JUDGMENT OF THE COURT (Sixth Chamber)

8 June 2006 *

In Case C-196/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht München (Germany), made by decision of 17 February 2005, received at the Court on 4 May 2005, in the proceedings

Sachsenmilch AG

v

Oberfinanzdirektion Nürnberg,

THE COURT (Sixth Chamber),

composed of J. Malenovský, President of the Chamber, S. von Bahr and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: German.

Advocate General: F.G. Jacobs,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2006,

after considering the observations submitted on behalf of:

— Sachsenmilch AG, by O. Dörfler and W. Haarmann, Rechtsanwälte, and by M. Hundebeck, adviser,

— the Oberfinanzdirektion Nürnberg, by S. Junker, acting as Agent,

— the Commission of the European Communities, by J. Hottiaux, acting as Agent, and by B. Wägenbaur, avocat,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of subheading 0406 10 of the Combined Nomenclature ('the CN') in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1832/2002 of 1 August 2002 (OJ 2002 L 290, p. 1).

2 The reference was made in proceedings between Sachsenmilch AG ('Sachsenmilch') and the Oberfinanzdirektion Nürnberg (Principal Revenue Office, Nuremberg) ('the Oberfinanzdirektion') concerning the classification in the CN of pizza mozzarella in block form that has been stored after its manufacture for one to two weeks at a low temperature.

Legal context

3 The CN, established by Regulation No 2658/87, is based on the Harmonised Commodity Description and Coding System ('the HS') drawn up by the Customs Cooperation Council (now the World Customs Organisation), and established by the International Convention concluded at Brussels on 14 June 1983 and approved on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). It takes six-digit headings and subheadings from the HS, only the seventh and eighth digits forming subdivisions specific to the CN. The CN, together with the autonomous and conventional rates of duty and the statistical supplementary units, are reproduced in Annex I to that regulation.

4 Heading 0406 in Chapter 4 of Section I of Part II of the CN in Annex I to that regulation is concerned with '[c]heese and curd'. That heading contains, inter alia:

— subheading 0406 10 concerning '[f]resh (unripened or uncured) cheese, including whey cheese, and curd', which includes subheading 0406 10 20 relating to cheese '[o]f a fat content, by weight, not exceeding 40%';

— subheading 0406 90 relating to '[o]ther cheese', which includes subheading 0406 90 87 concerning other cheese of a water content, by weight, in the non-fatty matter 'exceeding 52% but not exceeding 62%'.

5 Annex 7 to the CN, entitled 'WTO [World Trade Organisation] tariff contingents to be opened by the competent Community authorities', classifies in order number 36 'pizza cheese, frozen, cut into pieces each weighing no more than 1 g, in containers with a net content of 5 kg or more, of a water content, by weight, of 52% or more, and a fat content, by weight, in the dry matter of 38% or more' under subheading 0406 10 of the CN. 'Fresh (unripened or uncured) cheese including whey cheese, and curd, other than pizza cheese of order number 36' in order number 44 of that annex is also classified under the same subheading of the CN.

6 The Explanatory Notes to the HS relating to heading 0406 state that '[f]resh cheese is an unripened or uncured cheese which is ready for consumption shortly after manufacture (e.g. Ricotta, Broccio, cottage cheese, cream cheese, Mozzarella).'

The main proceedings and the questions referred for a preliminary ruling

7 On 7 June 1999, Sachsenmilch was served with a binding tariff information under which pizza mozzarella in block form which has been stored after manufacture for approximately 14 days at a temperature of between 2 and 4 °C was classified under subheading 0406 90 87 of the CN in Annex I to Regulation No 2658/87, in the version then in force. It follows from the order for reference that that product is described as follows: water content not exceeding 47%; fat content not exceeding 40%; water content in the non-fatty matter exceeding 52% but not more than 62%.

8 By decision of 30 October 2003, the Oberfinanzdirektion revoked that tariff information on the ground that the conditions for classification under subheading 0406 90 87 of the CN were not satisfied.

