Heading 16.02 of the Common Customs Tariff must be interpreted as meaning that it also includes poultrymeat to which salt and pepper have been added even if the pepper can be detected only microscopically.

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 17 May 1983.

P. Heim
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 3 FEBRUARY 1983 [1]

Mr President,
Members of the Court,

1. The preliminary questions referred to the Court in this case concern the meaning of the expression "Other prepared ... meat" contained in heading 16.02 of the Common Customs Tariff. The Finanzgericht [Finance Court] Düsseldorf requests the Court to determine the scope of those words in order to enable it to resolve a dispute between a customs office of the Federal Republic of Germany and the company Hans Dinter GmbH (hereinafter referred to as "Dinter") whose registered office is in Hamburg.

Dinter imports from France frozen escalopes and rolled turkey roast. During the manufacturing process that meat runs along a conveyor belt and is sprinkled with salt and pepper in such a way as to enable it to be sold ready for cooking. According to Dinter meat processed in that way must be considered "seasoned" and thus come within the concept of "Other prepared ... meat" and, at the moment of release into free circulation, must be classified under heading 16.02 of the Common Customs Tariff. The principal customs office at Cologne-Deutz at first accepted that classification, consequently levying import turnover tax. It however had several samples of the imported goods taken, a part of which was examined by the "Zolltechnische Prüfungs- und Lehranstalt" [Customs Laboratory and Training College], Cologne. The conclusion reached was that "the

1 — Translated from the Italian.

seasoning was perceptible neither organoleptically nor optically". Deciding however on an initial complaint by Dinter, the customs office altered the classification. Although it was not possible to perceive the seasoning organoleptically or optically and the meat did not emit a spicy odour, it acknowledged that particles of seasoning were identifiable, albeit very sparse.

Subsequently, a further examination of the remaining samples, carried out by a technical expert at Dinter's request, showed that the turkey escalopes and rolled turkey roast might be described as "lightly-seasoned". In fact particles of seasoning were identifiable microscopically "clearly in the case of the escalopes" and "slightly to clearly (according to the different pieces of meat) in the case of the roast". But those results did not alter the position. The customs office considered that the products could not be regarded as "Other prepared ... meat" within the meaning of tariff heading 16.02 of the Common Customs Tariff, stating that the mere addition of salt and pepper did not constitute seasoning if it was not perceptible to taste. The turkey-meat was therefore classified under heading 02.02 which relates to "Dead poultry (that is to say, fowls, ducks, geese, turkeys and guineafowls) and edible offals thereof (except liver) fresh, chilled or frozen". Contrary to the position as regards heading 16.02 that classification involves the levying of monetary compensatory amounts which the customs office requested in the amount of DM 7 141.10.

At that stage Dinter unsuccessfully lodged a second complaint. An action to have the re-classification set aside was then brought before the Finanzgericht [Finance Court] Düsseldorf, the IVth Senate of which, by order of 14 June 1982, registered on 1 July 1982, stayed the proceedings and requested the Court of Justice pursuant to Article 177 of the EEC Treaty, to rule on two questions.

2. In the first question the Finanzgericht Düsseldorf asks the Court whether heading 16.02 of the Common Customs Tariff is to be interpreted in such a way that it also includes meat to which, according "to the method of preparation notified, salt and pepper have been added but in which the presence of pepper may only be identified microscopically or may meat be regarded as being 'Other prepared ... meat' only if the seasoning added may be perceived by the sense of taste".

In fact that question is twofold, namely first what is to be understood by "Other prepared" meat under heading 16.02 and secondly what is the criterion of proof of seasoning. I would add that the circumstances which gave rise to the problem referred to the Court suggest that heading 02.02 should also be taken into consideration. It is true that the national court refers directly only to heading 16.02; however, to resolve a dispute involving two headings which are closely related and both of which in general may be used for the classification of a certain product it may be necessary to identify the content of one in relation to that of the other.

3. I therefore begin by analysing the content of the tariff headings one after the other. Heading 16.02, as I have already said, comprises "Other prepared or preserved meat or meat offal". On the other hand, according to the Explanatory Note to Chapter 16 of the Common Customs Tariff, meats which have been prepared or preserved in so far as is relevant to these purposes by means of the methods provided for in Chapter 2

are excluded from that chapter. Therefore, in order to interpret tariff heading 16.02 it is appropriate negatively to delimit its field of application by reference precisely to the methods of preparation or preservation mentioned in that chapter. If the observations submitted to the Court are disregarded the procedures mentioned in Chapter 3 (cooking and boiling) may be ignored. Those concern in fact preparations not of meat but of fish, crustaceans and molluscs.

