OPINION OF ADVOCATE GENERAL COSMAS
delivered on 16 January 1997 *

1. Pursuant to the third paragraph of Article 177 of the EC Treaty, the Supremo Tribunal Administrativo (Supreme Administrative Court) has referred to the Court for a preliminary ruling a number of questions which it considers necessary in order to resolve a dispute pending before it concerning the tariff classification of a particular cheese.

I — The relevant provisions

2. Council Regulation (EEC) No 2658/87 of 23 July 1987 contains rules on the tariff and statistical nomenclature and on the Common Customs Tariff. [1] The second part of Annex I to that regulation, as amended by Commission Regulation (EEC) No 3174/88 of 21 September 1988, [2] contains the table of rates of duty. Section I, Chapter 4, which concerns *inter alia* milk and dairy products, contains the following provision:

'CN Code	Description
0406	Cheese and curd:
...	
0406 20	— Grated or powdered cheese, of all kinds:
0406 20 10	— — Glarus herb cheese...
0406 20 90	— — Other
...	
0406 90	— Other cheese:
0406 90 11	— — For processing

...'. [3]

3 — In other words, the above tariff heading (0406 'Cheese and curd') contains the subdivisions cited (five in all), including subheading 0406 20 'Grated or powdered cheese, of all kinds' and subheading 0406 90 'Other cheese'. The first subheading (0406 20) is further subdivided into Glarus herb cheese (0406 20 10) and other cheese (0406 20 90). The second subheading (0406 90) is subdivided into 0406 90 11 cheese 'for processing' and other cheese which is specified (for example, Feta, etc.).

* Original language: Greek.

1 — OJ 1987 L 256, p. 1.

2 — OJ 1988 L 298, p. 1.

3. The Commission has published a number of explanatory notes in order to standardize the application of the Combined Nomenclature for the classification of goods. The 1989 version states, with regard to subheading 0406 20 10, that it includes grated or powdered cheese of all kinds and, as regards subheading 0406 20 90, that it includes grated cheeses, usually used as seasonings. They are obtained from hard cheeses (for example, Grana, Parmigiano-Reggiano, Emmental, Reggianito, Sbrinz, Asiago, Pecorino, etc.). These grated cheeses have been partially dehydrated with a view to ensuring the longest possible preservation.

4. In 1990 the Commission published further explanatory notes [4] relating to the abovementioned tariff subheadings and reading as follows:

'0406 20 10

and

0406 20 90

Cheese, grated or powdered, of all kinds

Point 1 is replaced by the following:

"1. Grated cheeses, usually used as seasonings or for other purposes in the food-processing industry. They are most often obtained from hard cheeses (for example, Grana, Parmigiano-Reggiano, Emmental, Reggianito, Sbrinz, Asiago, Pecorino, etc.). These cheeses may have been partially dehydrated with a view to ensuring the longest possible preservation.

This classification also covers cheeses which, after grating, are agglomerated."'

5. The Commission subsequently adopted Regulation (EEC) No 316/91 of 7 February 1991, concerning the classification of certain goods in the Combined Nomenclature. [5] The annex to that regulation reads as follows:

4 — Document 90/C 263/08 of 18 October 1990 (OJ 1990 C 263, p. 10), published in accordance with Article 10(1) of Regulation No 2658/87 as amended by Regulation (EEC) No 2472/90 (OJ 1990 L 247, p. 1).

5 — OJ 1991 L 37, p. 25.

Description of goods (1)	Classification CN code (2)	Reasons (3)
1. Grated cheese which as a result of its high moisture content and conditions of transport or packaging (partially vacuum packed) becomes agglomerated	0406 20 90	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature and by the wording of CN codes 0406, 0406 20 and 0406 20 90.

6. Section IA of Annex I to Regulation No 2658/87, as amended by Regulation No 3174/88, contains the general rules for the interpretation of the Combined Nomenclature. They read as follows:

'Classification of goods in the Combined Nomenclature shall be governed by the following principles:

1. The titles of sections, chapters and subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) ...

3. When ... goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description...

(b) ...

(c) When goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

...

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and *mutatis mutandis* to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires.'

7. It follows from those rules, taken in conjunction with the other rules for the interpretation of the Combined Nomenclature, that subheading 0406 20 covers 'grated or powdered cheese, of all kinds', which are *most often* obtained from hard cheeses, such as the cheeses quoted *by way of example* in the Combined Nomenclature (for example, Parmigiano Reggiano, Emmental, etc.) and which are usually used as seasonings. It also follows from the rules that subheading 0406 90 11 covers other cheeses, that is to say cheeses other than those quoted in the four other subdivisions of tariff heading 0406 (Cheese and curd) and which are 'for processing'. Processing is a broad legal term covering the manufacture (production) of a new product following processing or working of the raw material.