9 Sachsenmilch lodged an objection with the Oberfinanzdirektion, which, on 8 June 2004, reaffirmed that decision on the basis that: '[t]he finding "white section of a block of cheese without holes", in the examination of the nature of the goods, did not justify their classification under subheading 0406 90 [of the] CN. There had been no research whatsoever of the taste of the mozzarella sample, and it had therefore been classified without a proper examination of the facts. The taste established in the course of an organoleptic examination is the essential criterion for distinguishing unripened mozzarella under subheading 0406 10 [of the CN] from ripened mozzarella under subheading 0406 90 [of the CN]'.

10 On 7 July 2004, Sachsenmilch appealed against that decision to the Finanzgericht München (Finance Court, Munich). It argued that pizza mozzarella in block form has a dry mass of between 51.5 and 53.5% and keeps for at least four months since it is intended for use in the pizza industry. By contrast, table mozzarella intended for the consumer is typically a fresh product which keeps for only four weeks and has approximately 10% less dry matter. As a result, pizza mozzarella in block form has special functional characteristics, may be grated and has a melting and stretching consistency. It is therefore not an unripened fresh cheese. Moreover, in the Netherlands and the United Kingdom it was classified as a ripened cheese.

11 On the other hand, according to the Oberfinanzdirektion, pizza mozzarella in block form which has been stored for approximately two weeks at between 2 and 4 °C still displays all the characteristics of fresh cheese. The biochemical processes that occur during that storage period in fact bring about minor changes. Since there is no standard chemical or physicochemical procedure for determining the breakdown of

fat and protein, a sensory examination procedure, which is recognised as an objective method of analysis and is the subject of national norms (norm L.00.90/36 in Germany) and international norms (DIN 10964), must take priority over chemical methods and indications of the ripening period. Under the sensory examination procedure, it is only after 12 weeks' storage that a change in the properties of mozzarella can be identified, namely a slightly bitter, cheesy taste. The proportion of dry matter is not, on the other hand, an objective classification criterion. Pizza mozzarella in block form is therefore ripened cheese only if it can be clearly distinguished, on account of its qualities, from fresh cheese, which would require a sufficiently long ripening period. Both in German legislation and in the 2003 draft of the Codex Alimentarius Commission, established by the Food and Agriculture Organisation of the United Nations and the World Health Organisation, mozzarella is, moreover, defined as unripened cheese.

12 In its decision, the national court states that it is clear from the organoleptic examinations and the conditions in which the mozzarella at issue in the main proceedings is manufactured and stored that, after storage of between one and two weeks, it has not yet altered in such a way as to cease to display the qualities of fresh cheese. Quite to the contrary, such storage conditions would stop the ripening process or slow it down. The mozzarella in question could be eaten immediately after manufacture. It is transformed only after a two-week storage period, since it is only then that its melting, stretching and browning characteristics reach their optimal level. The Explanatory Notes to the HS, moreover, give mozzarella as an example of fresh cheese and Annex 7 to the CN also places 'pizza cheese' in that category. However, as, for a number of years, the Commission of the European Communities has allowed differences of classification of such mozzarella to coexist, according to the individual Member States, so that manufacturers established in Member States where mozzarella is classified as fresh cheese are at a competitive disadvantage from the point of view of export refunds, it is appropriate that the Court should give a preliminary ruling so that a uniform classification practice may be established in the internal market.

13 It was in those circumstances that the Finanzgericht München decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the [CN] in the version of Annex I to Commission Regulation (EC) No 1789/2003 of 11 September 2003, amending Annex I to Regulation (EEC) No 2658/87 ... (OJ 2003 L 281, p. 1), to be interpreted as meaning that pizza cheese (mozzarella) that was stored after its manufacture for one to two weeks at 2 to 4°C is to be classified under subheading 0406 10 CN?

(2) In the absence of Community rules, may the examination of whether cheese is fresh within the meaning of subheading 0406 10 CN be carried out on the basis of organoleptic features?'

The questions referred for a preliminary ruling

Preliminary observations

14 At the hearing, Sachsenmilch argued, for the first time, that the first question was not relevant to the resolution of the dispute in the main proceedings. It submitted that the reference to the Court under Article 234 EC arose as a result of the Oberfinanzdirektion's decision in 2003 to revoke the tariff information with which it had been issued in 1999 concerning pizza mozzarella in block form that had been stored after its manufacture for one to two weeks at 2 to 4 °C. As the reason for that decision was that the information had been issued without any organoleptic examination having taken place, the Court should, in the context of the present proceedings, answer the second question only.