Chapter 2 (headings 02.02, 02.03, 02.05, 02.06) comprises edible poultrymeat presented fresh (that is to say in its natural state), chilled, frozen, salted, in brine, dried or smoked. The procedures laid down therein are confined therefore to describing the state of a product (fresh, chilled, frozen, dried) or refer to methods either of preserving the products (salted, in brine) or of preparation properly so-called (smoking). On the basis of the Explanatory Note to Chapter 16, therefore, there can be no doubt that, when it is a case of meat prepared by means other than smoking, the product must be regarded as "Other prepared ... meat" and consequently classified under heading 16.02. In this case a mixture of salt and pepper is added to the turkey-meat, which certainly does not constitute a preparation other than that mentioned by Chapter 2 of the Common Customs Tariff. As I have already said, the addition of salt is provided for by that chapter so as the better to *preserve* the product. In our case, on the other hand, the salt is added by way of *seasoning* and apart from that there can be no doubt that the addition of pepper constitutes *quid novi et pluris* in relation to the procedures set out in Chapter 2.

That interpretation, advocated by the plaintiff in the main proceedings, clearly emerges from an examination of the wording, which in my opinion is absolutely correct, of the tariff headings under considerations. The Commission however advocates a different interpretation. It maintains that for a product to be classified under heading 16.02 the product must undergo a more elaborate treatment and one which is such as to alter its objective characteristics. It seems to me that its argument is based on a reading of Chapter 16 together with the finding that that chapter is at the most concerned with the products which have undergone "a change in condition" (for example sausages, extracts or sauces) but the reading and the finding are superficial. The products listed in Chapter 16 certainly comprise the converted products which the Commission has in mind. They however also include "Other prepared" meat. And the latter, as has been observed, includes "seasoned" meat (for example by the addition of salt and pepper).

4. The interpretation which I propose derives initial express support from the Explanatory Notes to heading 16.02 of the Convention on Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950, better known as " the Brussels Nomenclature". The Member States are all parties to that Convention and the Common Customs Tariff is based on it. The notes to which I have referred, drawn up by the Customs Cooperation Council, are intended to define the scope of the various headings. It is therefore appro-

priate to have regard to them whenever the classification is uncertain. The Court, moreover, affirmed in its judgment of 8 December 1970 in Case 14/70 *Deutsche Bakels* v *Oberfinanzdirektion München* [1970] ECR 1001 that, in the absence of relevant provisions adopted by the Community, the Explanatory Notes are a relevant factor in interpreting the Common Customs Tariff.

So the explanatory note to heading 16.02 must be read. If what I have said so far is correct the latter includes "meat and meat offals prepared or preserved by other processes not provided for in Chapter 2, including those merely covered with batter or breadcrumbs, truffled or seasoned *(e.g. with pepper and salt)*" (Note to Chapter 16, EN/AS 35 — February 1982, p. 110 (b), italics added). That "seasoned" meat must be classified under heading 16.02 and not heading 02.02 therefore seems clear.

To a certain extent the Commission itself acknowledges this, but does not draw from it the obvious consequences. On the contrary, following the opinion of the German customs authorities it seeks to persuade the Court that, in common parlance, "seasoning" means the addition to foods of spices intended to bring out their flavour. That is said to be the decisive factor in the sense that if the seasoning — whether microscopically identifiable or not — is not perceptible to the sense of taste, the product may not be regarded as "other prepared" within the meaning of heading 16.02.

I shall reserve my position on the criterion of taste until I deal with the methods of proof of seasoning. But even at this stage it is impossible to avoid pointing out the contradiction in the arguments put forward by the Commission at least when they are examined as a whole. I would point out that the Commission had stated that meat is "Other prepared" only when the objective characteristics of the product are altered. However, I do not understand why the same criterion should not be applied to the product in question here. Whether bland or savoury, piquant or not, the escalopes and turkey roll remain escalopes and turkey roll; salting them or spicing them more copiously does not transform them into sausages or meat extract or sauces. In other words, for the purposes of customs classification, the degree of seasoning is irrelevant. On the other hand neither the Common Customs Tariff nor the Brussels Nomenclature nor the Explanatory Notes contain specific criteria enabling that degree to be precisely determined or defining the point at which the product must be regarded as seasoned.