II — Facts

8. The company Fábrica de Queijo ERU Portuguesa, Lda ('ERU') imported into Portugal, under import declaration No 14595 issued by the Delegaçâo Aduaneira de Xabregas de l'Alfândega de Lisboa (Lisbon Customs Administration) on 20 March 1989, 1 110 boxes containing cheese from the Netherlands packaged in plastic bags each containing about 15 kg.

9. The packaged cheese had, on import, the appearance of a compact mass or paste. After unpacking and exposure to the atmosphere it broke down into irregular granules.

10. The cheese was described on the exporter's invoice as grated cheese. ERU claimed that it came under tariff subheading 0406 20 90 'Grated or powdered cheese, of all kinds' with the exception of Glarus herb cheese.

11. The first inspector, the second inspector, the committee of second inspectors and the Tribunal Técnico de Primeira Instância (Technical Court of First Instance) classified the imported cheese under tariff subheading 0406 90 11 as 'Other cheese, for processing'.

12. ERU challenged the decision of the Tribunal Técnico de Primeira Instância before the Tribunal Técnico de Segunda Instância (Technical Court of Second Instance). That court delivered a ruling confirming the tariff classification adopted at first instance.

13. It held that the goods in question, described on the invoice as grated cheese, were in fact cheese paste in irregularly shaped compact blocks weighing 15 kg, packaged in plastic bags. As tariff heading 0406 20 covers 'Grated or powdered cheese, of all kinds' that is to say cheese reduced to small pieces or very small granules, cheese appearing in any other form (for example in blocks) is — *a contrario* — excluded from that subheading in accordance with General Rules 1 to 6 for the interpretation of the Combined Nomenclature. [6]

14. The Tribunal Técnico de Segunda Instância also found that a similar description appears in the Explanatory Note to the Combined Nomenclature on subheadings 0406 20 10 and 0406 20 90 published later, in 1990.

15. On the basis of the foregoing considerations, it considered that the cheese in question did not meet those requirements, since it is in the form of a compact block, that is to say in a form in which it cannot be sold directly to consumers, and furthermore it has a high moisture content and breaks down into irregular granules on exposure to the atmosphere. It therefore held that the cheese had the characteristics of a product which was unfinished or in the course of processing and should consequently be classified under subheading 0406 90 11.

16. The plaintiff brought an appeal against that judgment of the Tribunal Técnico de Segunda Instância before the Tribunal Tribu-

6 — The reference order states that, according to the literature on the subject, grated cheese is obtained from very dry cheese (Gruyère, Comté, Parmesan, etc.) and is usually used to sprinkle on dishes before grilling or baking them but may also be served separately to add to soup, particularly fish soup (*Dictionnaire des Fromages*, R. J. Courtine, Librairie Larousse, p. 196).

tario de Segunda Instância (Tax Court of Second Instance) and against the judgment of that court before the Supremo Tribunal Administrativo (Supreme Administrative Court).

III — The questions submitted for a preliminary ruling

17. Being in doubt as to the interpretation of certain provisions of Community law which in its view apply to the matter at issue, the Supremo Tribunal Administrativo, by order of 25 January 1995, referred the following questions to the Court of Justice for a preliminary ruling:

'In view of the fact that, on 20 March 1989, there was presented to the Portuguese Customs Authorities for release into free circulation or for another customs procedure cheese coming from a Community country, described by the exporter as grated cheese, which had been ground and subjected to an industrial process in which oxygen was replaced by an injected nitrogen/002 solution, in order to enhance its preservation, and then packaged and compacted in plastic bags, each containing about 15 kg, with a high moisture content, having the appearance of a compact mass or paste, which, after unpacking and exposure to the atmosphere breaks down into irregular granules, the following questions arise:

(1) Having regard to Commission Regulation (EEC) No 316/91 of 7 February 1991, should the said cheese be classified under tariff heading 0406 20 90, as "Grated or powdered cheese, of all kinds", or under tariff heading 0406 90 11 as "other cheese, for processing"?

(2) Is the said regulation interpretative and therefore applicable retroactively to the import of the said cheese?

(3) In the event of either of the foregoing questions being answered in the negative, is account to be taken in this case of the explanatory notes to the Combined Nomenclature of the European Communities in the version referred to in Official Journal No C 263 of 18 October 1990, p. 10, or of the previous explanatory notes?

