them for use in the making of a certain category of sugar confectionery.

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Delivered in open court in Luxembourg on 7 November 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 24 OCTOBER 1973 [1]

Mr President,
Members of the Court,

The dispute between the parties in the case pending before the national court is here concerned with whether a product should be assigned to tariff heading 17.04 ('Sugar confectionery, not containing cocoa') of heading 21.07 ('Food preparations not elsewhere specified or included') of the Common Customs Tariff. It is for us to explain the meaning of the Customs Tariff in this respect, so as to enable the national court to apply it correctly to this case.

As often happens in the interpretation of the Common Customs Tariff, although the national court took care to make its questions appear abstract, nevertheless, in attempting to give a useful reply there is the risk of letting oneself be dragged into an examination of the facts and of considering specifically the particular product whose actual assignment is being discussed by the national court. I will take as much care as possible to avoid doing so while at the same time bearing in mind the need to give the national court a useful reply which will clear up the matter.

We are here concerned with a product imported in 1970 from Denmark and which was described in the vendor's invoice as 'bulk caramel' and in the customs declaration form as 'bulk caramel confectionery' and appearing on analysis to contain less than 50 % by weight of sucrose and 46·4 % of milkfat.

The relevant customs office, after having carried out an analysis of the product giving the results indicated above, decided to assign the product to tariff heading 21.07-F-VII-b-1. The German importer objected to that decision, maintaining that the product was covered by heading 17.04, for which the

1 — Translated from the Italian.

tax is lower than for goods assigned to heading 21.07.

Tariff heading 17.04-D-I-a of the Common Customs Tariff in force in 1970 concerning, as has been seen, sugar confectionery, deals with products containing no milkfat or containing less than 1·5 % by weight of such fats and containing less than 5 % by weight of sucrose.

Subheading D-II deals with other products containing by weight of sucrose (including invert sugar expressed as sucrose):

(a) less than 50 %,

(b) 50 % or more but less than 70 %,

(c) 70 % or more.

Even though no maximum limit for the milkfat content is here prescribed, the Commission points out that as the tariff heading specifically concerns sugar confectionery, as its title indicates, one must logically conclude from this that there exists a maximum limit of milkfat content. The Explanatory Notes to the Brussels Nomenclature relating to this heading seem to confirm that conclusion, since according to the Notes that heading covers 'most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and commonly referred to as 'sweetmeats or confectionery'. It mentions, *inter alia:* caramels, nougat, marzipan and others. According to the Commission, it may be deduced from the above that goods containing a proportion of ingredients other than sugar such as to affect their character as 'sugar confectionery' are not covered by that heading.

I would approve of this interpretation, which is confirmed by Regulation No 1060/69/EEC of the Council of 28 May 1969 fixing the quantities of basic products considered to have been used in the manufacture of the goods. Although this Regulation was enacted for the purpose of calculating the variable component of the levy charged on the importation of goods resulting from the processing of agricultural products and, thus its object is not to fix the composition of products for the purpose of their assignment to one or other tariff heading, it nevertheless provides a valuable indication of the legislature's conception of the normal composition of the goods in question. The Annex to that Regulation, relating to goods under heading 17.04, does not include butter as a basic product for any of the goods covered by that heading (unlike the case of goods under 21.07) whereas it allows a proportion of 20 kgs of whole milk powder for 100 kgs of sugar confectionery, which amounts to a milkfat content of 5·2 % by weight.

It thus appears that for the goods under heading 17.04-D the point of departure adopted by the Community legislature was that the milkfat content cannot normally exceed that level. If it were not so, the Regulation would presumably have referred to a higher level so as to ensure an effective protection for the corresponding Community product.

To the first question, whether the milkfat content in goods under tariff heading 17.04-D-II is subject to any, and if so what, limitation, one must therefore reply by confirming the existence of a limitation, which cannot be fixed in a precise manner and according to a general and abstract formula but only in relation to the particular product and on the basis of the criterion that the milkfat content must not be such as to affect the character of the goods as 'sugar confectionery'.

Therefore, since the ultimate fixing of this general criterion must be made according to each individual case, taking account of the objective characteristics of each product, it is a matter for the national court to determine; otherwise we will risk transgressing the bounds, which must be observed, of this Court's jurisdiction to interpret by way of preliminary ruling, and we would thereby apply the law to the actual facts

of the case, which is the exclusive task of the national court.