5. A final factor which seems to me to confirm that the argument here put forward is well founded may be inferred from Commission Regulation (EEC) No 3092/76 of 17 December 1976 on the application of monetary compensatory amounts to certain beef and veal products (Official Journal L 348, p. 18). As is the case with turkey, beef, whether fresh, chilled or frozen, is classified under Chapter 2 of the Common Customs Tariff and made subject to the import system. Where it is seasoned on the other hand it falls within Chapter 16.

Before that regulation entered into force monetary compensatory amounts did not apply to that product (I mean "seasoned" meat) with the result that such preparation was encouraged so as to escape the application of the system relating to fresh meat. This gave rise to an artificial development in trade in that sector and an obvious danger to the level of prices in the Member States concerned. The Commission, which in this sector has a wide discretion, in the end made it subject to the system of monetary compensatory amounts. But in the interests of making its tariff treatment uniform with that of fresh meat, the Commission refrained from taking into consideration the degree of seasoning. Article 1 of Regulation No 3092/76 in fact provides as follows: "For fresh, chilled or frozen products, other than minced products, which fall within sub-heading 16.02 B III (b) 1 of the Common Customs Tariff and which are excluded from classification in Chapter 2 thereof solely by reason of *simple seasoning (e.g. with salt and pepper)*, or the addition of other substances (e.g. vegetables, flours or oil), monetary compensatory amounts shall apply in trade between Member States at the level applicable to products of the same description without such treatment which fall within subheading 02.01 A II of the Common Customs Tariff" (my italics).

In reply to a request formulated by the Court by letter of 24 November 1982 seeking to ascertain whether the criterion used for determining whether beef is "seasoned" might also be applicable to turkey-meat, the Commission put forward an argument which seems to me to be unconvincing. In essence a distinction is drawn between "the mere addition of seasoning" and "light seasoning". Only in the first case is the meat said to be "Other prepared" within the meaning of Chapter 16. But the limits of the distinction are impossible to draw. In common parlance "the mere addition of seasoning" means that ingredients are mixed with the meat, whether beef or turkey, which are intended to bring out its flavour. That is all. The degree of seasoning, whether it is heavy or light, are foreign to the mind of whoever pronounces the words.

The conclusion is obvious; for meat to be "Other prepared" according to heading 16.02 it is enough if in fact seasoning had been added to the turkey-meat. I admit straight away that that is an unsatisfactory result because the system from which that result is inferred has no rational basis and is capable of giving rise to abuses in the application of compensatory amounts and to alterations in patterns of trade; hence it would be desirable if, as in fact has happened in the beef sector, the system of compensatory amounts were extended also to "seasoned" turkey-meat. But there it is: *hoc iure utimur* and in the light of the law the solution I have mentioned is mandatory.

6. The court making the reference, as I stated at the beginning, asks also how the presence of seasoning must be proven and, in particular, if such proof must be obtained by means of objective or subjective criteria. The reply to that question seems to me to be quite straight-forward. To ensure legal certainty, which in the present case is expressed by the interest in securing clear methods of appraisal, applicable without difficulty and based on factors which may easily be checked, the Court has

consistently held that the classification of goods for the purposes of the Common Customs Tariff must be carried out on the basis of their characteristics and objective properties at the time at which they are presented for clearance (judgments of the Court of 23 March 1972 in Case 36/71 *Henck* [1972] ECR 187; of 22 November 1973 in Case 128/73 *Past* [1973] ECR 1277; of 29 May 1974 in Case 185/73 [1974] ECR 607; of 10 December 1975 in Case 53/75 *Vandertaelen* [1975] ECR 1647; of 18 February 1976 in Cases 98 and 99/75 *Carstens* [1976] ECR 241; of 16 October 1976 Case 38/76 *Industriemetall Luma* [1976] ECR 2027; of 8 December 1977 Case 62/77 *Carlsen* [1977] ECR 2343). The rigour of that principle has been tempered in two cases only; where the product, as regards its objective characteristics, cannot be distinguished from a different product (such as wild reindeer which, when butchered, cannot be distinguished from domestic reindeer: judgment of 12 December 1973 in Case 149/73 *Witt* v *Hauptzollamt Hamburg-Ericus* [1973] ECR 1587) and when recourse to a subjective method is required by the Common Customs Tariff itself (treatment which may be seen with the naked eye, judgment of 30 September 1982 in Case 317/81, *Howe & Bainbridge BV* v *Oberfinanzdirektion Frankfurt am Main* [1982] ECR 3257).