15 In that regard, it is clear from settled case-law that the procedure provided for in Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate. It follows that it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court (see, in particular, Case C-403/98 *Monte Arcosu* [2001] ECR I-103, paragraph 21, and Case C-500/04 *Proxxon* [2006] ECR I-1545, paragraph 17).

16 In the present case, it is apparent from the order for reference that, contrary to the submission made by Sachsenmilch, the court seised of the main proceedings considers it to be necessary, in order for it to give judgment in those proceedings, not only to ascertain whether the organoleptic features of pizza mozzarella in block form constitute a relevant criterion for determining its tariff classification, but, primarily and in more general terms, to determine whether such mozzarella should be classified as fresh cheese under subheading 0406 10 of the CN. It is therefore not necessary for the Court to confine itself to answering the second question.

The interpretation of subheading 0406 10 of the CN

17 By its questions, which should be considered together, the referring court asks essentially whether pizza mozzarella in block form that was stored after its manufacture for one to two weeks at 2 to 4 °C is to be classified as fresh cheese under subheading 0406 10 of the CN and whether, in that regard, the organoleptic features of such mozzarella are a relevant criterion.

18 It should be observed at the outset that, as the Commission has rightly submitted, those questions must be examined not, as suggested by the wording of the first question, in the light of Regulation No 1789/2003, but in the light of Regulation No 1832/2002 since the national decision which established the contested tariff classification was adopted under the latter regulation. The relevant provisions of those two regulations are, however, essentially the same as far as the subheadings of the CN in question are concerned.

19 It should then be noted that, when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. In any event, the national court is in a better position to do so (Joined Cases C-260/00 to C-263/00 *Lohmann and Medi Bayreuth* [2002] ECR I-10045, paragraph 26, and *Proxxon*, paragraph 23).

20 The questions raised are therefore to be understood as meaning that they seek to ascertain what criteria are to be used to determine whether a product such as the pizza mozzarella in block form at issue in the main proceedings may be classified as fresh cheese under subheading 0406 10 of the CN.

21 Heading 0406 covers '[c]heese and curd' and it is not disputed in the main proceedings that pizza mozzarella in block form falls under that heading. However, whereas the Oberfinanzdirektion, together with the referring court and the Commission, consider that such mozzarella must be classified under subheading 0406 10 of the CN, headed '[f]resh (unripened or uncured) cheese, including whey cheese, and curd', Sachsenmilch contends that it falls under subheading 0406 90 of the CN, headed '[o]ther cheese'.

22 According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters (Case C-396/02 *DFDS* [2004] ECR I-8439, paragraph 27, and Case C-445/04 *Possehl Erzkontor* [2005] ECR I-10721, paragraph 19).

23 The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force (*Possehl Erzkontor*, paragraph 20).

24 In this case, the wording of the notes to the sections and chapters does not give any guidance as to the tariff classification of pizza mozzarella in block form.

25 On the other hand, whilst such mozzarella is not specifically referred to in the wording of any of the relevant subheadings of the CN, it is clear from the wording of subheading 0406 10, headed '[f]resh (unripened or uncured) cheese ...', that the concept of 'fresh cheese' is indissociable from that of 'unripened cheese'.

26 As that subheading is more specific than subheading 0406 90 of the CN, which refers to '[o]ther cheese', it must, in principle, be preferred to subheading 0406 90, as the Court has already held with regard to subheading 0406 20 of the CN relating to 'grated or powdered cheese', which is next to subheading 0406 10 (see Case C-164/95 *Eru Portuguesa* [1997] ECR I-3441, paragraph 17).

27 It therefore falls to be determined whether pizza mozzarella in block form is capable of constituting unripened cheese within the meaning of subheading 0406 10 of the CN, which means that the concept of 'ripening' must be clearly defined.

28 Whilst the Explanatory Notes to the CN do not give any guidance in that regard, it is clear, on the other hand, and by contrast with the Explanatory Notes to the HS, that ripening involves a process of maturing after cheese has been stored for a certain period, since ripened cheese is not ready for consumption 'shortly' after manufacture.

