REPORT FOR THE HEARING
in Case C-256/91 *

I — Legal background

1. Subheadings 1108 13 00, 1901 90, 3505 10 50, 3809 10 50 and 3809 10 90 of the Common Customs Tariff and the explanatory notes of the Customs Cooperation Council on the Harmonized System (hereinafter 'the explanatory notes') relevant to the present case read as follows:

2. '1108 Starches; inulin:

— Starches

1108 13 00 — Potato starch'

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.

According to Article 1 of Commission Regulation No 28/90 of 4 January 1990 (OJ 1990 L 3, p. 9) and paragraph 3 of the annex thereto, the following are to be classified under subheading No 1108 13 00 — and not (as esterified starches) under heading No 3505 10 50:

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 the following characteristics:

— starch content (determined by the Ewers method) 95% or more by weight on the dry product,

— acetyl content (determined by the enzymatic method): less than 0.5% by weight on the dry product,

3. 1901 ... food preparations of ... starch ... not containing cocoa powder or containing cocoa powder in a proportion by weight of less than 10%, not elsewhere specified or included ...

* Language of the case: German.

1901 10 00 — Preparations for infant use

1901 20 00 — Mixtures and doughs for the preparation of bakers' wares under heading No 1905

1901 90 — Others

— — Malt extract

1901 90 90 — — Others

According to the explanatory notes to Chapter 19, that chapter covers a number of preparations generally used for food. The explanatory notes to heading No 1901 state that those (starch) preparations are often used for the rapid preparation of beverages, gruels, infant foods, dietetic foods, and so forth by simply mixing with, or boiling in, milk or water or for making cakes, puddings, custards or similar culinary preparations. They may also constitute intermediary preparations for the food industry.

4. 3505 Dextrins and other modified starches (for example, pregelatinized or esterified starches; glues based on starches, or on dextrins or other modified starches:

3505 10 50 — — — Starches, esterified or etherified.

According to the explanatory notes to heading No 3505, dextrins and other modified starches are products 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).

5. 3809 Finishing agents, dye carriers to accelerate the dying or fixing of dyestuffs and other products and preparations (for example, dressings and mordants), of a kind used in the textile, paper, leather or like industries, not elsewhere specified or included:

3809 10 — with a base of amylaceous substances:

3809 10 50 — — containing by weight of such substances 70% or more but less than 83%

3809 10 90 — — containing by weight of such substances 83% or more.

According to note 1(b) to Chapter 38, that chapter does not include mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs. According to the explanatory notes to heading No 3809, the latter 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.

II — Facts and procedure

6. The *Oberfinanzdirektion* (Regional Finance Office, hereinafter 'the OFD') issued to the applicant, Emsland-Stärke GmbH (hereinafter 'Emsland') on 13 December 1988 an official tariff classification notice for a product called 'starch ester F 2000'. It is a powder mixture comprising about 90% native potato starch and about 10% esterified starch. Its starch content, determined by the Ewers method, is 99% or, determined by saccharification, 81.1% by weight; its acetyl content is 0.65% or 0.67% by weight.

The product in question is made from potato starch ester obtained from potato starch by alkaline catalysis with vinyl acetate, to which, after acetaldehyde has been removed and the substance neutralized, more native potato starch is added, the substance being finally dried.

7. The OFD classified the product, which was intended for use in surface treatment and coating in the paper industry and as a stiffening and dressing agent in the textile industry but was, by its very nature, also suitable for human consumption, under subheading No 1901 90 90 of the Combined Nomenclature as a food preparation of starch not elsewhere specified or included. The plaintiff's complaint to the effect that the product should be classified under heading No 3505 10 50 (esterified starch) was rejected by the OFD on the ground that when the two constituents were mixed together there was no chemical reaction. The addition of a small quantity of esterified starch to native starch could not, in the defendant's view, result in the product being classified according to the characteristics of what was added.

8. In the action which it brought against that decision, Emsland maintains that the 'starch ester F 2000' should be classified under subheading No 3505 10 50. It argues, essentially, that the classification of the product as an esterified starch under subheading No 3505 10 50 is not dependent on the manufacturing process (wet or dry mixing of native starch and strongly esterified starch) but rather on the ratio of starch to acetyl content, as an analytical criterion. In its view, it is impossible to separate the esterified and native starch in the product produced by homogenous mixing. The product should not be used as a food preparation and, under the food legislation, it is not regarded as fit for human consumption.

