OPINION OF ADVOCATE GENERAL ELMER

delivered on 17 May 1995 *

1. Are uncooked but oven-ready sticks of short pastry made with butter, with a flour content of 46%, 'bakers' wares' or 'doughs for the preparation of bakers' wares'? That is the question that the Court is called upon to answer in this case.

Facts of the case

2. In the period from 1991 to January 1992 Uelzena Milchwerke ('Uelzena') supplied concentrated butter under a number of contracts to Firma Willi Antpöhler GmbH&Co. KG ('Antpöhler'). Under Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the grant of aid for cream, butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs, [1] as amended by Commission Regulations (EEC) No 949/88 of 8 April 1988, [2] No 2951/88 of 26 September 1988, [3] No 352/89 of 13 February 1989, [4] No 1048/89 of 21 April 1989, [5] No 1157/91 of 3 May 1991, [6] and No 2675/91 of 9 September 1991 [7] (hereinafter, the 'butter aid regulation'), Uelzena had received aid for that concentrated butter. Antpöhler processed part of the concentrated butter into deep-frozen, oven-ready sticks of short pastry made with butter, in the form of biscuits, which had an average flour content of 46% and were intended for baking only when they reached the consumer.

The German customs authorities found that the processing of the concentrated butter carried out by Antpöhler did not give rise to entitlement to aid, since it took the view that 'sticks of short pastry made with butter' could not be regarded as 'bakers' wares', as declared by Antpöhler, and thus covered by the Common Customs tariff combined nomenclature Code 1905 30 referred to in Article 4(1), Formula A(a), of the butter aid regulation. The customs authorities considered that the product was uncooked dough as referred to in Article 4(3), Formula C(a)(i), of the butter aid regulation, which did not qualify for aid, because the dough's flour content was under the 51% required

* Original language: Danish.

1 — OJ 1988 L 55, p. 31.

2 — OJ 1988 L 92, p. 43.

3 — OJ 1988 L 266, p. 28.

4 — OJ 1989 L 42, p. 7.

5 — OJ 1989 L 111, p. 24.

6 — OJ 1991 L 112, p. 57.

7 — OJ 1991 L 253, p. 13.

under the regulation. Accordingly the German intervention agency, the Bundesanstalt für landwirtschaftliche Marktordnung, decided that an amount of over DM 330 000 which Uelzena had lodged as security was forfeited, whereupon Uelzena repaid the aid which it had received.

Uelzena then brought an action against Antpöhler seeking compensation for the loss caused by the repayment. Uelzena claimed that in processing the concentrated butter into sticks of short pastry made with butter, as described above, Antpöhler had acted in breach of contract and was liable to pay damages.

Questions referred for a preliminary ruling

3. In an order of 9 December 1993 the Oberlandesgericht Hamm stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is Article 4(1), Formula A(a), of Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the grant of aid for cream, butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs, as amended by Regulations Nos 949/88, 2951/88, 352/89, 1048/89, 1157/91 and 2675/91, in conjunction with subheading 1905 30 of the Common Customs Tariff, to be interpreted as meaning that a product (sticks of short pastry made with butter) which consists of deep-frozen, oven-ready sticks of short pastry made with butter, in the form of flour-based biscuits with an average flour content of 46% of the weight of the constituents, and intended for baking only when they reach the end-user can qualify for aid?

Is the flour content of a product relevant for its inclusion under Article 4(1), Formula A, of Regulation No 570/88?

2. If the answer to either or both questions under heading (1) is in the negative:

Is Article 4(3), Formula C(a)(1) of Regulation No 570/88 to be interpreted as meaning that a product of the type described under heading (1) does not qualify for aid if its flour base constitutes less than 51% of its weight?'

