JUDGMENT OF THE COURT
8 DECEMBER 1970[1]

Deutsche Bakels GmbH
v Oberfinanzdirektion München[2]
(Reference for a preliminary ruling by the Bundesfinanzhof)

Case 14/70

Summary

1. *Common Customs Tariff — Description of goods — Uniform scope in the Common Market — Interpretation — Respect for Community jurisdiction — Prohibition against the issue by Member States of binding rules of interpretation*
(Regulation No 950/68 of the Council)

2. *Common Customs Tariff — Description of goods — Interpretation — Absence of Community provisions — Authority of Explanatory Notes and Classification Opinions of the Convention on the Brussels Nomenclature*

1. Since the individual tariff headings must have the same scope in all Member States, their interpretation can only be fixed if the powers vested in the Community are respected. Consequently, even in the absence of an express Community interpretation, the effect of a binding interpretation cannot be attributed to the explanatory notes of the national authorities relating to the headings of the Common Customs Tariff.

2. In the absence of relevant Community provisions, the explanatory notes and the classifications opinions provided for by the Convention on Nomenclature for the Classification of Goods in Customs Tariffs are an authoritative source for the purposes of the interpretation of the headings to the Common Customs Tariff.

In Case 14/70

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

DEUTSCHE BAKELS GMBH

and

1 — Language of the Case: German.
2 — CMLR.

OBERFINANZDIREKTION MÜNCHEN

On the interpretation of Regulation No 160/66/EEC of the Council, replaced by Regulation (EEC) No 1059/69 of the Council, in conjunction with Regulation (EEC) No 950/68 of the Council.

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

Summary of facts and of procedure

The facts and procedure may be summarized as follows:
The Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950, known as the 'Brussels Nomenclature', places each of the contracting parties under an obligation to establish its customs tariff in conformity with the nomenclature. Since all the Member States of the EEC were parties to this Convention, the Common Customs Tariff was also based on the Brussels Nomenclature.
In order to resolve the problems posed by the interpretation of the various headings of the nomenclature, the Convention and the annexes thereto provide, on the one hand, for Explanatory Notes composed by the Customs Cooperation Council and on the other hand, Classification Opinions sent out by the Nomenclature Committee of the same Council. The Explanatory Notes define the sphere of application of a given heading of the nomenclature, while the Classification Opinions relate to a specific product and establish its exact classification.
On 24 October 1968, Deutsche Bakels GmbH (hereinafter referred to as 'the plaintiff') received from the Oberfinanzdirektion (Regional Finance Office) a binding customs tariff notification (verbindliche Zolltarifauskunft) relating to a product described under the name of 'Voltem' as a baking emulsifier, consisting as to 51.35% of sucrose and for the rest of approximately three parts fat in the form of triglycerides and two parts diacetyltartaric-acid-ester. In a proportion to flour of two to three per cent, this product acts as an emulsifier and stabilizer in the manu-

facture of bread and pastry products, in order to obtain an even fermentation of the dough, an increase in the volume of the finished product, and, in the case of bread, a finer texture. The Oberfinanzdirektion classified this product under heading 21.07/F-I-e-1 of the Common Customs Tariff.[1]

This classification implies that the product is subject to customs duty of 17%,[2] making up one of the two components (the other being a variable component) of the levy provided for by Article 10 of Regulation No 160/66 EEC of the Council of 27 October 1966, establishing the trade arrangements for certain goods resulting from the processing of agricultural products (OJ of 28.10.1966, p. 3361) (replaced by Article 5 of Regulation (EEC) No 1059/69 of the Council of 28 May 1969 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products, OJ L141 of 12.6. 1969, p. 1).

Contrary to the wishes of the plaintiff the Oberfinanzdirektion refused to classify the product under heading 38.19 of the tariff,[3] giving the reason that Voltem is made up nutritive material (sugar and fat).