9. For its part, the OFD contends that esterification by the mixing of native starch with

starch ester (wet or dry) is unknown in specialized literature. Esterification is brought about by the chemical reaction of starch with, for instance, vinyl acetate; a new and different chemical compound is thereby produced by a structural molecular change. Unconverted starches, like mixtures of the kind in this case, are not covered by heading No 3505. It cannot be inferred from the wording of that heading that starches should be classified as starch ester merely on the basis of a higher acetyl content, regardless of their manufacture by esterification.

10. In the grounds of its order for reference, the Bundesfinanzhof doubts whether the amylaceous product in question can be classified under tariff heading No 1901, which covers food preparations of starch, since it is not intended for human consumption.

The Bundesfinanzhof also considers it doubtful whether the product can be regarded as an 'esterified starch' under subheading No 3505 10 50. In its view, the classificatory regulation (No 28/90) does not support the plaintiff's view. The fact that in paragraph 3 in the annex to that regulation mixtures of native potato starch, with a starch content of 95% or more by weight, and acetylated potato starch with a starch content of less than 0.5% by weight, must be classified, by virtue of their analytical characteristics, notably their low acetyl content, as starches under heading No 1108 and not as starches modified by esterification does not mean that it can be inferred that equivalent mixtures should be classified solely by virtue of a somewhat higher acetyl content under subheading No 3505 10 50. According to the national court, what is more important for tariff classification is the actual wording of the (sub)heading itself. It wonders, in that connection, whether the term 'esterified starch' is based on the process of esterification of the product. If that is the case, the national court considers that the method of manufacturing is a tariff characteristic. In its view, because esterification presents a chemical equilibrium reaction, the product concerned, for the manufacture of which potato starch ester has had the acetaldehyde removed and been neutralized, does not satisfy that requirement.

According to the Bundesfinanzhof, it might be appropriate to classify the product as a preparation with a basis of amylaceous substances under the subheadings covering *inter alia* stiffening, dressing and binding agents for the textile or paper industries. However there is also uncertainty in that respect, since if classification under those subheadings presupposes that, by virtue of its composition and presentation, it has a specific use in the industry concerned, it would have to be excluded from heading No 3809 by reason of its (neutral) characteristics and presentation.

Finally, the Bundesfinanzhof considers that the product concerned might be classifiable as potato starch under heading No 1108 13 00. According to an expert opinion given by the Bundesforschungsanstalt für Getreide-und Kartoffelverarbeitung (Federal Research Institute for Cereal and Potato Processing), the nature of the significantly preponderant native starch by dry mixing is not modified even though the compound mixture is no longer regarded as native starch.

11. Having regard to the foregoing considerations, 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?'

12. The order for reference, dated 20 August 1991, was received at the Court Registry on 10 October 1991.

13. Pursuant to Article 20 of the protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiff in the main proceedings, represented by B. Festge, and by the Commission of the European Communities, represented by B. Rodriguez Galindo, of its Legal Service, and by A. Ridout, a United Kingdom civil servant seconded to the Commission Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe.

III — Written observations submitted to the Court

The first question (on the interpretation of subheading No 1901 90 90)

14. *Emsland*, the plaintiff in the main proceedings, maintains that the mere fact that the product at issue is in principle fit for human consumption — even though it is not allowed to be used for that purpose by the

German legislation — is not sufficient for it to be classifiable under heading No 1901 since that heading is intended solely for products suitable for human consumption or food preparations not elsewhere specified or included.

It adds that even though the product at issue is, in principle, fit for human consumption, it nevertheless does not fall within Combined Nomenclature code 19.01 but rather under code 35.05, since the latter is the more specific heading. In support of that assertion, it cites paragraph 3(a) of the general provisions for the interpretation of the Combined Nomenclature, which indicates that headings with the most specific description of products are to take precedence over those with a more general description. According to Emsland, the description 'food preparation' is more general that 'modified starch', a more specific description of the product.

In the applicant's view, even if it were to be considered that the esterification method used in the present case does not constitute esterification in the strict sense of the term, it nevertheless implies that starch processed in that way is a modified starch. Consequently, its classification as a modified starch, being a classification in which the product is described more precisely, takes precedence over its classification as a food preparation.

In conclusion, Emsland submits that an amylaceous product with a starch content of 99% by weight and an acetyl content of 0.65 to 0.67% by weight, made up of native potato starch, to which an acetaldehyde-free and neutralized potato starch ester is added, intended to be used in the paper and textile industries, but also by its nature fit for human consumption, does not fall to be classified under subheading No 1901 90 90.

