically muscle containing a very small quantity of veins and glands and are thus meat of very little value which no longer has a real structure and which cannot be sold in its unprocessed state to the consumer in trays or some other form in small pre-packed quantities: they can be used only as meat for processing (manufacture of sausages or pies . . .).

Biegi gives further information relating to the formation of the market price for "pieces" in which the labour costs — in contrast to those for boned poultry cuts — are substantially higher than the value of the goods and states that in classifying the products in question as "boneless poultry cuts" the Hauptzollamt Bochum failed to take account of the basic principle of the Common Customs Tariff that the tariff classification of a product depends not only on its composition ("substance") but also on the use to which it is to be put ("purpose").

The German regulation relating to categories of products however specifies particularly clearly what is meant by "poultry cuts": the lower thigh, the upper thigh, the whole leg, the breast and the wings. Of the above parts those which are without bones constitute the "boneless poultry cuts". On the other hand the regulation does not refer to "carcasses" or "skeletons" as poultry cuts so that those products are not included as poultry cuts and cannot be included there even if they are "boned or boneless".

Biegi finally observes that the term "boned or boneless poultry meat" indicates precisely that the "bone" has been removed from the pieces of meat whilst "pieces" are obtained by the inverse method, by removing the remaining pieces of meat from a carcass: the process consists of the removal of meat rather than the removal of bones.

With regard next to the substance of the questions raised Biegi makes the following observations in particular:

(a) First question

— Commission Regulation No 1669/77 is based on Regulation No 97/69 of the Council for which the legal basis is, according to the recitals in the preamble to the amending regulation, Council Regulation No 280/77 (Official Journal L 40 of 1977, p. 1) *inter alia*, Article 28 of the EEC Treaty. Under that article any autonomous alteration or suspension of duties in the Common Customs Tariff is to be decided unanimously by the Council whilst the Commission has in this respect merely the right to submit proposals. In carrying out its tasks and in the context of Regulation No 97/69 the Commission is bound by the principles of Article 29 of the Treaty which lays down first that the Commission is to be guided by "the need to promote trade between Member States and third countries". It must not abuse its power of elucidation to adopt, through the Common Customs Tariff, decisions relating to commercial policy in the context of the Common Agricultural Policy and the common organizations of the markets.

— Regulation No 97/69 authorizes the Commission and the Committee on Common Customs Tariff Nomenclature which is provided for in Article 1 and is responsible for examining any matter concerning the nomenclature of the Common Customs Tariff only to adopt the provisions required "for the application" of the nomenclature. It is also clear from the recitals in the preamble to the regulation that those provisions are only to specify the content of the headings or subheadings of the Common Customs Tariff without amending the text thereof; it also shows the narrow framework within which the Commission must remain when it specifies the content of a tariff subheading. The judgment of the Court of 11 November 1975 in Case 37/75 (*Bagusat* v *Hauptzollamt Berlin-Packhof* [1975] 2 ECR 1339) does not affect that conclusion. That judgment refers only to classifications involving the solution of *particularly technical* questions for which the Commission must be given a wider discretion. That is not the case for the *legal application* of tariff heading 02.02 to products such as those in question. Such a question presents no difficulties of a technical nature but must be resolved by interpreting the term "offals" in respect of which the Commission has no discretion.

— The recitals in the preamble to Regulation No 1669/77 on the other hand give the impression that the Commission is claiming for itself the power to determine arbitrarily what products should be classified under one or other of the tariff subheadings in question: "poultry cuts" (B) or "offals" (C). It does not even take the trouble to define in a more detailed manner the term "offals" in order to determine, on the basis of the definition of that word, whether meat scraped from the carcass falls within that subheading: that in itself constitutes a serious formal defect in Regulation No 1669/77. In accordance with the recitals in the preamble to that provision the Commission drew bone scrapings within tariff heading 02.02 B by means of tariff subheading 02.02 B II (c) and then classified them

under tariff subheading 02.02 B I. Such a course does not amount to specifying the content of tariff subheadings 02.02 C and 02.02 B I but a reclassification which goes beyond the powers conferred by Article 3 of Regulation No 97/69.