In its direct application (Sprungklage) to the Bundesfinanzhof (Federal Finance Court), the plaintiff relied principally on the Explanatory Notes to the Brussels Nomenclature relating to heading 21.07. In the terms of these explanatory notes, heading 21.07 only covers those preparations which are intended for human consumption and which because of their nutritive value or their taste are used in the manufacture of foodstuffs which are intended for consumption by humans. Preparations which are clearly incorporated for reasons other than those set out above by reason of the nature of their composition and the small quantities in which they are generally used, for example emulsifiers or stabilizers, even if combined with nutritive elements (sugar, powdered milk etc,) serving as a vehicle to facilitate determination of quantities, as a general rule come under heading 38.19 rather than heading 21.07.

The plaintiff maintains that the sugar content of Voltem only acts as an agent designed to facilitate determination of quantities or even to make this possible. Since it is only used in a small proportion of 1 to 2% and since it serves other purposes than nutrition or influencing taste, Voltem comes under heading 38.19. Moreover this was the heading in which Voltem had generally been classified in those countries whose customs tariff is based on the Brussels Nomenclature. The German customs offices had adopted the same practice before the amendment made to the German explanatory notes to heading 21.07 by the Order of 22 June 1967 relating to the Explanatory Notes to the German Customs Tariff of 1967 (Bundesgesetzblatt II 1967, p. 1935). This amendment was based on a Classification Opinion relating to heading 21.07 issued by the Brussels Nomenclature Committee which classified two auxiliary products for pastry and breadmaking under this heading, because of their composition. The plaintiff maintains that Voltem does not correspond to the products referred to this in this notice of classification either by its composition or by its intended use.

The Oberfinanzdirektion asks for the direct appeal to be dismissed for the following reasons.

Diacetyl-tartaric-acid-ester should be assimilated to monoglycerides and to diglycerides because of its chemical structure, of its decomposition in the body and of the role which it plays in the manufacture of food products. In both cases it was their physiological properties which made the substances particularly suitable to be used as emulsifiers for food products. As regards their chemical structure they were glycerides (fat), that is to say nutritive substances. According to the German explanatory notes to heading 38.19, preparations derived from these substances are excluded from

1 — Heading 21.07 'Food preparations not elsewhere specified or included'.

2 — Cf. Annex III to Regulation (EEC) No 950/68 of the Council of 28 June 1968, relating to the Common Customs Tariff (OJ L 172, of 22. 7. 1968, p. 1 et seq.).

3 — Heading 38.19: 'Chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical allied or industries not elsewhere specified or included'.

this heading, since this heading only covers auxiliary substances for bread and pastry making which are made up of monoglycerides and diglycerides and substances which are not nutritive. Substances which are nutritive should be classified under heading 21.07, pursuant to the German explanatory notes to this heading.

On 21 January 1970 Regulation (EEC) No 107/70 of the Commission was adopted, relating to the classification of goods under sub-heading 21.07 F of the Common Customs Tariff (OJ L16 of 22.1.1970 p. 9), which classified products such as Voltem under sub-heading 21.07-F.

By order of 25 February 1970, the Bundesfinanzhof decided to stay the proceedings and to refer to the Court of Justice, pursuant to Article 177 of the EEC Treaty, the following questions for a preliminary ruling:

'1. If explanatory notes at the Community level have not yet been issued for the headings of the Common Customs Tariff, can explanatory notes issued by the national authorities be recognized as a binding interpretation of these tariff headings?

2. If Question 1 is answered in the negative: if explanatory notes at the Community level have not yet been issued for headings of the Common Customs Tariff, is their interpretation determined by the Explanatory Notes to the Brussels Nomenclature of 1955 relating to these headings?

3. If Question 2 is answered in the negative: how is the distinction to be made between 'food preparations' under heading 21.07 and 'chemical preparations' under heading 38.19 of the Common Customs Tariff? Is the decisive element for this distinction the use (to which the product may mainly be put), the (predominant) attribute of taste of its content in food substances?'