(4) In either case, under which of the two tariff headings mentioned above is the said cheese to be classified?' [7]

7 — As the Commission rightly remarks in its written observations, the phrase 'by an injected nitrogen/002 solution' should be replaced by the phrase 'by a nitrogen/CO_2 (carbon dioxide) mixture'. The representatives of the Portuguese Republic and of the Commission also made this point at the hearing.

IV — Replies to the questions

18. I propose, for reasons of logic, to take the questions in three parts, in the following order: first the second question, then the third question and, lastly, the first and fourth questions together.

A — *The second question*

19. In the second question, the national court asks whether a Commission regulation, in this case Regulation No 316/91, is applicable retroactively as an interpretative regulation, that is to say whether it is also applicable to situations that occurred before it was published.

20. Citing Article 9(1)(e) of Regulation No 2658/87, under which the Commission is required to adopt 'amendments to the Combined Nomenclature intended to adapt it to take account of technological or commercial developments or aimed at the alignment or clarification of texts' and Article 10(2) of the same regulation, under which the Commission is required to adopt measures which will be immediately applicable, ERU claims that the abovementioned Article 10 acknowledges the principle that an interpretative provision forms part of the provision interpreted and infers that the rules for the interpretation of the Combined Nomenclature are immediately applicable even with respect to disputes that were pending when they entered into force.

21. In its written observations, the Portuguese Government points out that Regulation No 316/91 amends the Combined Nomenclature with a view to adapting it to technological developments. However, a text concerned with adaptation to technological change cannot, by definition, be an interpretative text. It must be regarded as a new text covering cases that were not covered by the preceding one. If the Community legislature intended the new text to cover situations that had occurred earlier, that is to say at the time when the development took place, that would have to be made clear in the new text.

22. I must emphasize in this connection that Regulation No 316/91 has the character of a tariff classification regulation. The Court has consistently held that 'a regulation specifying the conditions for classification in a tariff heading or subheading is of a legislative nature and cannot have retroactive effect'. [8] In the light of that case-law, I consider that Regulation No 316/91 cannot have retroactive effect.

8 — Case 158/78 *Biegi* v *Hauptzollamt Bochum* [1979] ECR 1103, paragraph 11.

23. On the contrary, to ensure legal certainty and facilitate inspection, the decisive criterion for the customs classification of goods must be sought generally in their objective characteristics and qualities, as defined in the relevant heading of the Common Customs Tariff and in the notes to the sections or chapters. [9] That may reveal that Regulation No 316/91 simply contains a provision based on the prior regulation under which, even if we are unaware of the existence of the regulation, the goods in question should in any case be classified under heading 0406 20 90. [10] This point will be considered later in connection with the answer to the first and fourth questions.

B — *The third question*

25. In the third question the national court asks whether, for the purpose of determining the tariff classification of imported goods, account is to be taken of explanatory notes to the Combined Nomenclature published after the date on which they were imported.

26. The national court's problem arises from the fact that there are differences between the explanatory notes published in 1989 and those published in 1990 in respect of subheading 0406 20 90.

24. The answer to the second question should therefore be that Regulation No 316/91 lays down the conditions for classification under a tariff heading or subheading and is of a legislative nature. It is therefore not applicable retroactively. Consequently, it cannot be binding on national authorities called upon to determine the tariff classification of goods imported before it entered into force, on the basis of the objective characteristics of those goods.

27. The Court has held that, for the purpose of interpreting the Common Customs Tariff, the notes to chapters and the explanatory notes to the combined nomenclature of the Customs Cooperation Council 'constitute an important means' [11] of ensuring the uniform application of the Common Customs Tariff and as such may be regarded as 'a valid aid to the interpretation of the tariff'. [12]

9 — See, for example, Case C-11/93 *Siemens Nixdorf* [1994] ECR I-1945, paragraph 11, Case C-219/89 *WeserGold* [1991] ECR I-1895, paragraph 6, and Case 62/77 *Carlsen-Verlag* v *Oberfinanzdirektion Köln* [1977] ECR 2343, paragraph 3.

10 — See *Siemens Nixdorf*, cited above, paragraphs 11 and 17, and the Opinion of Advocate General Jacobs in the same case, point 17.

11 — Case 798/79 *Hauptzollamt Köln-Rheinau* v *Chem-Tec* [1980] ECR 2639, paragraph 11.

12 — See also Joined Cases 69/76 and 70/76 *Dittmeyer* v *Hauptzollamt Hamburg-Waltershof* [1977] ECR 231 and Joined Cases C-106/94 and C-139/94 *Colin and Dupré* [1995] ECR I-4759, paragraph 21.