29 The general rule on cheese (Codex Stan A-6-1978, rev. 1-1999, amended in 2003) laid down by the Codex Alimentarius, which is intended to provided guidance on defining the characteristics of certain foodstuffs (see Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 15), provides that ripened cheese is cheese that must be kept for a certain period at a temperature and in the conditions necessary for the biochemical and physical changes that are characteristic of the cheese to take place.

30 It follows that the concept of ripening requires the cheese concerned, in the course of storage for a certain period and at a certain temperature, to undergo a process at the end of which it will have acquired one or more new objective characteristics and properties, in particular as regards its composition, appearance and taste.

31 It is clear that Annex 7 to Regulation No 1832/2002 expressly classifies 'pizza cheese' under subheading 0406 10 of the CN relating to fresh cheese and that in the Explanatory Notes to the HS mozzarella is given as an example of fresh cheese without any distinction being made between different kinds of mozzarella.

32 The Community regulations relating to the CN therefore make clear that the fact that pizza mozzarella in block form is stored for one to two weeks at 2 to 4 °C does not necessarily confer upon it the status of ripened cheese unless such storage is sufficient to enable it to undergo a process at the end of which it has acquired one or more new objective characteristics and properties, in particular as regards its composition, appearance and taste.

33 However, in the light of the case-law cited at paragraph 19 above, it is not for the Court, in the context of the present reference for a preliminary ruling, to determine whether those conditions are satisfied by assessing the facts in the case before the national court. It is for that court, which, moreover, stated in its decision that pizza mozzarella in block form does not cease to display the qualities of fresh cheese since the storage to which it is subject slows down or even stops the ripening process, to apply those criteria in order to resolve the dispute in the main proceedings.

34 Accordingly, contrary to Sachsenmilch's contention, there is nothing to preclude the national court from taking account, should they exist, of objective sensory analyses governed by national and international norms, provided such norms make it possible to determine whether a cheese has undergone a process which has affected one of its objective characteristics and properties as a fresh cheese (see, to that effect, Case C-233/88 *Van de Kolk* [1990] ECR I-265, paragraph 13). In the present case, it is clear from the order for reference that norms of that kind exist for the analysis of pizza mozzarella in block form.

35 On the other hand, contrary to the Commission's unsubstantiated assertions, the period for which and the temperature at which other ripened cheeses are stored are not necessarily relevant criteria for determining whether pizza mozzarella in block form constitutes ripened cheese. As Sachsenmilch pointed out, without being contradicted, the length of the storage period, for example, may vary considerably according to the type of cheese in question. Thus, it has not been disputed that, although Brie and Camembert fall under subheading 0406 90 of the CN, they are not ripened for more than 10 days.

36 The fact, as Sachsenmilch alleges to be the case, that, at the end of its storage, pizza mozzarella in block form has objective characteristics and properties, such as the ability to melt and be grated, which are different from those of mozzarella to be consumed as it is — which, it is accepted, is a fresh cheese — is not of itself decisive. Even on the assumption that it were established, that would not in any way prove that that mozzarella has necessarily acquired the objective characteristics and properties necessary for it to be classified as ripened cheese.

37 The answer to the questions referred for a preliminary ruling must therefore be that subheading 0406 10 of the CN in Annex I to Regulation No 2658/87, as amended by Regulation No 1832/2002, must be interpreted as meaning that it applies to pizza mozzarella in block form that was stored after its manufacture for one to two weeks at 2 to 4 °C unless that storage is sufficient for such mozzarella to undergo a process at the end of which it has acquired one or more new objective characteristics or properties, in particular with regard to its composition, appearance or taste. It is for the national court to determine whether those conditions are satisfied.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Subheading 0406 10 of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EC) No 1832/2002 of 1 August 2002, must be interpreted as meaning that it applies to pizza mozzarella in block form that was stored after its manufacture for one to two weeks at 2 to 4 °C unless that storage is sufficient for such mozzarella to undergo a process at the end of which it has acquired one or more new objective characteristics or properties, in particular with regard to its composition, appearance or taste. It is for the national court to determine whether those conditions are satisfied.

[Signatures]