Relevant Community law provisions

4. Let me first mention that Chapter 19 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff [8] gives the combined nomenclature codes for 'preparations of cereals, flour, starch or milk; pastrycooks' products'. Subheading 1901 20 00 includes 'Mixes and doughs for the preparation of bakers' wares of heading No 1905'. Heading 1905 refers to 'Bread, pastry, cakes, biscuits and other bakers' wares...' and subheading 1905 30 to 'Sweet biscuits; waffles and wafers'.

5. The butter aid regulation lays down in Article 2 that the butter is to be sold and the aid granted by means of a standing invitation to tender organized by each intervention agency.

Under Article 3 of the regulation, tenders may not be entertained unless the tenderer gives a written undertaking to incorporate, or have incorporated, the butter or concentrated butter into the final products referred to in Article 4.

Under Article 4(1), Formula A(a), the butter or concentrated butter may be incorporated *inter alia* into products falling within combined nomenclature subheading 1905 30.

Under Article 4(3), Formula C, the butter can also be incorporated into:

'products falling within subheadings 1901 20 00 ...

(a) in the form of:

1. uncooked dough:

(i) with a flour base of 51% or more of the weight of the constituents except water, mixed with milkfat and with other ingredients such as sugar (sucrose), eggs or egg yolk, milk powder, salt, etc. and with a milkfat content by weight which exceeds 90% of the total fat content, not including the fat forming part of the normal composition of the ingredients;

8 — OJ 1987 L 256, p. 1.

(ii) the ingredients of which have been thoroughly kneaded and the fat emulsified so that no matter what physical treatment is applied it is impossible to separate the milkfat;

(iii) ready for baking, or other heat treatment of equivalent effect, for the direct production of goods falling within Heading No 1905 of the combined nomenclature;

(iv) put up in accordance with the provisions of (b), or

2....'.

The parties' submissions to the Court

6. Antpöhler contends that aid can be granted for butter incorporated into the sticks of short pasty made with butter which it produces under Article 4(1), Formula A(a), of the butter aid regulation, since they should be regarded as falling under the finished bakers' wares category because the consumer has only to put the products into the oven and bake them before they are eaten. In the alternative, it must be possible for aid to be granted for butter incorporated into sticks of short pastry made with butter under Article 4(3), Formula C(a)(1)(ii), concerning uncooked dough, since the ingredients are thoroughly kneaded and the fat emulsified so that no matter what physical treatment is applied it is impossible to separate the milkfat; the conditions set out in Article 4(3), Formula C(a)(1) are not cumulative so that it is irrelevant that the flour content is only 46% of the weight of the constituents.

7. Uelzena and the Commission claim that aid may not be granted for butter which is incorporated into the sticks of short pastry made with butter under Article 4(1), Formula A(a), of the butter aid regulation since, because the product is not baked, it cannot be included in the category of bread, pastry, cakes, biscuits and other bakers' wares of Common Customs Tariff combined nomenclature heading 1905. The sticks are, on the contrary, a food preparation of flour under heading 1901, more specifically dough for the preparation of bakers' wares of heading 1905, under combined nomenclature heading 1901 20 00 which is included in Article 4(3), Formula C(a)(1), of the butter aid regulation. Since the sticks of short pastry made with butter do not, however, satisfy the condition

in Article 4(3), Formula C(a)(1)(i), of a flour content of at least 51%, no aid can be given for the butter incorporated therein.

At the hearing the Commission explained that the condition in Article 4(3), Formula C(a)(1)(i), of a minimum flour content of 51% was introduced in order to avoid abuse of the butter aid regulation. In certain cases where the flour content is lower than 51% it might be worth incorporating the butter or concentrated butter into dough and then — after aid has been obtained for that butter — melting the butter down and using it for other purposes that do not qualify for aid.

Opinion

Question 1

8. As far as the tariff classification of goods is concerned, the Court has repeatedly stated, for instance in its judgment in Case C-388/90 *Hamlin Electronics*, [9] that

'the decisive criterion for the tariff classification of goods must be sought generally in their objective characteristics and qualities, as defined in the headings of the Common Customs Tariff.