28. For the purpose of interpreting the tariff headings and subheadings, it is therefore necessary to take account not only of the wording and general scheme of the Common Customs Tariff but also of the explanatory notes. [13] However, those notes are not binding, so that it may be necessary to consider whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions. [14] The Court has also held that the explanatory notes drawn up by the Customs Cooperation Council are, in the absence of specific provisions of Community law, an authentic source for interpreting the headings to the Common Customs Tariff. [15]

29. In the present case, the imported cheese was a Dutch cheese of the Gouda type, grated and packaged in accordance with a special procedure. If, as the Commission has pointed out, the wording of the 1989 Explanatory Note meant that this grated cheese, which appeared on import in the form of a compact mass, was not one of the cheeses classified under tariff subheading 0406 20 90 and must therefore be classified under a different tariff heading even though it was clear from the wording of the tariff subheading of the Common Customs Tariff and from the characteristics of the cheese itself that the appropriate subheading was subheading 0406 20 90, that would mean that the Explanatory Note altered the meaning of the provision of the Common Customs Tariff. However, the Court has held that that is not permissible. [16]

30. To be more precise, it is clear from the description that subheading 0406 20 90 covers grated or powdered cheese of all kinds with the exception of Glarus herb cheese. The 1989 Explanatory Note stated, with regard to subheading 0406 20 90, that it included grated cheeses, *usually* used as seasonings. They are *most often* obtained from *hard cheeses* (for example Grana, Parmigiano-Reggiano, Emmental, Reggianito, Sbrinz, Asiago, Pecorino, etc.), which, after grating, have been *partially dehydrated* with a view to ensuring the longest possible preservation.

31. In the light of those considerations, I think the reference in the 1989 Explanatory Note to grated cheese obtained from the hard cheeses cited by way of example, which having been grated are packaged in accordance with a certain procedure (after partial dehydration) and are usually used as seasonings, did not exclude similar products obtained from some other type of cheese, packaged in accordance with a different procedure and intended for different purposes (other purposes in the food-processing industry). It is sufficient that they have the characteristics of grated cheese. The 1989 Explanatory Note thus contained a lacuna regarding the imported product in question, a lacuna that the fuller 1990 Explanatory Note sought to fill.

32. The answer to the question put by the national court should therefore be that explanatory notes published after the facts in the case may also be taken into account by

13 — Case 200/84 *Daiber* v *Hauptzollamt Reutlingen* [1985] ECR 3363, paragraphs 13 and 14.

14 — See, for example, *Chem-Tech*, cited in footnote 11 above, paragraph 11.

15 — Case 11/79 *Cleton* v *Inspecteur der Invoerrechten en Accijnzen* [1979] ECR 3069.

16 — Case C-35/93 *Develop Dr Eisbein* [1994] ECR I-2655, paragraphs 18 and 21.

national authorities for the purpose of determining the tariff classification of an imported product. It is sufficient that it is clear from an examination of its objective characteristics that the meaning of the relevant provision of the Common Customs Tariff is not thereby modified.

C — *The first and fourth questions*

33. In the first and fourth questions, the national court asks whether the Combined Nomenclature of the Common Customs Tariff is to be interpreted as meaning that a cheese having the characteristics described in the reference order is to be classified under tariff subheading 0406 20 90 or, if not, to what extent it may be classified under subheading 0406 90 11.

34. According to ERU, dehydration is a technical procedure for the preservation of the product and not a prerequisite for it to have the characteristics of grated cheese. Neither subheading 0406 20 90 nor the 1989 Explanatory Note excludes other forms of preservation, or requires that the product, preserved by vacuum packing, be intended for immediate consumption. ERU also pointed out that no further processing was necessary for the imported cheese to be usable after importation not only as a seasoning but also for other purposes. All that was required was to neutralize the preservation procedure that had been used earlier to package and export it.

35. The Portuguese Government, on the other hand, contends that the imported product did not have the objective characteristics of grated cheese at the time of customs clearance, as it was still necessary to employ a special procedure to break it down before it could be offered to the final consumer. It emphasized the point that even if the product was regarded as agglomerated at the time of importation, within the meaning of Regulation No 316/91, it did not have the other characteristics of grated cheese and should therefore be classified not under subheading 0406 20 90 but under subheading 0406 90 11.

36. Lastly, the Commission points out that the cheese was in fact grated cheese when it came out of the machine but, because of its high moisture content it was natural for it to agglomerate after grating. The Commission adds that this tendency to agglomerate is increased by the packaging procedure designed to enhance preservation by the removal of oxygen and the injection of a nitrogen/carbon dioxide solution and by the substantial weight of each bag (15 kg). For these reasons, the Commission considers that the cheese still has the characteristics of grated cheese and that this was simply confirmed by the 1990 Explanatory Note and Regulation No 316/91.

