REPORT FOR THE HEARING
in Case C-324/89 *

I — Facts and procedure

A — Facts and relevant legislation

In 1984 the company Nordgetränke placed apricot purée from Argentina in free circulation within the Community.

The apricot purée is prepared by passing the fruit pulp through a sieve and heating the purée thus obtained in a vacuum concentrator to boiling point for 10 to 30 seconds. The purpose of the process is to reduce the volume of the product by evaporating off the water for ease of transport. The purée is of firm consistency, yellow in colour, and it smells of apricot.

The Hauptzollamt (Principal Customs Office) Hamburg-Ericus (hereinafter referred to as 'the Hauptzollamt') first classified the purée under heading No 20.06 of the Common Customs Tariff (in the version annexed to Regulation No 3333/83/EEC, Official Journal L 313, p. 1) in accordance with the declaration made by Nordgetränke. In an amending decision of 20 March 1984 the Hauptzollamt then placed the purée under heading No 20.05 and demanded that Nordgetränke pay additional customs duties and levies.

Heading No 20.05 is for 'jams, fruit jellies, marmalades, fruit purée and fruit pastes, being cooked preparations, whether or not containing added sugar', while heading No 20.06 refers to 'fruit otherwise prepared or preserved, whether or not containing added sugar or spirit'.

Nordgetränke lodged an objection with the Hauptzollamt which was rejected whereupon Nordgetränke appealed to the Finanzgericht which dismissed the appeal. Nordgetränke then appealed on a point of law to the Bundesfinanzhof (Federal Finance Court).

The Bundesfinanzhof doubts whether heading No 20.05 can be applied in the present case on the ground that boiling is insufficient to constitute cooking within the meaning of the Common Customs Tariff. This view is above all borne out by the fact that the explanatory notes to the Combined Nomenclature in respect of the current heading No 2007 (Commission Regulation No 3174/88/EEC of 21 September 1988, Official Journal L 298, p. 1), which is essentially similar to heading No 20.05, require prolonged cooking. Heading No 2007 covers 'jams, fruit jellies, marmalades, fruit purée and fruit pastes, being cooked preparations, whether or not containing added sugar or other sweetening matter'.

The Bundesfinanzhof states that if it was decided to exclude heading No 20.05, the product would then have to be classified

* Language of the case: German.

under heading No 20.06 rather than under heading No 20.07 or heading No 08.10. The latter two headings respectively cover 'fruit juices (including grape must) and vegetable juices, whether or not containing added sugar but unfermented and not containing spirit' and 'fruit (whether or not cooked), preserved by freezing not containing added sugar'.

B — *The Bundesfinanzhof's questions*

As the outcome of the proceedings turns directly on the interpretation of the Common Customs Tariff, the Bundesfinanzhof, by order of 7 September 1989, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, pursuant to Article 177 of the Treaty:

'(1) Should the Common Customs Tariff (1984) be interpreted as meaning that apricot purée made by pressing fruit pulp through a sieve and then bringing it to the boil for no more than 30 seconds in a vacuum concentrator should be classified under subheading 20.05 C as fruit purée, being a cooked preparation?

(2) If not:

Is it to be interpreted as meaning that products of the kind described should be classified under subheading 20.06 B as "fruit otherwise prepared or preserved"?

(3) If not:

Under which other heading should the goods be classified?'

C — *Procedure before the Court*

The order of the Bundesfinanzhof was received at the Court Registry on 23 October 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 29 January 1990 by Nordgetränke GmbH & Co. KG, the appellant in the main proceedings, represented by Mr Jahnke, Rechtsanwalt, and on 26 January 1990 by the Commission, represented by J. Sack, a member of its Legal Department, acting as Agent, and R. Kubicki, an official of the Ministry of Justice of the Federal Republic of Germany, seconded to the Commission's Legal Department under the exchange scheme with national administrations.

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

By order of 20 September 1990, pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the First Chamber.

II — Written observations submitted to the Court

According to *Nordgetränke* the apricot purée comes under tariff heading No 20.07 and not heading No 20.05.

Nordgetränke claims first that the apricot purée at issue does not correspond to the wording of the description of the product envisaged by heading No 20.05. In the first place the technique for concentration under vacuum used in the present case cannot be treated as a cooking method within the meaning of that heading: cooking entails changing the constituents of the product by heating to render it directly suitable for consumption. In the present case there is no such chemical transformation and the raising of the temperature is intended solely to evaporate off the water in the fruit for ease of transport. In the second place, since the fruit purée is simply reduced in volume, it is not strictly *obtained* by cooking. The term 'obtained' used in heading No 20.05 [1] refers to the appearance of a new product, something which does not happen in this instance.

Nordgetränke further argues that the apricot purée does not have the characteristic common to the different products — fruit pastes, marmalades, fruit jellies, jams — mentioned in heading No 20.05. In those preparations, the fruit, as a result of prolonged exposure to heat, undergoes a chemical transformation which means that it is no longer the same as the original product. In the case of apricot purée, on the other hand, there is neither prolonged exposure to heat nor a change in the chemical nature of the product.