Only in that way can the unequivocal application of the provision at issue be ensured for both the trader concerned and the authorities called upon to interpret it.'

9. In connection with the above provisions in the Customs Tariff the 'objective characteristics' displayed by the sticks of short pastry which are at issue in this case must therefore be determined.

The sticks of short pastry are a foodstuff with a substantial flour content and must be classified under Chapter 19 of the Common Customs Tariff relating to 'Preparations of cereals, flour, starch or milk; pastrycooks' products'.

The sticks of short pastry made with butter have the further characteristic that they are uncooked, but are intended to be baked only when they reach the consumer. In normal parlance the term 'pastrycooks' products' (in

9 — [1992] ECR 2333, at paragraphs 8 and 9.

Danish 'bagværk', German 'Backwaren' and in French 'pâtisseries') is used only for finished products which *have been* baked. It would be more natural to call an uncooked finished product which has to be baked 'dough'. To take a more specific example from 'pastrycooks' products', the characteristics of 'wienerbrød (pastries)' — expressly mentioned in the Danish version of tariff heading 1905 — are *inter alia* the crispness and taste which baking produces. The unbaked product, on the other hand is completely lacking in the crispness and taste which are the properties of *wienerbrød*. As long as cooking has not taken place the product is not *wienerbrød* but dough.

The sticks of short pastry made with butter which are to be baked by the consumer thus do not have the characteristic of being 'baked' which must be regarded as necessary for classification under heading 1905 'Bread, pastry, cakes, biscuits and other bakers' wares'. [10] The sticks must therefore fall under subheading 1901 20 00 'Mixes and doughs for the preparation of bakers' wares of heading No 1905'.

10. The same clear distinction between bakers' wares and other products manufactured from flour is apparent in Article 4 of the butter aid regulation, since finished products falling under heading CN 1905 'bakers' wares' are covered by Formula A(a), whereas products falling under CN heading 1901 (food preparations of flour) are covered by Formula C. It is expressly stated in Article 4(3), Formula C, that that provision covers *inter alia* products falling within CN subheadings 1901 20 00 and 1901 20 00 (mixes and doughs for the preparation of bakers' wares of heading No 1905).

11. If oven-ready dough could be regarded as bakers' wares, both subheading 1901 20 00 of the Common Customs Tariff regulation and the provisions in Article 4(3), Formula C(a)(1), of the butter aid regulation concerning the conditions under which butter or concentrated butter incorporated into uncooked dough can qualify for aid would, furthermore, be redundant.

12. The national court extended its first question to ask whether the flour content of a product was relevant for its inclusion under Articled 4(1), Formula A, of the butter aid regulation. That provision does not lay down any requirement as to the flour content of the products mentioned therein, since the only conditions laid down relate to sugar, cocoa, chocolate and milkfat content. For-

10 — In the French version of Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, heading 1905 covers 'Produits de la boulangerie, de la pâtisserie ou de la biscuiterie' and subheading 1905 30 'Biscuits additionnés d'édulcorants ...'. The word 'biscuit' specifically means that the product has been baked twice and thus the French version literally emphasizes the requirement that the product should have been baked.

mula A also refers to products falling under CN headings 1704, 1806 and 1905 of the Common Customs Tariff, but according to those headings only the sucrose, milkfats, milk proteins, isoglucose, glucose, starch, water, fat and cocoa butter content is relevant. The product's specific flour content must thus be regarded as irrelevant for its inclusion under Article 4(1), Formula A, of the butter aid regulation.

13. I would therefore propose that the Court answer the first question to the effect that under Article 4(1), Formula A(a), of the butter aid regulation concerning bakers' wares aid cannot be granted for butter incorporated into a product consisting of deep-frozen, oven-ready short pastry (sticks of short pastry made with butter), in the form of biscuits intended for baking only when they reach the consumer. The flour content of the product is irrelevant as far as its inclusion under Article 4(1), Formula A, is concerned.