37. According to the reference order, before it was packaged the imported cheese was grated cheese, as ERU claims. It lost the characteristics of grated cheese as a result of the procedure to which it was subjected when it was packaged with a view to ensuring the longest possible preservation.

38. Moreover, as I have already observed, the steps taken to reverse the preservation procedure are not intended to create a new variety of cheese but to neutralize that procedure so that the cheese can be offered to the consumer in its original form, that is to say to produce grated cheese as it was when it was imported, packaged in bags.

39. The procedure to which the packaged cheese is subjected after importation is therefore intended to neutralize the effects of the procedure to which it was subjected earlier for preservation purposes, not to create a new product. [17] The procedure is also intended to restore the product to the form it had before packaging. [18] An analysis of the case-law on the processing of products with a view to manufacturing new products inclines me to take the same view. [19]

40. Having regard to the foregoing considerations, I consider that the procedure consisting of removing the nitrogen/carbon dioxide solution from the imported product does not constitute processing, as the purpose of that procedure is not to create a new product but to restore the product to its original form of grated cheese. In other words that procedure does not constitute 'processing' within the meaning of subheading 0406 90 11.

41. The answer to the question referred by the national court should therefore be that the Combined Nomenclature of the Common Customs Tariff must be interpreted as meaning that a cheese which has the characteristics described in the reference order is to be classified under tariff subheading 0406 20 90.

17 — As the Commission also observes in this connection, further support for this view is to be found in Regulation (EEC) No 1523/70 of the Commission of 29 July 1970 on the classification of goods under subheading 02.01 A II (a) of the Common Customs Tariff (OJ, English Special Edition 1970, p. 518), incorporated into the Combined Nomenclature by Commission Regulation (EEC) No 2723/90 of 24 September 1990 (OJ 1990 L 261, p.24), under which meat of domestic bovine animals continues to be classified under tariff heading 0202 after it has been defrozen, despite the fundamental change in its characteristics.

18 — Although a court may have regard only to provisions in force at the time of the events giving rise to the dispute, it is not without interest to note that, according to the Commission, the 1990 Explanatory Note and Regulation No 316/91 were adopted to solve problems that had appeared in connection with the tariff classification of this type of cheese, and an examination of those texts suggests that that is indeed the case. See also *Carlsen-Verlag* v *Oberfinanzdirektion Köln* (cited in footnote 9), paragraph 10, which refers to a corrigendum made after the facts on grounds of linguistic harmonization.

19 — See Case 36/71 *Henck* v *Hauptzollamt Emden* [1972] ECR 187 on the processing of maize and sorghum and Case 185/73 *Hauptzollamt Bielefeld* v *König* [1974] ECR 607, Case C-87/92 *Hoche* v *BALM* [1993] ECR I-4623 and Case C-267/94 *France* v *Commission* [1995] ECR I-4845, paragraph 34.
In Case 49/76 *Gesellschaft für Überseehandel* v *Handelskammer Hamburg* [1977] ECR 41, the Court held that the cleaning and grinding of a raw material, in this case raw casein, together with the grading and the packaging of the product obtained, do not constitute a substantial process or operation resulting in the manufacture of a new product or representing an important stage of manufacture within the meaning of Article 5 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (OJ, English Special Edition 1968, p. 165).

V — Conclusion

42. Having regard to those considerations, I propose that the Court reply as follows to the questions submitted by the Supremo Tribunal Administrativo for a preliminary ruling:

(1) Commission Regulation (EEC) No 316/91 of 7 February 1991 concerning the classification of certain goods in the Combined Nomenclature lays down the conditions for classification under a tariff heading or subheading; it is not binding on national authorities who are called upon to determine the tariff classification of goods imported before it entered into force, on the basis of the objective characteristics of those goods.

(2) Explanatory notes published after the facts in the case may also be taken into account by national authorities for the purpose of determining the tariff classification of an imported product; it is sufficient that it be clear from an examination of the objective characteristics of the product that the meaning of the applicable provision of the Common Customs Tariff is not thereby altered.

(3) The Combined Nomenclature of the Common Customs Tariff, as set out in the Annex to Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending 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, must be interpreted as meaning that cheese which, after grating, is subjected to a process in which oxygen is replaced by a nitrogen/carbon dioxide solution with a view to ensuring its preservation for as long as possible and then packaged and compacted in plastic bags, each containing about 15 kg, with a high moisture content, having the appearance of a compact mass, which, after unpacking and exposure to the atmosphere, breaks down into irregular granules, is to be classified under tariff subheading 0406 20 90.