— In the penultimate recital in the preamble to Regulation No 1669/77, furthermore, the Commission is guilty of two inexactitudes. First "small pieces which result from the cutting up of larger cuts" do not "undoubtedly", as the Commission states, fall within subheading 02.02 B I. In fact that subheading covers boned or boneless poultry meat, for example meat from the breast or the thighs of turkeys, that is to say poultry meat which has retained its structure. Secondly both from the point of view of the quality and the possible uses, there is a considerable difference between the parts of meat from "prime cuts" and those obtained by scraping the carcass or those which contain fibrous, gristly and fatty tissue. It is not possible for such a difference to be "bridged over" for the purposes of the customs tariff by means of "specification" by the Commission in particular when, by means of such a "specification" the Commission suddenly classifies "edible offal" in a tariff heading which entails a roughly 700% higher levy and leads to unacceptable losses on past imports and the cessation of future imports.

Even if it is assumed that the Commission has a wide discretion it cannot reasonably be held that the Council wished to confer such powers on the Commission by means of Regulation No 97/69.

— For those reasons the answer should be given to the first question that Regulation No 1669/77 is invalid because it infringes Regulation No 97/69.

(b) Second question

— If Regulation No 1669/77 is however valid it cannot be recognized as having retroactive effect without serious inconveniences arising with regard to vested rights acquired under a different tariff classification at least in certain Member States.

The case-law of the Court of Justice against the retroactivity of regulations adopted by the Commission in the context of its powers under Regulation No 97/69 is based on the desire to safeguard the principle of *legal certainty* and the principle of the *protection of the legitimate expectation* of traders, and the need to ensure, for the future, *uniform tariff classification throughout the Community.*

The two said principles would, however, be seriously disregarded if explanatory regulations on the tariff adopted by the Commission in the context of Regulation No 97/69 also had retroactive effect with regard to already established situations. The resultant difficulties would be not only of a legal nature, at both national and Community level, but also of a political nature.

— Furthermore, in the present instance such retroactivity is inadmissible for the further reason that it is provided in Article 2 of Regulation No 1669/77 that the regulation is to enter into force on the 21st day following its publication. In that way the regulation thus lays down, at least indirectly, a *transitional system* to enable existing contracts to be performed

and in particular to allow goods being shipped by sea to be given customs clearance. The said Article 2 is therefore full proof of the legislative nature of the regulation. It shows in fact that during the transitional period the Commission expressly decided not to seek the uniform application of Article 1 throughout the Community.

— The answer to the second question must therefore be that Regulation No 1669/77 entered into force only on the 21st day following its publication and that, consequently, the courts and authorities of the Member States are not obliged to apply it to imports before that date.

(c) Third question

— A first criterion for drawing a distinction between the tariff subheadings is contained in the wording itself of the descriptions of the goods. The wording of subheading 02.02 B refers to "Poultry cuts (excluding offals)" which may be "boned or boneless" (I) or "unboned (bone-in)" (II). As regards the latter it is clear from the list contained under entries (a) to (e) that the products covered thereby are poultry cuts which may be identified and described by objective characteristics and the meat of which retains its original structure. The determinative factor in this respect is the *quality* of the product, determined having regard to the way in which the product has been obtained, its shape, its size and weight. What cannot be regarded as a special poultry cut and is none the less edible should therefore be classified as "offals" within the meaning of subheading 02.02 C. In that case they are not pieces of meat which have retained their original structure but pieces of meat of varying origins and of inferior quality.

— Another distinguishing criterion is derived from the way in which the product is *obtained.* From this point of view "offal" is clearly distinguished from "poultry cuts" by the fact that it only arises when the prime poultry cuts have already been removed.

— Finally, the distinction between the two tariff subheadings may also be based on the *use to which the product is to be put.* From the point of view of use edible offals are only used for processing and cannot be sold to the ultimate consumer through the retail trade.

— The trade value of the product is not a valid distinguishing criterion. The trade value is determined by supply and demand which are anything but objective criteria.

— In view of the above the pieces of poultry meat as described in the order of the German court should therefore be classified under subheading 02.02 C covering "offals". Nevertheless it is for the national court to make the final decision on that classification in reliance on criteria, such as those set out above, laid down by the Court of Justice.

(d) Fourth question

— The case-law of the Court does not support the application of different criteria depending on whether the tariff classification is for the imposition of customs duties or of charges under the common organization of the markets.