On the other hand, this general criterion must be considered together with those which I shall have occasion to clarify when replying to the other questions referred to this Court and which are capable of furnishing the national court with more precise and pertinent data for appraisal.

The second question which the German court asks this Court is whether half-finished products, in the finishing of which more sugar must be added, can be considered as sugar confectionery and thus be covered by the said tariff heading 17.04; and if this is answered in the affirmative, whether, in determining classification, account must be taken of the general opinion obtaining in the confectionery trade or some other opinion.

To give a useful reply to this question I cannot avoid a more specific reference to tariff heading 21.07 even if there is no express mention of it in the text of the national court's questions. It deals with food preparations not elsewhere specified or included. Products containing 45 % or more but less than 65 % by weight of milkfat and containing 5 % or more by weight of sucrose are considered in subheading F-VII-b.

As the Hamburg Finanzgericht points out in its decision to refer, if one takes into account solely the material composition of the product in question — independently of other qualitative criteria — it could be classified without distinction either under tariff heading 17.04-D-II-a (because it contains less than 50 % sucrose and more than 1·5 % milk powder) or under tariff heading 21.07-F-VII-b-1 (as it contains more than 5 % sucrose and between 45 % and 65 % milk powder).

A correct and systematic interpretation of the CCT must however avoid any such likelihood of confusion. That would be possible by the finding of a definitive criterion of classification by which one can attribute a product of this nature on a definite basis to one of the abovementioned tariff headings. The criterion of the specific designation of the basic materials, to which the Commission refers, can be of assistance for this purpose: for a product to be classified under the heading 17.04 it must consist of basic materials which are specifically destined, by their very nature and by their market characteristics, for the making of sugar confectionery.

Even if one cannot discount the possibility that on a general basis the goods under tariff heading 17.04-D-II may even cover semi-finished products requiring the addition of more sugar for their ultimate transformation, it must however be recognized that there are limits to this possibility and it cannot be extended to cases where, to transform the particular product into a finished product classified as sugar confectionery, it is necessary to add many times more sugar than the original product contained, as appears to have occurred in this case. In such a case one can generally consider that it is a product not specifically intended for making sweetmeats.

Besides the fact that heading 17.04 is specific and heading 21.07 is residual, and therefore general, also the fact that the duty levied on the importation of basic materials intended for the production of sweetmeats is lower than that prescribed for the importation of food preparations generally forces one strictly to limit the application of tariff heading 17.04.

Otherwise, besides the risk of the unfortunate confusion of distinct tariff headings, there is also that of impeding the correct operation of the Community rules on agricultural markets for the reason explained above in relation to Regulation No 1060/69/EEC.

It does not in fact seem to me to be rash to presume that the Community legislature, so as to ensure the functioning of the agricultural markets, took account of the higher rate of the

external tariff on foodstuffs under heading 21.07, i.e. those not covered by specific headings, in the composition of which butter had an important part. If, therefore, importers were allowed to relieve products containing a high percentage of butter from their proper duty, that could constitute a disturbance of the functioning of the Community agricultural organization, all the more so because there exists the possibility of using the butter, an ingredient of those goods, once it has been extracted from them.

The Commission points out that in this case the product in question was not transformed into caramel, but instead, the purchaser used it to extract the melted butter which has a higher commercial value. It appears to me therefore that if one were to allow a product of this kind to be classified under tariff heading 17.04 there would be the risk of facilitating the evasion of the rules laid down for the protection of Community agricultural production.

This Court has already held that when interpreting one tariff heading and comparing it with another one must, when in doubt, take account not only of the function of the common tariff in relation to customs duty, but also of its function in the scheme of the market organization (Judgment 72/69, *Hauptzollamt Bremen,* of 18 June 1970, Rec. 1970, p. 434).

Despite the criticisms which have been made on this matter by some, I consider that one is here concerned with a functional criterion of interpretation which, in the case of doubt on the precise meaning of the headings of the CCT, the Court must continue to follow. For this reason also I consider that a product must be excluded from classification under tariff heading 17.04 when, because of its characteristics, it does not appear to be specifically intended for the production of 'sugar confectionery'. When, therefore, it is necessary, for the production of such goods, to add to the basic product a quantity of sugar several times greater than that which it already contains, that fact can be considered as an indication of the lack of the abovementioned requirement of specific intended use, despite any opinion which interested economic circles of individual Member States may hold.

I am therefore of the opinion that the questions of the national court should be dealt with in accordance with the comments set out above.