JUDGMENT OF THE COURT (Fourth Chamber)
1 April 1993 *

In Case C-256/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling in the proceedings pending before that court between

Emsland-Stärke GmbH

and

Oberfinanzdirektion München,

on the interpretation of the Common Customs Tariff in the version contained in Commission Regulation (EEC) No 2587/91 of 26 June 1991 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1991 L 259, p. 1),

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris, President of the Chamber, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Emsland-Stärke GmbH, by B. Festge, Rechtsanwalt, Hamburg,

* Language of the case: German.

— the Commission of the European Communities, by B. Rodríguez Galindo, of its Legal Service, and by A. Ridout, a national civil servant seconded to the Commission Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of the parties at the hearing on 12 November 1992,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1992,

gives the following

Judgment

1 By order of 20 August 1991, received at the Court Registry on 10 October 1991, the Bundesfinanzhof referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of the Common Customs Tariff in the version contained in Commission Regulation (EEC) No 2587/91 of 26 June 1991 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1991 L 259, p. 1).

2 Those questions were raised in proceedings brought by Emsland-Stärke GmbH (hereinafter 'Emsland') against the Oberfinanzdirektion München (Regional Finance Office, Munich, hereinafter 'the OFD') concerning the tariff classification of an 'amylaceous' product referred to as 'starch ester F 2000'.

3 The amylaceous product in question is very finely granulated potato starch with a starch content, determined by the Ewers method, of 99% by weight, or, by the

saccharification method, of 81.1% by weight, and an acetyl content of 0.65% or 0.67% by weight. The powder is manufactured from potato starch ester obtained from potato starch by alkaline catalysis with vinyl acetate, which, after removal of the acetaldehyde and neutralization, is mixed with additional starch and finally dried.

4 According to the order for reference, the abovementioned product is intended for use in surface treatment and coating in the paper industry and as a stiffening and dressing agent in the textile industry. It is also, by its nature, fit for human consumption although, under German food legislation, it may not be marketed for that purpose.

5 On 13 December 1988, the OFD issued an official tariff classification notice according to which the amylaceous product in question was classified under subheading No 1901 90 of the Combined Nomenclature, 'other' food preparations of starch not elsewhere specified or included.

6 Emsland challenged that classification before the Bundesfinanzhof. It considers that the product in question should be classified under subheading No 3505 10 50 of the Combined Nomenclature as an esterified starch. Essentially, it argues that the classification of the product as an esterified starch depends not on the manufacturing process but on the ratio between the starch content and the acetyl content, that is to say an analytical criterion. It adds that, if the acetyl content of the product exceeds 0.5% by weight and the starch content is less than 95% by weight, the product must be classified under subheading No 3505 10 50. The OFD considers on the other hand that the wording of subheading No 3505 10 50 does not support the inference that starches must be classified under the same heading as starch ester merely because their acetyl content is higher, regardless of the manufacturing process.

7 In its analysis of the case, the Bundesfinanzhof expresses doubts as to the classifications advocated by the parties to the proceedings. Classification under heading No 1901 (food preparations of starch) is in its view unjustified since the product in question is not intended for human consumption. Classification under subheading

No 3505 10 50 (esterified starches) is likewise unjustified: the fact that mixtures of native potato starch and acetylated potato starch, with a starch content of 95% by weight and an acetyl content of less than 0.5% by weight, must, by reason of their low acetyl content, be classified as starch under heading No 1108 and not, as esterified starch, under subheading No 3505 10 50 does not mean that corresponding mixtures should be classified under the latter subheading merely because their acetyl content is slightly higher. According to the Bundesfinanzhof, another possible classification might be under heading No 3809 (stiffening, dressing and binding agents with an amylaceous basis used in the textile, paper, leather and like industries) or, if it is considered that native potato starch is the material which gives the product its essential character, under subheading No 1108 13 00 (potato starch).

8 In those circumstances, the Bundesfinanzhof decided to stay the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'(1) Is the Common Customs Tariff — Combined Nomenclature — to be interpreted as meaning that an amylaceous product, intended for use in the paper and textile industries and, as it is constituted, also suitable for human consumption although not authorized as such under food legislation (starch content (determined by the Ewers method): 99% by weight, or (saccharification method) 81.1% by weight, with an acetyl content of 0.65% or 0.67% by weight), made up of native potato starch, to which an acetaldehyde-free and neutralized potato starch ester is added, is to be classified under subheading No 1901 90 90 as other food preparations of starch not elsewhere specified or included?

(2) If the first question is answered in the negative, is the Customs Tariff to be interpreted as meaning that a product such as that described in the first question is to be regarded as "esterified" and accordingly classified as an esterified starch under subheading No 3505 10 50?