15. The *Commission* states in the first place that, according to the explanatory notes, food products and intermediate preparations intended for the manufacture of food products are to be classified under heading No 1901. The Commission also observes that, according to the Bundesfinanzhof's findings, the product in question is not in fact fit for human consumption. On the contrary, it is intended for use in the paper and textile industries. The Commission considers, having regard to the case-law of the Court, that the use of a product may be an objective factor for its classification under the Common Customs Tariff (judgment in Case 36/71 *Henck* v *Hauptzollamt Emden* [1972] ECR 187, paragraph 4).

The Commission also considers that a preparation is intended as a foodstuff if, by virtue of its objective characteristics, it is appropriate only for use as a foodstuff. In its view, that is not the case here since although, from the factual standpoint, 'starch ester F 2000' is also fit for human consumption, it nevertheless is not only suitable for use in the textile and paper industries but is also intended for that purpose.

In conclusion, the Commission considers that the product in question must not be classified under subheading No 1901 90.

The second question (on the interpretation of subheading No 3505 10 50)

16. *Emsland* observes, first, that heading No 3505 covers, *inter alia*, esterified starches and is mentioned under subheading No 3505 10 50, etherified and esterified starches. On the other hand, the way in which esterified starches have to be manufactured is not specified either in the wording of heading No 3505 or in that of subheading No 3505 10 50 or in classificatory Regulation No 28/90.

However, according to Emsland, the abovementioned regulation gives an indication that the manufacturing method at issue is a 'regular' esterification method. It observes in that connection that, in the annex to that regulation, a distinction is drawn between NC code 1108 13 00 and NC code 3505 10 50 only on the basis of the analytical characteristics of the products and not by reference to the manufacturing process. The plaintiff states that the products themselves are described in the same annex as being in the form of fine white powder and consisting either of a mixture of native potato starch and small quantities of acetylated potato starch or very weakly acetylated potato starch, having the characteristics described in the relevant paragraph.

In the plaintiff's view, that shows unambiguously that a mixture of native potato starch and small quantities of acetylated potato starch may constitute esterified potato starch under NC code 3505 10 50 where it displays the appropriate analytical characteristics, failing which such mixtures must be regarded as native starches. It adds that the wording of the classificatory regulation alone is such as to enable the product concerned to be classified amongst the starches under subheading No 3505 10 50 since its starch content is less than 95% by weight and its acetyl content is greater than 0.5% by weight.

The plaintiff goes on to claim that heading No 3505 does not refer to the manufacturing process as a classification criterion. The manufacturing process used by the plaintiff does not endow the products with analytical values (starch and acetyl content) different from those of the product obtained by the traditional process for the manufacture of esterified starches. The manufacturing process used by the plaintiff is therefore irrelevant to the classification of goods under the customs tariff.

The plaintiff refers in that connection to the case-law of the Court according to which, for reasons of legal certainty and ease of monitoring, the classification of a product under the Common Customs Tariff depends solely on its characteristics and objective properties as defined in the customs tariff (judgments in Case 62/77 *Carlsen Verlag* v *Oberfinanzdirektion Köln* [1977] ECR 2343, Case 145/81 *Wünsche & Co* [1982] ECR 2493 and Case 40/88 *Weber* [1989] ECR 1395).

The plaintiff maintains that, according to objective criteria, the esterified starches which it manufactures are in no way different from starches manufactured by the

traditional method and therefore should be classified as esterified starches under heading No 3505 10 50.

It also considers that the product which it manufactures is not a mixture within the meaning of paragraph 3(b) of the general rules since, as is apparent from an expert's report annexed to its observations, the product cannot be separated into its constituents; on the contrary, the process gives rise to an entirely new product: esterified starch. But even if it were a mixture, paragraph 3(b) of the general rules is in its view applicable and that rule provides that mixtures must be classified on the basis of the material or component which gives them their essential character. In Emsland's view, the essential character in this case derives from the added esterified starch which causes the gelatine formed from the potato starch to become technically more stable. General rule 3(b) thus also has the effect of bringing the product in question under heading No 3505.

In conclusion, the plaintiff considers that a product obtained from a homogeneous mixture of native potato starch and highly acetylated potato starch must be considered to be an esterified starch and, as such, be classified in NC code 3505 10 50.

17. The *Commission*, having noted that, according to the order for reference, the amylaceous product in question is a mixture of about 90% native potato starch and about 10% esterified starch, states that, according to general rule 3(b), mixed products are classified according to the material or component which gives them their essential character in so far as that criterion is applicable.