According to Nordgetränke, the requirement of a change in the product follows from a comparison of headings Nos 20.05 and 20.06 of the Common Customs Tariff. Without requiring that a new product be obtained, the latter heading presupposes a qualitative change in the goods which it covers: those products which were originally perishable, must have acquired keeping properties as a result of being heated.

Furthermore, three regulations preclude the classification of the product under heading No 20.05: Council Regulation No 4115/86/EEC of 22 December 1986 on import into the Community of agricultural products originating in Turkey (Official Journal L 380, p. 16), Council Regulation No 1910/86/EEC of 16 June 1986 opening, allocating and providing for the administration of a Community tariff quota for apricot pulp falling within subheading ex No 20.06 B II c) 1 aa) of the Common Customs Tariff and originating in Turkey (Official Journal L 165, p. 4), and Council Regulation No 802/87/EEC of 16 March 1987 (Official Journal L 79, p. 16) amending Regulation No 1910/86. None of those regulations places the product under heading No 20.05.

Nordgetränke accordingly maintains that the contested product should be classified under heading No 20.07. Like the concentrated fruit juice covered by that heading, apricot purée is obtained by pressing, then removal of water by evaporation, and it is used to produce fruit juice.

1 — Translator's Note: The German expression 'durch Kochen hergestellt' corresponds to 'being cooked preparations' in the English version.

Nordgetränke claims however, in the alternative that, if the Court decides that the product does not fall under heading No 20.07, the residual heading No 20.06 should be applied. The apricot purée at issue constitutes at the very least a product from fruit 'otherwise prepared or preserved'.

Nordgetränke suggests that the Court should answer the questions referred for a preliminary ruling as follows:

'(1) A compote of apricots obtained by pressing fruit pulp through a sieve and heating to boiling point in a vacuum concentrator for a maximum of 30 seconds is not to be regarded as fruit purée obtained through cooking coming under tariff subheading 20.05 C;

(2) The product described above is to be regarded as a concentrate coming under tariff heading No 20.07;

(3) Alternatively the product described above is to be regarded as "fruit otherwise prepared or preserved" coming under tariff heading No 20.06.'

According to the *Commission*, the fruit purée at issue must be classified under heading No 20.05.

The Commission states first, that the method of cooking used in the preparation at issue does not exclude the product from that heading. The term 'cooked' is not defined in the Common Customs Tariff, in the Explanatory Notes on the Customs Cooperation Council Nomenclature or in the notes on the new Harmonised System and so it is necessary to refer to common usage, according to which the term 'cooked' refers to any heat treatment involving boiling. The procedure used in the present case, namely raising the temperature by concentration under vacuum, is covered by that definition.

The Commission further considers that the particularly short duration of the boiling in the present case is not such as to exclude heading No 20.05 which does not lay down any requirement in that regard. That view is not affected by the fact that the Customs Cooperation Council's Explanatory Notes on heading No 20.05, in their French version, and the Explanatory Notes on the Combined Nomenclature on the current heading 2007, which is essentially similar to heading No 20.05, require lengthy cooking. The appearance of very rapid cooking methods, especially by microwave, has rendered altogether irrelevant any time factor in this criterion and the only remaining question is whether the process used can have the same effect on the product to be cooked as traditional lengthy cooking. That is the position in the present case as concentration under vacuum produces an evaporating and drying effect which in the past could only be obtained by means of lengthy cooking. In support of that view, the Commission submits an opinion from the Common Customs Tariff Nomenclature Committee endorsing the classification of apple purée under heading No 20.05. In arguing against reference to time as a criterion, the Commission points out that that would lead to a difference in classification between products obtained through classic cooking processes and

others, and that difference is not justified either by the structure of the Common Customs Tariff or by the wording of heading No 20.05.

The Commission further argues that, in order to be classified under heading No 20.05, it is not necessary for the product in question to have undergone a chemical transformation or change of taste; it is sufficient that, at the end of a heating process, the product displays the properties of the products — jams, jellies, marmalades, purée or pastes — listed in the title of that heading. In the present case the product obtained by the thermal concentration process undeniably constitutes apricot purée.

Nor does the fact that the product can subsequently be restored to its original state by the addition of water justify the exclusion of heading No 20.05. That heading and, more generally, the Common Customs Tariff as a whole do not require the state of the product and, consequently, its tariff classification to be irreversible.

Finally, according to the Commission, classification under heading No 20.05 is borne out by Rule 3a of the general rules on the interpretation of the Common Customs Tariff, according to which 'The heading which provides the most specific description shall be preferred to headings providing a more general description.'

Accordingly, the Commission suggests replying to the questions referred for a preliminary ruling as follows: 'The Common Customs Tariff, in the version annexed to Council Regulation No 3333/83/EEC of 4 November 1983, must be interpreted as meaning that apricot purée obtained by pressing fruit pulp through a sieve and bringing it to boiling point in a vacuum concentrator for a maximum of 30 seconds, must be regarded as fruit purée obtained by cooking coming under tariff heading No 20.05 of the Common Customs Tariff'.

The Commission adds, in the alternative, however, that if that position is not adopted, the product should be classified under the residual heading No 20.06.

R. Joliet
Judge-Rapporteur