In its order making the reference the Bundesfinanzhof further observes that the distinction established by Regulation (EEC) No 107/70 between heading 21.07 on the one hand and 38.19 on the other, does not correspond to the explanatory notes in force in the Federal Republic of Germany at the time when the binding customs tariff notification was issued or with the explanatory notes of the Customs Cooperation Council.

Indeed in the regulation it is the predominant content of nutritive substances which is used as the distinguishing criterion, while the German and Brussels explanatory notes mainly take into consideration the nutritive value or the attributes of taste.

The Bundesfinanzhof believes that it is this difference and the fact that Regulation (EEC) No 107/70 only came into force on 30 January 1970 which give rise to the questions which it refers to the Court.

The order making the reference was registered at the Court Registry on 6 April 1970.

The plaintiff, the German Government and the Commission of the European Communities submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral proceedings without holding a preparatory inquiry.

The plaintiff, the German Government and the Commission of the European Communities presented oral argument at the hearing on 29 October 1970.

The Advocate-General delivered his opinion at the hearing on 17 November 1970.

The plaintiff was represented by Mr Schürmann of the Frankfurt am Main Bar.

The German Government was represented by Messrs Morawitz, Cludius and Karbe.

The Commission of the European Communities was represented by its Legal Adviser, Mr Kalbe.

Summary of the observations of the parties

The observations of the parties may be summarized as follows:

1 — *The first question*

Both the German Government and the Commission believe that this question should be answered in the negative, and they feel that there can be no doubt in this respect following the judgment of the Court in Case 40/69.

2 — *The second question*

(a) Observations of the Commission

The Commission maintains that the Explanatory Notes to the Brussels Nomenclature (as well as the classification opinions) are not binding measures in the Community legal order, as the Council for Customs Cooperation does not possess direct legislative power, and because the explanatory notes and the classification opinions are not themselves integral parts of the Convention.
On the other hand they certainly have the value of an expert opinion on the scope of the various headings of the Nomenclature. Therefore they may also be taken into consideration in interpreting the Common Customs Tariff which also follows the Brussels Nomenclature.
However in the view of the Commission, this statement is subject to two qualifications. On the one hand, where applicable the particular principles of interpretation of the Common Customs Tariff and the explanatory notes and the specific classification decisions, which are adopted for the purposes of the application of the common tariff, take precedence over the explanatory notes and classification opinions issued by the Customs Cooperation Council.
On the other hand, as a general point, the explanatory notes are only valid so long as they have not been overtaken by commercial and technical developments. In this respect the Commission further observes that the consequences of such overtaking are sometimes in fact corrected by means of a classification opinion, which exactly serves the purpose of adaptation to such developments.

(b) Observations of the German Government

As regards the second question the German Government observes that account must be taken not only of the explanatory notes, but in addition of the classification opinions which are also an essential element in the definition of the Brussels Nomenclature.
As regards the reply to be given to this question, the German Government recalls a judgment of the Bundesfinanzhof relating to the obligations of the Federal Republic of Germany within the sphere of the Brussels Nomenclature which is also relevant to this case.[1]
Relying on the decision in this case, the Federal German Government states that, whilst the explanatory notes and the classification opinions of the Customs Cooperation Council do not constitute measures which are directly binding on the courts, nevertheless the fact that the Community adopted the Brussels Nomenclature necessarily implies an undertaking on its part to guarantee the uniform application of the Nomenclature and thus to conform to these explanatory notes and the classification opinions. Therefore in answer to this question the German Government suggests that in the absence of explanatory rules or directives from the Community with binding force, the main headings of the Common Customs Tariff should be interpreted in the light of the explanatory notes and classification opinions of the Brussels Nomenclature.