According to the Commission, if account is taken of the respective proportions of native potato starch and ester, there is no doubt that the native starch is the constituent which defines the character of the mixture. Moreover, the Commission states that there is nothing in the order for reference to indicate that potato starch ester determines the properties of the mixture to such an extent that it can be regarded as the component which gives the mixture its essential characteristics. It also states that, according to an expert's report from the Federal Research Institute for Cereal and Potato Processing, the character of the native starch is not changed by dry mixing with the potato starch ester. The Commission considers that those reasons are in themselves sufficient to rule out classification of the product at issue as starch under subheading No 3505 10 50.

The third question (on the interpretation of heading No 3809)

18. *Emsland* claims that subheading No 3809 10 is excluded by its very wording since it covers only preparations with a basis of amylaceous substances or those derived from starch which are used in the textile, paper, leather or like industries, whereas esterified starches of the kind at issue can also be used in order to produce foodstuffs. According to the plaintiff, the use of esterified starches is therefore much wider than that mentioned in the wording of heading No 3809, which must be interpreted as meaning that the preparations mentioned in it can be used only in the industries indicated.

19. The *Commission* states, first, 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.

It then states that, for the interpretation of heading No 3809, the explanatory notes are of decisive importance: according to them, products 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 that heading. According to the Commission, the applications of starch, modified starch and amylaceous products are so varied that it is necessarily the specificity of their composition and/or presentation which makes it possible to determine whether the products in question are intended for the industries cited in heading No 3809.

The Commission concludes by indicating that the amylaceous product at issue cannot be classified under heading No 3809 because its characteristics and presentation are, as is apparent from the order for reference, neutral.

The fourth question (on the interpretation of subheading No 1108 13 00)

20. *Emsland* considers that of all the headings mentioned by the Bundesfinanzhof, the classification of the product at issue as native starch under heading No 1108 is the least conceivable. In its view, the product is not a native starch, just as the starch which has been esterified by homogeneous mixing with highly esterified starch obtained in the first place does not determine the characteristics of the product.

The plaintiff refers in that connection to an expert's report prepared on 15 December 1987 by the Federal Research Institute for Cereal and Potato Processing dealing with a starch whose degree of esterification was much lower and in which the expert stated that a starch of that kind could not be classified as native starch.

Consequently, the plaintiff considers that the product in question likewise cannot be regarded as classifiable under Chapter 11.

21. The *Commission* observes that potato starch comes within heading No 1108 13 00. It also points out that the product at issue is a mixture including 90% native potato starch, which is the main constituent, giving it its essential character. It considers that pursuant to rule 3(b) the amylaceous product in question can be classified under subheading No 1108 13 00.

However, the Commission queries whether classification Regulation No 28/90 precludes that classification. It states, first, that according to Article 1 and paragraph 3 of the annex to that regulation, products in the form of a fine white powder made up of a mixture of native potato starch and small quantities of

acetylated potato or other starch accounting for 95% or more by weight and with an acetyl content of less than 0.5% by weight are classified under subheading No 1108 13 00. It is clear from the annex, column 3, that those products, by reason of their characteristics (in particular their low acetyl content) are to be regarded as starches under NC code 1108 13 00 and not esterified starches under NC code 3505 10 50.

It then notes that, according to the order for reference, the amylaceous product at issue has an acetyl content of 0.65 or 0.67% by weight. That slightly higher acetyl content than that mentioned in paragraph 3 of the annex to Regulation No 28/90 does not, however, lead the Commission to regard the product as esterified starch and to classify it under subheading No 3505 10 50.

The Commission explains in that regard that the acetyl content of starch is an indicator of the extent to which substitution has taken place, that is to say the extent to which the starch has been modified. The higher that content, the more extensive the modification of the starch, whereby the hydrogen in the hydroxyl groups has been replaced by acetyl groups. The very weakly esterified starch (whose acetyl content is very low) may therefore be very close to native starch.

According to the Commission, the classification of native potato starch in accordance with Regulation No 28/90 was not intended to establish 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. The purpose of the regulation was certainly not automatically to classify under heading No 3505 amylaceous products with an acetyl content in excess of 0.5% by weight. It was, in the Commission's view, merely intended to ensure that an amylaceous product displaying the characteristics mentioned in the annex to the regulation would in any event be classified under heading No 1108 and, in the case of potato starch, under subheading No 1108 13 00. On the other hand, the rules contain nothing to indicate under what heading amylaceous products should be classified in other cases.

In conclusion, the Commission considers that the possibility of also classifying under subheading No 1108 13 00 amylaceous products whose acetyl content is slightly higher (in the present case 0.65 or 0.67% by weight) than the content indicated in Regulation No 28/90 cannot be ruled out, particularly where, as in this case, the amylaceous product is a mixture made up of 90% native starch and 10% esterified starch.

M. Diez de Velasco
Judge-Rapporteur