Article 11 of Regulation No 2777/75 on the common organization of the market in poultry meat clearly shows that the Common Customs Tariff is decisive primarily for the tariff classification of goods falling under that organization of the market for the imposition and calculation of the levy and of the monetary compensatory amounts. According to the case-law of the Court, in interpreting a tariff heading in comparison with another account must be taken not only of its purely customs function: in cases of doubt regard must also be had to the function of the tariff having regard to the requirements of the common organization of the markets.

— No criteria concerning the common organization of the markets are to be drawn from Regulation No 1669/77 itself. Regulation No 2777/75 introduced levies with a twofold purpose: to take account both of the incidence on feeding costs of the difference between prices for feed grain within the Community and on the world market, and of the need to protect the Community processing industry.

Sufficient account is taken of those two objectives by reason of the fact that the lowest levy is imposed on offals and, for example, on backs, necks, rumps and wing tips. Sufficient account is thereby taken of the need to protect the common market in poultry. Classification of the offals in question under tariff subheading 02.02 B I, to which the highest levy is applicable, with the result that imports of offal, the commercial value of which is in principle low, would cease, would be an abuse and contrary to the objectives of Articles 39 and 110 and of Article 29 of the Treaty.

Regulation No 2777/75 authorized the Commission at most to impose a higher levy on offals taking account of the average ratio between market values (Article 5) but in the course of the period in question the necessary conditions for this were apparently not satisfied.

— For the above reasons the reply to the fourth question should be that in interpreting one tariff heading in comparison with another account may be taken, alongside their customs function, of the requirements of the common organization of the markets. The tariff classifications should not give rise to abuses in order to exclude certain goods from importation by misusing provisions laid down in the framework of the organization of the market.

2. The *Commission* sets out its observations on the various questions under two main headings.

(a) Temporal application of Regulation No 1669/77

— According to the Commission the "legislative" nature of this regulation is clear from the fact that its entry into force deprived the national authorities of the power which they had held until that time, to interpret the nomenclature independently in its application to individual cases, and imposed a legal obligation for them to comply with the prescribed result.

— Furthermore, having regard to the fact that the tariff classification is always made pursuant to the provisions applying at the time of the importation the Court has excluded the possibility that a regulation such as the one in question may also have binding effects with regard to the classification of goods imported

before its entry into force. The Finanzgericht Münster is therefore not legally obliged to comply with this regulation in the main proceedings.

— None the less, whilst it is true that the Finanzgericht should classify the products in question in reliance on the general methods and principles relating to the application of the Common Customs Tariff, the fact remains that the "content" of Regulation No 1669/77 constitutes an authorized commentary, issued by the institution which drew up and formulated the tariff subheadings in question. It is for that reason that, even if it does not have binding force, the said regulation remains an extremely valuable means of interpreting the customs tariff correctly so that the Finanzgericht cannot dispense with it any more than with the other official explanatory documents and it cannot dispense with an evaluative assessment of it on the ground that it has no retroactive effect. The question whether that regulation interpreted the customs tariff correctly is unrelated to the question whether the interpretation set out therein is retroactive.

— It is also not possible to infer from the adoption of Regulation No 1669/77 that all turkey cuts imported prior to it should necessarily and automatically be classified not as "poultry cuts" but as "offals". Provisions adopted pursuant to Regulation No 97/69, such as those of Regulation No 1669/77, cannot and do not seek to amend the scope of existing tariff provisions. They merely provide a commentary on the tariff subheadings in question and establish definite and binding criteria for the correct classification of the products in question.

— With regard finally to the significance of the delay of 21 days after publication for the entry into force of the regulation, the Commission argues that the period was laid down to enable the Member States to inform all their customs departments. In this respect no account was taken of economic or commercial considerations, particularly as the customs authorities had already for a long time acted in accordance with the provisions of Regulation No 1669/77.

(b) Tariff classification of "turkey pieces"

The Commission first recalls that the tariff classification of "turkey pieces" has always given rise to difficulties in the context of the system of levies in the common organization of the market in poultry-meat.

Having regard to the lower rate of levy on imports of offal as compared with that on poultry cuts it is often more advantageous to declare poultry-meat as "offals" in particular as the terms "meat" and "offals" have not yet been given a legal definition.