(3) If the second question is answered in the negative, is the Customs Tariff to be interpreted as meaning that a product such as that described in the first

question whose intended use is not identifiable from its composition and presentation is to be classified as a preparation of a kind used in the textile and paper industry with a basis of amylaceous substances not elsewhere specified or included under the appropriate subheading of heading No 3809?

(4) If the third question is answered in the negative, under which other heading should a product such as that described in the first question be classified?'

9 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant legislation, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 By its four questions, which may be conveniently considered together, the national court essentially wishes to determine the appropriate classification under the Common Customs Tariff — Combined Nomenclature — for an amylaceous product (with a starch content, determined by the Ewers method, of 99% by weight, or, by the saccharification method, of 81.1% by weight, and an acetyl content of 0.65% or 0.67% by weight) made up of native potato starch mixed with neutralized potato starch ester from which the acetaldehyde has been removed, intended for use in the textile industry, which is also, by its nature, fit for human consumption although its marketing for that purpose is not authorized by the legislation on foodstuffs.

11 The Court has consistently held (see, in particular, the judgments in Case 62/77 *Carlsen Verlag* v *Oberfinanzdirektion Köln* [1977] ECR 2343, paragraph 3, and Joined Cases C-153 to C-157/88 *Ministère Publique* v *Fauque and Others* [1990] ECR I-649, paragraph 10) that the decisive criterion for the classification of goods for customs purposes is generally to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters.

12 Potato starch is mentioned in Chapter 11 of the Combined Nomenclature and more particularly in subheading No 1108 13 00.

13 According to note 1(b) to Chapter 11, that chapter does not cover prepared flours, meals or starches of heading No 1901. According to the explanatory notes to heading 1108, that heading likewise does not cover dextrins and other modified starches of heading No 3505 or starches constituting prepared dressings or glazings of the kind covered by heading No 3809.

14 In order to determine whether the amylaceous product at issue falls within subheading No 1108 13 10, it is therefore necessary first to ascertain whether or not it is one of the amylaceous products in one of the categories which the explanatory notes exclude from Chapter 11 of the Combined Nomenclature.

15 As regards, first, heading No 1901 of the Combined Nomenclature, it must be noted at the outset that food preparations of starch not elsewhere specified or included are classified under that heading. According to the explanatory notes for that heading, those food preparations are often used for the rapid preparation of beverages, gruels, infant foods and dietetic foods and may also constitute intermediary preparations for the food industry.

16 That heading thus covers products intended solely for use as foodstuffs or as intermediary products for the food industry. However, although, as is apparent from the order for reference, the amylaceous product in question is fit for human consumption, it is intended for use in the paper and textile industry; and as the Court made clear in its judgment in Case 36/71 *Henck* v *Hauptzollamt Emden* [1972] ECR 187, the use of a product may be an objective factor for its classification under the Common Customs Tariff.

17 It follows that the product at issue cannot be classified under heading No 1901 of the Common Customs Tariff.

18 As regards, secondly, heading No 3505 of the Common Customs Tariff, it is necessary to ascertain whether the product in question must be regarded as esterified starch and therefore be classified under subheading No 3505 10 50.

19 Modified starches, in particular esterified starches (subheading No 3505 10 50), are among the products classified under heading No 3505. According to the explanatory notes to the harmonized system for that heading, modified starches are obtained by the transformation of starches through the action of heat, chemicals (for example acids, alkalis) or diastase and starch modified, for example, by oxidation, esterification or etherification. The notes also state that heading No 3505 does not include starches that are not prepared (heading No 1108) or prepared glazings and dressings based on starches or dextrins of a kind used in the paper, textile, leather or like industries (heading No 3809).

20 According to the order for reference, the amylaceous product at issue is a mixture of about 90% native potato starch and about 10% esterified starch.

21 Pursuant to general rule 3(b) for the interpretation of the Combined Nomenclature, mixtures and composite goods consisting of different materials or made up of different components are classified according to the material or component which gives them their essential character in so far as that criterion is applicable.

22 By virtue of the respective proportions of native starch and potato starch ester, it is clear that native starch is the material which gives the mixture its essential

character. There is nothing in the documents before the Court to support the view that potato starch ester determines the properties of the mixture to such an extent that it can be regarded as the material which gives it its essential character. On the other hand, according to an expert's report cited in the order for reference, prepared by the Federal Research Institute for Cereal and Potato Processing, the nature of the native starch is not modified by dry mixing with potato starch ester.

23 Accordingly, the amylaceous product at issue cannot be classified as esterified starch under subheading No 3505 10 50.

24 As regards, thirdly, subheading No 3809 of the Common Customs Tariff, it must be observed that Chapter 38 covers various products of the chemical industries, including those with a basis of amylaceous substances, of the kinds used in the textile, paper, leather or like industries, not elsewhere specified or included.