Question 2

14. The next question is whether butter incorporated into a product such as that at issue in this case qualifies for aid under Article 4(3), Formula C(a)(1).

15. That provision covers products falling under *inter alia* CN subheading 1901 20 00. Since, as stated above, it must be assumed that frozen, oven-ready sticks of short pastry made with butter fall under CN subheading 1901 20 00 (mixes and doughs for the preparation of bakers' wares of heading No 1905), butter incorporated therein qualifies for aid provided the conditions set out in Article 4(3), Formula C(a)(1), are satisfied.

The sticks of short pastry manufactured by Antpöhler had, however, a flour content of only 46%, and thus the condition laid down in Article 4(3), Formula C(a)(1)(i), of a flour base of 51% or more of the weight of the constituents is not met. The conditions laid down in Article 4(3), Formula C(a)(1)(ii) to (iv), are, however, according to the information provided, satisfied. The question is therefore whether those conditions should be regarded as cumulative, so that they must all be satisfied before a product qualifies for butter aid under that provision.

16. The punctuation in Article 4(3), Formula C(a)(1) would appear to be relatively arbitrary in the different language versions. Sometimes there is a comma, sometimes a semi-colon, sometimes no punctuation at all

after one or more of the conditions specified. It is accordingly hard to tell from the punctuation whether all the conditions are to be satisfied before butter incorporated into uncooked dough qualifies for aid. It might be pointed out that it would have been helpful if an 'and' or an 'or' had been inserted to make it clear whether all or simply one of the conditions was to be satisfied. Between the conditions in Formula C(a)(1) and Formula C(a)(2) there is, however, an 'or', which could indicate that all the conditions in either Formula C(a)(1) or Formula C(a)(2) have to be met in order for aid to be granted.

17. An interpretation of Article 4(3), Formula C(a)(1), in the light of the general arrangement of the butter aid regulation and its purpose must, in my view, lead to the result that the conditions laid down in Formula C(a)(1)(i) to (iv) are cumulative. The butter aid regulation is aimed at granting aid for butter or concentrated butter incorporated into a number of finished products and hence, as far as uncooked dough is concerned, a number of requirements must necessarily be laid down concerning the dough's composition, the incorporation of milkfat in the dough, the further treatment of the dough and its packaging.

It is in addition apparent from the fifth recital in the preamble to the butter aid regulation that in connection with the grant of that aid certain conditions must be laid down which have to be satisfied in order to ensure that the butter is used as intended. In the light of the Commission's explanation that the condition of a flour content of 51% is laid down in order to avoid misuse of the butter aid regulation, it must be concluded that all the conditions set out in Article 4(3), Formula C(a)(1)(i) to (iv), must be satisfied before aid can be obtained for butter or concentrated butter incorporated into uncooked dough.

18. In view of the foregoing, I consider that butter or concentrated butter incorporated into a product which does not satisfy the condition laid down in Article 4(3), Formula C(a)(1)(i), of a flour base of 51% or more does not qualify for aid.

Conclusion

19. Accordingly I would propose that the Court replies to the questions referred by the national court as follows:

— Article 4(1), Formula A(a), of Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the grant of aid for

cream, butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs, as amended by Regulations Nos 949/88, 2951/88, 352/89, 1048/89, 1157/91 and 2675/91, should be interpreted as meaning that aid cannot be granted for butter incorporated into a product consisting of deep-frozen, oven-ready sticks of short pastry made with butter, in the form of biscuits intended for baking only when they reach the consumer.

— The flour content of the product is irrelevant as regards its inclusion under Article 4(1), Formula A, of Regulation No 570/88, as subsequently amended.

— The conditions for qualifying for aid set out in Article 4(3), Formula C(a)(1), of Commission Regulation No 570/88 as subsequently amended, must be regarded as cumulative, so that under that provision no aid can be granted for butter incorporated into a product which does not satisfy the condition in Article 4(3), Formula C(a)(1)(i), of a flour content of at least 51%.