The relevant explanatory notes merely list, by way of example, and without claiming to be exhaustive, certain typical offals; that does not enable a definitive answer to be given to the question of the classification of meat scraps obtained after the parts with value have been removed.

Furthermore, the judgment of the Bundesfinanzhof of 1967 according to which the skeleton left after boning together with the scraps of meat and fibrous, gristly and fatty tissue adhering to it "abfalle" [literally "falls off"] and accordingly all the "bone scrapings"

which can still be scraped off must be regarded as "Schlachtabfall" [offal from slaughtering] for the purposes of the tariff, unfortunately rather had the effect of increasing the problems which Regulation No 1669/77 seeks to resolve.

Having said that, the Commission observes that Regulation No 1669/77 represents the result of several years' work on the part of the Committee on Common Customs Tariff Nomenclature established within the Commission. That committee found in fact that several of the factors relied on for tariff classification were inadequate. On the one hand the wording of the tariff drew a distinction between poultry cuts and poultry offals according to the objective characteristics of the products at the time of importation but not according to the way in which the products were obtained by boning, removal or scraping. On the other it has become evident that it is unpractical to regard as "poultry cuts" all that is sold in the Community under that description and to treat what is left as scraps on slaughtering as "offal". The habits of consumers, the assessment of the value, the use and the marketing of the various poultry cuts are not sufficiently similar in the nine Member States of the Community to be used as criteria for a uniform interpretation of the customs tariff.

Furthermore, from the tariff point of view account should have been taken of the fact that the wording of subheading 02.02 B refers to certain parts of poultry not as "offal" but as independent cuts, such as for example wing tips or rumps which, objectively, might quite well be regarded as offal.

With regard, finally, to the commercial value of the products, that too fails to constitute a sufficient criterion for the tariff classification as a product may be regarded differently in the different regions of the Community, which would lead to differences in price.

After thus defining the context of the problem to be resolved the Commission goes on to set out the factors on which the solution adopted by Regulation No 1669/77 is based.

— First it may be inferred from the wording and the structure of tariff heading 02.02 that the distinction between "poultry cuts" and "offals" must be based on the objective characteristics and the appearance of the goods at the time of importation. The wording of the customs tariff makes no provision for different classification of the same product depending on the method of production or the use.

— Furthermore, the term "Poultry cuts: Boned or boneless" may be compared with that of "meat" used in tariff heading 02.01, "Meat and edible offals ...", as has in fact been done in the relevant explanatory notes.

Muscular tissue from turkeys, detached from the bones, whether by removal, boning or scraping therefore certainly falls under "Poultry cuts: Boned or boneless" within the meaning of tariff subheading 02.02 B I. The Explanatory Notes to the Customs Co-operation Council Nomenclature point out furthermore that the quality of "meat" (that is to say "poultry cuts") within the meaning of the customs tariff does not depend on the size of the pieces offered for sale: meat, even minced, is still meat. Similarly, the question what part of the animal the meat comes from is irrelevant

in so far as that part is not itself defined as offal. The smaller the pieces the more difficult it is to say from which part of the animal the meat comes.

— Regarding the definition of offal the examples given in the above-mentioned explanatory notes give some guidance inasmuch as the parts which are not expressly mentioned but which are similar and comparable to those which are mentioned may be assimilated to them. Large pieces of muscle tissue do not satisfy that condition.

— For the purposes of Regulation No 1669/77 a general and exhaustive definition of the terms "poultry cuts" and "offals" was not necessary as that regulation is based on the fact that for tariff purposes large pieces of muscle tissue are nothing other than "poultry meat".

— In consequence therefore both as regards the result obtained and the reasons relating to the customs tariff on which it is based Regulation No 1669/77 does not go beyond the limits set by Regulation No 97/69 and is therefore valid.

On the basis of these observations the Commission proposes that the following answers should be given to the questions raised:

1. Regulation (EEC) No 1669/77 does not oblige the Finanzgericht to classify within tariff subheading 02.02 B I the goods therein defined which were imported before the entry into force of that regulation.
2. The content of that regulation correctly interpreted the tariff provision in question. It is valid.
3. On a proper interpretation of the customs tariff the turkey pieces described in the questions referred to the Court for a preliminary ruling fall within tariff subheading 02.02 B I: "Poultry cuts".
4. In the present instance the question whether the tariff classification is for the imposition of the levy and monetary compensation is not relevant for the result obtained.