I would also observe that particularly with reference to the tariff classification of meat, the Common Customs Tariff in Additional Note No 3 to Chapter 2, uses an objective criterion. I refer to the concept of "slightly dried meat" or "slightly smoked meat". In principle there was nothing to prevent it from being based on taste; on the contrary the aforementioned provision defines it on the basis of the relationship between water and proteins.

To argue therefore, as does the Commission, that the meat involved in the present dispute must be appraised in accordance with taste is certainly a mistake. The adoption of such a criterion would constitute above all an unjustified departure from a system which is based on objective methods of assessment. As is shown by the treatment of the "seasoned" turkey-meat by the German customs office, that would inevitably result in an unacceptable difference of tariff classification within the Community. As has been recognized since earliest times the reaction to flavour is one of the most variable things there is since every individual has his own general attitude to taste and a particular sensitivity as regards perception of spices. In fact this would be the antithesis of Community rules which in this as in other sectors seek without doubt to institute a uniform system.

But that is not all. In the field of customs classification the Court has given its preference to the criterion which is the most "practicable" (judgment of 20 October 1977 in Case 29/77 *Roquette* [1977] ECR 1835). It seems evident to me, and even the Commission has acknowledged it during the course of the oral procedure, that the tariff classification of the meat in question may be carried out according to the most practicable objective criteria. Let me cite the most obvious; the details supplied by the label, which are to be presumed accurate unless proved to the contrary, and chemical or microscopic analysis by a specialized laboratory.

7. For the purpose of classifying "seasoned" turkey-meat under customs heading 16.02 the proof of seasoning

must therefore be obtained on the basis of objective criteria without having recourse to taste. Therefore, by implication, the second question of the Finanzgericht which, as will be remembered, sought to ascertain "according to which criteria is the existence of the taste to be ascertained", becomes superfluous.

I should like to devote some words to this point as well for the support which may be derived therefrom regarding the justification of the objective method in the proof of seasoning. The Commission argues that the customs authorities are well able to establish whether the goods are "seasoned" and proposes that the Court state that "proof of taste should be furnished in accordance with the possibilities of perception of the average customs official".

However, that opinion must be rejected in the clearest way possible for two reasons. I have already dwelt on the first reason; sensitivity to taste is a criterion which is too much dependent on geography, physiology and anthropology (I am thinking of culinary habits) to be reliable. As is borne out by the German customs treatment to which I alluded just now, it may give divergent results within the same Member State and certainly within the whole of the Community. Nor let it be said that, for the purposes of uniform customs classification, it is possible to use the concept of the "average" taste of Community citizens. An argument of that kind would be absurd. And because of its complexity the argument put forward in the alternative by Dinter that, as it is impossible for the average customs official to provide proof of taste, it should be entrusted to a group of independent persons representing the various peoples of the Community, is also absurd and impractical.

Second argument. Community citizens are perhaps strange in their age-old but well-established habit of eating their escalopes and rolled turkey roasted or at least cooked. Not even the hungriest or most rustic of them would be tempted by it raw and frozen as it is submitted for customs clearance. To appraise the taste therefore the average customs official in which the Commission puts its faith would be forced to cook the meat and that would be a breach of the general principle of tariff classification which requires that the goods be appraised in the state in which they are when submitted for customs clearance.

Recently on the other hand the Court was asked to have recourse to the perceptive capacity of the average customs official or of experts. The Court was asked to interpret a note in the Common Customs Tariff regarding "textile fabrics impregnated, coated, covered or laminated with preparations of cellulose derivatives" which provides, as I have already said, for the criterion of perception with the naked eye. The Court ruled that "although the Common Customs Tariff constitutes a measure of Community law to be interpreted uniformly in all Member States, its application is entrusted to the States". Accordingly "it is for the Member States to designate the authorities and persons required to undertake the tariff classification of products and to decide their training in order to enable them properly to fulfil such tasks" (judgment of the Court of 30 September 1982 in Case 317/81 [1982] ECR 3257, mentioned above, at paragraphs 16 and 17 of the decision).

8. In conclusion I propose that the Court should reply as follows to the request for interpretation put forward by the Finanzgericht Düsseldorf by order of 14 July 1982 pursuant to Article 177 of the EEC Treaty:

The concept of "Other prepared . . . meat" appearing in heading 16.02 of the Common Customs Tariff must be interpreted as including meat "seasoned" for example by the addition of salt and pepper, even if the presence of the ingredients used in the seasoning is identifiable only microscopically.