(c) Observations of the plaintiff

In the oral proceedings, the plaintiff observed in particular that it is in the interests of the Community itself, in order to achieve as uniform an interpretation as possible of the Common Customs Tariff, to conform to the explanatory notes and classification opinions issued by the Customs Cooperation Council.
In addition, it recalls that the question does not relate to the mandatory nature (Verbindlichkeit) of the Explanatory Notes to the Brussels Nomenclature, but that the

1 — Judgment of 10 March 1970, AZ: III A/5-51069-112/70.

Bundesfinanzhof only asks whether these notes are decisive for the interpretation of the customs headings. The plaintiff believes that this question must certainly be answered in the affirmative.

3 — *The third question*

(a) Observations of the Commission

The Commission recalls that Regulation (EEC) No 107/70 classified preparations such as Voltem under heading 21.07-F 'because of their use as additives in foodstuffs for human consumption and of their composition'. However, this regulation is merely of a declaratory nature.
Indeed it follows from the content of the concept of 'food preparations' itself, that the determining factors are the content of nutritive substances and the use as a food. On the other hand the fact that the Brussels explanatory notes exclude preparations which are partially nutritive from heading 21.07 because of the purpose of their incorporation and of the 'small' proportions required in use, gives rise to ambiguity. It is not impossible that a preparation such as Voltem should be incorporated in certain products not only, and perhaps not even, as an emulsifier, but also because of its fat and sucrose content.
The classification of Voltem under heading 38.19 would permit the processing industry to avoid the high prices of these substances in the Common Market.
Moreover the bodies concerned with the Brussels Nomenclature had reached the same conclusion themselves. On the one hand, the Customs Cooperation Council is in the course of preparing an amendment to its explanatory notes on this subject and on the other hand, its Nomenclature Committee has departed from the explanatory notes and classified preparations comparable to Voltem under heading 21.07 rather than under heading 38.19.
In addition, application of the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, in particular Rules 3 (c) and 5,[1] would also result in heading 21.07 being applicable.
Finally the Commission observes that the customs protection which is the objective of Regulation No 160/66/EEC (and of Regulation (EEC) No 1059/69 which replaced it), would be incomplete if it did not extend to preparations such as Voltem, which contain an appreciable quantity of agricultural products.
Therefore it concludes that in view of the delimitation of headings 21.07 and 38.19 account should be taken, not solely of the nutritive value or the organoleptic attributes of the product in question, but also of its sugar, milk products and cereals content, while still having regard to the intended use.

(b) Observations of the German Government

The German Government produces a classification opinion, whereby the Nomenclature Committee had classified under heading 21.07 additives for bread making, whose composition contains a substantial percentage of chemical products, and states that this notice was confirmed by the Customs Cooperation Council at its meeting of 6 to 9 June 1967.
In the German Government's view the following criteria should be excluded in distinguishing between the headings 21.07 and 38.19 relating to additives for bakery and fine bakery;

— the question whether the additive is added as a stabilizer or as an emulsifier or else to improve the taste of the product, since both objectives overlap as any improvement in the preparation of such a product tends finally to improve its taste as well;

— the question in what quantity the preparation is intended to be incorporated in the product, since this quantity depends as much on the product as on the additive;

— the question whether the substances making up the preparation are 'for human consumption' since these substances are always of this nature,

1 — Cf. Regulation No 950/68/EEC, (OJ L 172 of 22. 8. 1968, p. 11).

whether they are 'natural substances' (sugar, flour, etc.) or 'chemical substances' (monoglycerides and diglycerides, sorbitol, etc.).

Finally then, the only suitable criterion for classification under one heading or the other is the predominant percentage of either typically nutritive or chemical components. Such was the conclusion of both the Nomenclature Committee (classification opinion mentioned above) and of the Commission (Regulation (EEC) No 107/70).
As regards the classification of Voltem the German Government, in the oral proceedings, adopted the arguments presented by the Oberfinanzdirektion before the Bundesfinanzhof.