III — Oral procedure

Biegi and the Commission of the European Communities presented their oral observations at the hearing on 1 February 1979.

The Advocate General delivered his opinion at the hearing on 8 March 1979.

Decision

1 By order of 27 April 1978, which was received at the Court Registry on 26 July 1978, the Finanzgericht Münster referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the validity and temporal application of Commission Regulation (EEC) No 1669/77 of 25 July 1977 on the classification of goods under Common Customs Tariff subheading 02.02 B I (Official Journal L 186

of 1977, p. 23), and concerning the interpretation of certain subheadings of the Common Customs Tariff.

These questions were raised in the context of a dispute between an importer and the German customs authorities concerning the classification in the Common Customs Tariff of boned or boneless poultry meat.

The importer classified the goods in question as "offals" within the meaning of tariff subheading 02.02 C but the customs authorities on the other hand take the view that the goods constitute "Poultry cuts (excluding offals): Boned or boneless" and must therefore be classified within subheading 02.02 B I.

2 In implementation of Regulation (EEC) No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special Edition 1969 (I), p. 12) and in order to define the relative scope of subheadings 02.02 B I (Poultry cuts (excluding offal): Boned or boneless) and 02.02 C (Offals) the Commission adopted Regulation No 1669/77, Article 1 of which defines the products to be classified under subheading 02.02 B I as follows:

"Raw, frozen poultry-meat, in particular turkey meat, obtained by scraping poultry bones from which the prime cuts have been removed or in any other way (for example, in the reduction of larger cuts to smaller size) and consisting of small, irregularly shaped pieces, sometimes with fibrous, gristly and fatty tissue attached thereto and individually weighing from 5 to 40 grams approximately . . .".

3 The plaintiff in the main action, whilst accepting that the classification adopted by the customs authorities is in conformity with that laid down by Article 1 of Regulation No 1669/77 nevertheless denies that that classification is well founded and argues that the aforesaid article contains an error of fact and that it lacks legal basis inasmuch as, in adopting that provision, the Commission made a substantive amendment to the Common Customs Tariff and exceeded the powers conferred upon it by Regulation No 97/69 of the Council.

It further argues that the classification in question is illegal as the said Regulation No 1669/77 entered into force on a date subsequent to that of the imports in question and cannot, therefore, be applicable to those imports as it would thus have retroactive effect.

4 In order to resolve that dispute the Finanzgericht Münster raised the following questions:

"1. Is Commission Regulation (EEC) No 1669/77 of 25 July 1977 on the classification of goods under Common Customs Tariff subheading 02.02 B I (Official Journal L 186, p. 23) invalid because it does not specify the content of tariff subheadings 02.02 B I and 02.02 C but amends them and therefore goes beyond the powers conferred by Regulation (EEC) No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special Edition 1969 (I), p. 12)?

2. If Question 1 is answered in the negative:

Does Regulation (EEC) No 1669/77 have retroactive effect in the sense that courts and authorities in the Member States are to apply it to imports carried out before its entry into force?

3. If Question 1 is answered in the affirmative or if Question 2 is answered in the negative:

According to what criteria was the distinction to be drawn between tariff subheading 02.02 B I — "Poultry cuts (excluding offals) boned or boneless" — and subheading 02.02 C — "Offals" — before the entry into force of Regulation (EEC) No 1669/77? Were the shape, size, weight and quality of the goods, the way in which they were produced, the use to which they were to be put and/or their commercial value the decisive factors?

In this particular case:

In the period from 2 March to 13 April 1977 did pieces of turkey meat without bones, of irregular shape, individually weighing approximately 20 grams, with certain pieces however weighing up to 60 grams, 10 to 15% of which consist of fat, skin and fibrous tissue and the remainder of which is muscle with a small proportion of veins and glands, obtained by scraping poultry bones from which the prime cuts have been removed and which are only suitable for the production of sausage and pies with the addition of other types of meat and the market price of which in the first half of 1977 was DM 4.40 to 4.80 per kilogram fall within tariff subheading 02.02 B I of 02.02 C of the Common Customs Tariff?