25 According to the explanatory notes to heading No 3809, those products are of an industrial nature which, although containing or based on substances fit for human consumption, are not, as such, fit for human consumption or intended to be used for that purpose. That heading covers a wide range of products and preparations of a kind generally used during processing or finishing of yarns, fabrics, paper, paperboard, leather or similar materials. According to the explanatory notes, they may be identified as falling within that heading because of their composition and presentation, which give them the specific use in the industries cited in the heading and like industries, such as the textile floor carpeting industry, the vulcanized fibre manufacturing industry and the fur industry.

26 It is therefore clear from the abovementioned explanatory notes that products are identifiable as falling within heading No 3809 because of their composition and presentation, which give them a specific use in the industries cited in the heading. However, the amylaceous product at issue cannot be thus characterized by reference to its characteristics and presentation since, as indicated in the order for reference, its characteristics and presentation are neutral.

27 The product at issue cannot therefore be classified under heading No 3809.

28 It follows from all the foregoing considerations that the amylaceous product at issue cannot be classified under heading Nos 1901, 3505 or 3809 mentioned in the explanatory notes to the harmonized system in respect of heading No 1108. Therefore, that product, being a mixture of 90% potato starch and 10% esterified starch must in principle, pursuant to general rule 3(b), fall under heading No 1108 and, more precisely, subheading No 1108 13 00, potato starch.

29 However, it remains to be ascertained whether Commission Regulation (EEC) No 28/90 of 4 January 1990 concerning the classification of certain goods in the codes 1108 11 00, 1108 12 00, 1108 13 00 and 1108 14 00 of the Combined Nomenclature and repealing Regulation (EEC) No 1463/87 precludes the above classification.

30 According to Article 1 and paragraph 3 of the annex to that regulation, products in the form of fine white powder consisting of a mixture of native potato starch and small quantities of acetylated potato starch or very weakly acetylated potato starch, and having a starch content of 95% or more by weight and an acetyl content of less than 0.5% by weight, must be classified under subheading No 1108 13 00. According to the reasons set out in the annex, those products, because of their characteristics, in particular their low acetyl content, are to be regarded as starches under CN code 1108 13 00 and not as starches modified by esterification under CN code 3505 10 50.

31 It must next be observed that, according to the order for reference, the amylaceous product in question has an acetyl content of 0.65 or 0.67% by weight, a higher content than the 0.5% mentioned in Regulation No 28/90.

32 It must therefore be considered whether the fact that the acetyl content of the product at issue slightly exceeds 0.5% means that it cannot be classified under heading No 1108.

33 There is nothing in the wording of Regulation No 28/90 to indicate that it seeks to draw a distinction, based on acetyl content, between native starch to be classified under subheading No 1108 13 00 and esterified starch falling under heading No 3505 10 50. That regulation merely indicates that an amylaceous product having the characteristics described in its annex must in all cases be classified under subheading No 1108 13 00. Moreover, the regulation gives no guidance as to the proper classification of an amylaceous product with an acetyl content slightly in excess of 0.5%.

34 The acetyl content of starch is an indicator of the extent to which substitution has taken place: the higher the acetyl content, the more extensive the modification of the starch. Starch with a very low acetyl content may therefore be close to native starch.

35 In those circumstances, a slightly higher acetyl content (in this case 0.65 or 0.67% by weight) than that indicated in Regulation No 28/90 is not sufficient to exclude classification of the product in question under subheading No 1108 13 00, *a fortiori* where, as in the present case, the product is a mixture composed of 90% potato starch and 10% esterified starch.

36 Consequently, the amylaceous product in question must be classified, as potato starch, under subheading No 1108 13 00 of the Common Customs Tariff.

37 The answer to the national court's questions must therefore be that the Common Customs Tariff — Combined Nomenclature — must be interpreted as meaning that an amylaceous product (starch content determined by the Ewers method: 99% by weight, or by the saccharification method: 81.1% by weight, with an acetyl content of 0.65% or 0.67% by weight) made up of native potato starch, mixed with an acetaldehyde-free and neutralized potato starch ester, which is intended to be used in the paper and textile industries and which, by its nature, is also fit for human consumption, but is not authorized for that purpose under the legislation on food products, must be classified under subheading 1108 13 00.

Costs

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

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 20 August 1991, hereby rules:

The Common Customs Tariff — Combined Nomenclature — must be interpreted as meaning that an amylaceous product (starch content determined by the Ewers method: 99% by weight, or by the saccharification method: 81.1% by weight, with an acetyl content of 0.65% or 0.67% by weight) made up of native potato starch, mixed with an acetaldehyde-free and neutralized potato starch ester, which is intended to be used in the paper and textile industries and which, by its nature, is also fit for human consumption, but is not authorized for that purpose under the legislation on food products, must be classified under subheading 1108 13 00.

Kakouris Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 1 April 1993.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Fourth Chamber