(c) Observations of the plaintiff

The plaintiff states that the Oberfinanzdirektion was wrong to assimilate Diacetyltartaric-acid-ester to monoglycerides and diglycerides. In support of this view it relies in particular on the following arguments:

— the respective chemical formulae are clearly different;

— hydrolysis of diacetyl-tartaric-acid-ester produces, apart from fatty acids and glycerol (products from the hydrolysis of monoglycerides and diglycerides), considerable quantities of other substances which are not for human consumption;

— German legislation on foodstuffs regards diacetyl-tartaric-acid-ester as an artificial chemical product and therefore restricts its use;

— since the preparation of diacetyl-tartaric-acid-ester is very expensive, it would not be worthwhile to produce it if indeed monoglycerides and diglycerides, the preparation of which is much less expensive, could be wholly substituted for it;

— in fact, it is the diacetyl-tartaric-acid-ester which gives Voltem the properties of an emulsifier and stabilizer, as the other components of Voltem serve only as vehicles to facilitate determination of quantities.

The plaintiff maintains that Voltem should be classified on the basis of the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, in particular Rule 3 (b). Therefore the substance which gives Voltem its essential character must be determined. Although it is possible in this respect to take as the essential element either the use, or the composition, or again the financial value of the various components, the Customs Cooperation Council adopted as its criterion the normal use of the product. On the other hand, it is not possible to do as the Commission does, that is to rely solely on a given percentage of nutritive material in a product in order to decide that the essential use of the product is as a foodstuff. As regards the purposes for which the product is used, the plaintiff further makes the distinction between (a) the intended use, (b) the possible use and (c) the actual use of Voltem. The Commission and the German Government are mainly anxious about the possible use. The plaintiff states, however, that their fears are without foundation, because the end product may be rendered inedible if even slightly larger quantities of Voltem are added.

Grounds of judgment

1 By an order dated 25 February 1970, received at the Court on 6 April 1970, the Bundesfinanzhof of the Federal Republic of Germany, pursuant to Article 177 of the Treaty establishing the EEC, referred to the Court several questions relating to

the interpretation of Regulation (EEC) No 950/68 of the Council of 28 June 1968 concerning the Common Customs Tariff (OJ L 172 1968).

The first question

2 By the first question the Court is asked to rule whether, where the Community authorities have not yet issued explanatory notes for headings to the Common Customs Tariff, the explanatory notes issued by national authorities can be recognized as having the force of a binding interpretation of these tariff headings.

3 The Council issued pursuant to Articles 28 and 111 of the EEC Treaty Regulation No 950/68 concerning the Common Customs Tariff, which contains the customs tariff as an annex. The interpretation of the headings of this tariff can only be fixed if the powers vested in the Community are respected. For it follows from the very nature of the Common Customs Tariff that the individual tariff headings must have the same scope in all the Member States. This requirement would be jeopardized if, where there are difficulties in classifying a product for tariff purposes, each Member State were itself able to fix this scope by way of interpretation.

4 Although, where there are difficulties in classifying a product, the national administration may find it advisable to take implementing measures and to elucidate thereby the doubts raised by the description of a product, it may only do so by observing Community law, without the national authorities' being to issue rules of interpretation having binding effect.

5 Accordingly, the first question put by the Bundesfinanzhof must be answered to the effect that even in the absence of an express Community interpretation, the effect of a binding interpretation cannot be attributed to the explanatory notes of the national authorities relating to the headings of the Common Customs Tariff.

The second question

6 In the event of a negative answer to the first question, the Bundesfinanzhof asks the Court to rule whether, where explanatory notes have not yet been isssued by the Community for headings to the Common Customs Tariff, the Explanatory Notes to the Brussels Nomenclature of 1955 on these headings are authoritative.

7 It is accepted that the Common Customs Tariff annexed to Regulation (EEC) No 950/68 is based on the Brussels Nomenclature, which was established by the Con-Convention on Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 to which the Member States were parties.

8 In order to ensure the uniform interpretation and application of the Nomenclature, Articles III and IV of the Convention provide that a Nomenclature Committee under the authority of the Customs Cooperation Council is to issue explanatory notes and classification opinions.

9 These explanatory notes and opinions are a means of interpretation for the original and present meaning and scope of the individual tariff headings. In the absence of relevant provisions issued by the Community, therefore, their authority as regards the interpretation of the Nomenclature cannot be ignored by the institutions called upon to apply the Community provisions incorporating the Brussels Nomenclature.

10 In particular where no Community explanatory notes have yet been issued in respect of the tariff headings to the Common Customs Tariff, the observance of these explanatory notes and opinions is a useful means of ensuring that the common external tariff is uniformly interpreted and applied at all the frontiers of the Common Market. Therefore, the consultation and observance of the explanatory notes and classification opinions promote an approximation of the practices of the authorities entrusted with the execution of the Common Customs Tariff.

11 Accordingly the aims and the structure of the Common Customs Tariff imply that in the absence of relevant Community provisions the abovementioned explanatory notes and classification opinions should be regarded as an authoritative source for the purposes of the interpretation of the tariff headings contained in Regulation (EEC) No 950/68. The second question put by the Bundesfinanzhof must therefore be answered in the affirmative.

The third question

12 The third question is put solely in the event of a negative answer to the second question and therefore need not be examined.

Costs

13 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities which submitted observations to the Court are not recoverable.

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

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, in particular Articles 18 to 29, 111 and 177;
Having regard to Regulation (EEC) No 950/68 of the Council of 28 June 1968;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Bundesfinanzhof of the Federal Republic of Germany, by its order of 25 February 1970, hereby rules:

1. **Regulation (EEC) No 950/68 of the Council of 28 June 1968 must be interpreted to the effect that the Member States are not permitted to issue binding provisions of national law affecting the scope of the regulation or of the tariff headings appearing therein;**

2. **In the absence of relevant provisions issued by the Community the explanatory notes and classification opinions provided for by the Convention on Nomen-**

clature for the Classification of Goods in Customs Tariffs are an authorative source for the purposes of the interpretation of the headings to the Common Customs Tariff.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 8 December 1970.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 17 NOVEMBER 1970[1]

Mr President,
Members of the Court,

The national proceedings from which the questions with which I have to deal today have arisen concern the correctness of a binding customs tariff notification issued to the plaintiff company by the Oberfinanzdirektion Munich on 24 October 1968. The classification relates to a product described as 'Voltem' baking emulsifier, consisting as to 51.35% of sucrose and in addition of approximately three parts fat in the form of triglycerides and two parts diacetyltartaric-acid-ester. This product is used in the manufacture of bakery products, in a quantity usually of about 2% to 3% in relation to flour. It is used as an emulsifier and stabilizer to ensure dough with a stable yeast, a greater volume of bakery product and a finer porosity and crumb in bread. The classification at issue related to tariff heading 38.19 of the Common Customs Tariff the products of which are described as 'chemical products and preparations of the chemical or allied industries (including those consisting of natural products), not elsewhere specified or included, residual products of the chemical or allied industries, not elsewhere specified or included'. With this tariff classification the products in question would have been subject solely to the import duty prescribed in the Common Customs Tariff which covers food preparations not elsewhere specified or included containing sugar, dairy products, cereals or cereal-based products. In this case, according to Article 10 of Regulation No 160/66 of the Council of 27 October 1966 (OJ 1966, p. 336) laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products, as amended by Regulations Nos 61/67 and 80/67 (OJ 1967, pp. 837 and 1593) a higher level than the normal rate of duty was payable on imports from third countries as 'food preparations, etc.' come within the scope of application of this regulation. As you know, such levies serve *inter alia* to cover 'the incidence of the difference between the prices' of the processed base products 'in the importing Member State and the prices prevailing for imports from third States'.
Faced with these alternatives the Oberfinanzdirektion Munich decided, in its

1 — Translated from the German.