4. What answer is to be given to Questions 1 to 3 with regard to the tariff classification for the purposes of the imposition of levies and monetary compensation?"

First question

5 As regards the first question, Article 3 of Regulation No 97/69 of the Council, pursuant to which Regulation No 1669/77 was adopted, confers on the Commission the power to adopt the provisions required for the application of the nomenclature of the Common Customs Tariff as regards classification of goods.

The second recital in the preamble to that regulation explains that those provisions should specify the content of the headings or subheadings of the Common Customs Tariff without amending the text thereof.

From the third recital in the preamble and Article 4 it appears that the provisions thus adopted by the Commission concern the measures which may be necessary for classifying certain goods in the tariff and similarly their inclusion under a given heading or subheading.

To that end the regulation set up a Committee on Common Customs Tariff Nomenclature and stated, in the third recital, that the provisions concerning those measures relate to a particularly technical field and close co-operation is required between the Member States and the Commission when drawing them up.

6 It is clear from those rules that in this field the Council has conferred on the Commission, acting in co-operation with the customs experts of the Member States, a wide discretion as to the choice between two or more tariff headings in which a given product might be classified.

7 Article 1 of Regulation No 1669/77 does not amend the text of the Common Customs Tariff but specifies the content of a tariff subheading with regard to a given product.

It is necessary to examine whether, although it repeats without amendment the text of subheading 02.02 B I, Regulation No 1669/77 has nevertheless not had the effect of making a substantive amendment to the tariff.

8 It appears from the third recital that Article 1 of Regulation No 1669/77 specifies the tariff classification of the products referred to therein having

regard to the tariff subheadings of Chapter 2, Section I, relating on the one hand to "Poultry cuts (excluding offals): Boned or boneless" and, on the other, to "Offals".

The Common Customs Tariff does not contain a legal definition of either of those products.

It is recognized that as such a definition is lacking the tariff classification of the products in question has not always been free of uncertainty for the national authorities in the Member States and it was in order to remove such uncertainty that the Commission decided that it was necessary to refer the matter for examination by the Committee on Common Customs Tariff Nomenclature in the context of the procedure laid down in Article 3 of Regulation No 97/69 of the Council.

Following such a procedure and in accordance with the opinion expressed by that Committee Article 1 of Commission Regulation No 1669/77 was adopted.

Administrative practice with regard to tariff classification or commercial practice current in a Member State cannot make up for the absence of such a regulation as the Common Customs Tariff nomenclature must be applied on the basis of objective criteria which are uniform throughout the Community.

9 It is precisely in cases such as the present one where the tariff does not lay down an exhaustive list of products falling within one or other subheading but merely gives examples of generic definitions that the Commission, in co-operation with the national experts, has the power to adopt a regulation determining the types of products covered by it.

Furthermore, nothing put forward by the plaintiff in the main action serves to show that the Commission has gone beyond the limits of the discretion conferred on it in the context of Regulation No 97/69 of the Council.

10 The answer to the national court must therefore be that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 1669/77 of 25 July 1977.

Second question

11 With regard to the second question, as has been stated above, Regulation No 1669/77 was adopted by the Commission in the exercise of the power, conferred on it by Regulation No 97/69, to specify the content of the headings or subheadings of the Common Customs Tariff by means of measures effecting, subject to the conditions laid down in Article 4 of the latter regulation, "the inclusion of goods under a particular heading or subheading".

A regulation specifying the conditions for classification in a tariff heading or subheading is of a legislative nature and cannot have retroactive effect.

Consequently, Commission Regulation No 1669/77 of 25 July 1977 is not binding on national courts which have to define the tariff classification of goods imported before its entry into force.

Third question

12 As regards the third question, subheading 02.02 C, considered in the context of heading 02.02, constitutes a residuary subheading with regard to the whole of subheading 02.02 B.

Both the Explanatory Notes to the Customs Co-operation Council Nomenclature concerning the whole of Chapter 2 of Section I of the tariff and the Explanatory Notes to the Nomenclature of the Customs Tariff of the European Communities concerning more particularly the products within subheading 02.02 C list under the term "Offals" unboned (bone-in) parts of the animal or, amongst the boned or boneless parts, those from certain internal organs of the animal.

On the other hand tariff subheading 02.02 B I refers to "Poultry cuts (excluding offals): Boned or boneless" without providing any restriction as to the products which may be covered.

13 By stating that that tariff subheading "covers poultry meat without bones regardless of the part of the carcass from which it comes" the Explanatory Notes to the Customs Tariff relating to it show that the subheading has a general scope and covers all cut poultry meat resulting from boning, irrespective of the manner in which it was obtained or its commercial value.

The Explanatory Notes of the Customs Co-operation Council which state that "fat adhering to [cut] meat is treated as forming part of the meat" mean that the presence in the boned or boneless pieces of a certain percentage of fat does not affect their classification as "boned or boneless meat".

14 Having regard to the wide scope which the interpretative rules set out above attribute to the concept of boned or boneless meat within subheading 02.02 B I, the manner in which the product is presented, the way in which it was produced, the use to which it is to be put and its commercial value cannot be decisive criteria for its tariff classification.

Similarly, neither the size nor the weight of the pieces which make up the product are decisive for that classification as the Notes of the Customs Co-operation Council do not exclude the possibility of "meat" being presented in the form of "minced" meat.

15 On the other hand it is clear from the Explanatory Notes and the aforesaid interpretative rules that the decisive criterion for the tariff classification in subheading 02.02 B I is the objective characteristics of the product.

In the light of that criterion pieces made up for the most part of muscle or parts of muscle containing only a very small proportion of tendons, gristly and fatty tissue and skin are to be regarded as "Poultry cuts (excluding offals): Boned or boneless".

16 Moreover Commission Regulation No 1669/77 merely confirms this as an interpretative criterion since, in describing the composition of the products listed, it refers to pieces of raw frozen poultry meat "with fibrous, gristly and fatty tissue attached thereto".

17 The third question should thus be answered to the effect that boned or boneless poultry cuts come under Common Customs Tariff subheading 02.02 B I, and regardless of the manner in which they are presented, the way in which they were produced, the use to which they are to be put and/or their commercial value, they do not constitute offals within the meaning of subheading 02.02 C so long as they essentially consist of muscle or fragments of muscle comprising only a small proportion of tendons, fat and fibrous tissue.

It is solely for the national court to carry out that assessment in the light of the interpretative criteria laid down by the Court and having regard to the facts of the case.

Fourth question

18 As regards the fourth question, in the absence of express provisions it would be inappropriate for the headings of the Common Customs Tariff to be applied differently for one and the same product depending on whether the classification is for the imposition of customs duties, the application of the rules of common organizations of the market or of the system of monetary compensatory amounts.

Furthermore, Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultry meat (Official Journal L 282 of 1975, p. 77) provides in Article 11 (1) that "the general rules for the interpretation of the Common Customs Tariff and the special rules for its application shall apply to the tariff classification of products covered by this regulation".

Article 3 of that regulation provides that a levy is to be charged on imports of products subject to that common organization including those falling within tariff heading 02.02.

19 For those reasons the answer should be that the criteria for the tariff classification of products coming under Common Customs Tariff heading 02.02 are, for the purposes also of the imposition of the levy and the application of monetary compensatory amounts, those which result from the rules of interpretation and application of the tariff and its nomenclature.

Costs

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

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Finanzgericht Münster by order of 27 April 1978, hereby rules:

1. **Consideration of the first question raised has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 1669/77 of 25 July 1977.**

2. **Commission Regulation No 1669/77 of 25 July 1977 is not binding on national courts which have to define the tariff classification of goods imported before its entry into force.**

3. **Boned or boneless poultry cuts come under Common Customs Tariff subheading 02.02 B I, and regardless of the manner in which they are presented, the way in which they were produced, the use to which they are to be put and/or their commercial value, they do not constitute offals within the meaning of subheading 02.02 C so long as they essentially consist of muscle or fragments of muscle comprising only a small proportion of tendons, fat and fibrous tissue.**

4. **The criteria for the tariff classification of products coming under Common Customs Tariff heading 02.02 are, for the purposes also of the imposition of the levy and the application of monetary amounts, those which result from the rules of interpretation and application of the tariff and its nomenclature.**

Mertens de Wilmars Donner Bosco

Delivered in open court in Luxembourg on 28 March 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber