OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 2 DECEMBER 1975 [1]

Mr President,
Members of the Court,

Mr Vandertaelen and Mr Maes, the defendants in the national proceedings which resulted in the reference at present before the Court effected imports from third countries into the Community during the period from 6 December 1968 to 5 March 1969. These imports took place on the basis of import licences valid in respect of heading 18.06 B II (b) of the Common Customs Tariff ('Chocolate and other food preparations containing cocoa: ice-cream: containing by weight of milk fat 7 % or more'). This was also the description of the goods as given when clearing them through the customs.

Samples of the goods were repeatedly taken and examined by the Belgian State Laboratory of Customs and Excise. In the course of these tests the laboratory found that it was dealing with a frozen, brownish-beige-coloured fat having a buttery taste, containing 66 % by weight of fat (including 53 % milkfat), 20 % by way of sucrose, approximately 14 % of water and in addition colouring matter, but without cocoa. It was further stated that the product shows after 24 hours no trace of melting at a temperature of 20° C. From this it was deduced that the product — which, it might be added, was processed into butter oil and sold to foreign buyers — could not be regarded as ice-cream but at the most as goods falling under heading 21.07 F VII (b) 1 ('Food preparations not elsewhere specified or included: other: containing 45 % or more but less than 65 % by weight of milkfat: containing 5 % or more by weight of sucrose ...: containing no starch or containing less than 5 % by weight of starch').

For the reasons stated proceedings were instituted against the said importers alleging a customs offence. The Tribunal Correctionnel convicted them of the offence of an illegal importation, that is to say, because there was no licence in respect of heading 21.07 F VII (b) 1 for the importation of the goods. The Cour d'Appel of Brussels allowed the appeal and acquitted the defendants. Treated as crucial by the court was the fact that at the time when the imports took place there was no legal definition of the term 'ice-cream'. Accordingly — thus it was said by the court — this gave rise to the question whether the goods clearly and in a manner apparent to anyone in no way merit the name ice-cream. There could be no question of this here, since it was not shown that the product could not be used as frozen food preparations which might be considered ice-cream.

An appeal was in turn made to the Belgian Cour de Cassation. In that court's opinion there arose first the question how the term 'ice-cream' ought to be understood within the meaning of the Common Customs Tariff which did not contain a definition. The court further points to the fact that Regulation No 495/69 of the Commission of 18 March 1969 (OJ L 67 of 19. 3. 1969) on the classification of goods also contains under subheadings 18.06 D II (c) and 21.07 F VII of the Common Customs Tariff a definition of the term 'ice-cream'. Since, however that regulation was made and came into force subsequent to the imports in question the court is in doubt whether the regulation can be referred to in interpreting the Common Customs Tariff in relation to imports that had taken place before the coming into force of the regulation. Accordingly by order of 20 May 1975 the court stayed the

1 — Translated from the German.

Proceedings and referred under Article 177 of the EEC Treaty the following questions for a preliminary ruling:

1. Whether Regulation No 495/69 of 18 March 1969 of the European Economic Communities is applicable for the classification of goods imported before it came into force, in particular as regards the classification of goods imported during the period from 6 December 1968 up to and including 5 March 1969;
2. What is the definition of the term 'ice-cream' for the purpose of applying headings 18.06 B and 21.07 C of the Common Customs Tariff prior to the entry into force of Regulation No 495/69, in particular during the period from 6 December 1968 up to and including 5 March 1969, and more particularly whether this term can refer to products with a relatively high content in fats, of which milk fats amount to 45 % or more but less than 65 % by weight of the total weight of these products, which contain in particular sucrose and water, which do not melt in an ambient temperature of approximately 0° C, and which even in an ambient temperature of 20° C show after 24 hours no sign of melting, even if aerated and offered chilled or frozen.

The following individual comments seem appropriate.

I — The first question

i.e. whether Regulation No 495/69 applies to goods imported before it came into force

This question was asked since in the light of this regulation the classification of the goods in question for tariff purposes is clearly quite unequivocal. As can be seen from the third recital to the regulation, ice-cream understood in the trade does not always contain milkfat; when it does contain milkfat, the fat content does not usually exceed 15 % by weight; furthermore a distinguishing characteristic of ice-cream is that it melts in a temperature of about 0° C. Since, however, the imported goods contained 66 % of fat by weight of which 53 % was milkfat and since even at a temperature of 20° C they showed no trace of melting after 24 hours, they could not in fact under the said regulation have been classified either under heading 18.06 B II (b) or under heading 21.07 C II (b), i.e. the headings covering ice-cream, but would have been classified under 18.06 B II (c) or under 21.07 F VII depending on whether they did or did not contain cocoa.

This way of looking at the matter is not however relevant for a decision on the point which arose in the main action. On the basis of the clear case-law of this court it is certainly out of the question to apply the said regulation to imports concluded before it came into force.

In this respect I can first refer to the judgment in case 30/71 (Judgment of 24 November 1971, *Kurt Siemers & Co.* v *Hauptzollamt Bad Reichenhall* [1971] ECR). Under the terms of that judgment, regulations which make detailed provisions for the classification of goods under particular tariff headings cannot be applied to goods imported before their entry into force. The judgment expressly emphasizes that the legislative nature of such regulations precludes their having any retroactive effect. A decision on the same lines and, it might be added, in relation to the same regulations making provisions for the classification of goods for tariff purposes, was given in Case 77/71 (Judgment of 15 December 1971, *Gervais-Danone AG* v *Hauptzollamt München-Schwanthalerstraße* [1971] ECR). In that case there was an express finding to the effect that regulations are of a legislative nature and accordingly have no retroactive effect if made on the basis of Regulation No 97/69 of the Council (OJ L 14 of 21. 1. 1969), that is to say, the Regulation which empowers the Commission to adopt such provisions as are necessary for the purpose of

applying the Common Customs Tariff for classifying goods in the Tariff which define the content of the headings or subheadings without, however, amending their wording.

This principle must also be adhered to in the present case. This is so first because the relevant regulation of the Commission was made on the basis of Regulation No 97/69 of the Council. Secondly, it is important to note that the regulation of the Commission expressly lays down 22 March 1969 as the date for its entry into force, i.e. its taking on binding force, and thus does not provide for any retroactive effect.

As regards the supplementary question raised by the Commission, that is to say, whether, bearing in mind the fact that it contains the only possible interpretation of the Common Customs Tariff, the regulation of the Commission cannot at least be used as an aid to interpretation in relation to imports carried out at an earlier date, I see no reason for going into this point also — reasons for taking this view will soon emerge in the course of dealing with the second question.

II — The second question

The second question calls for an examination of what is the definition of the term 'ice-cream' for the purpose of applying headings 18.06 B and 21.07 C of the Common Customs Tariff prior to the entry into force of Regulation No 495/69. There will further have to be examined whether it can refer to products presented for customs clearance in a cooled or frozen state but which have a relatively high fat content (45 % milkfat by weight or more, but less than 65 % by weight of the total weight of these products), which contain a certain degree of sucrose and water and which even in an ambient temperature of 20° C show after 24 hours no sign of melting.

On this point one can immediately ask whether the court making the reference is indeed dependent on a comprehensive definition of the term ice-cream, or whether the finding of certain characteristics does not in fact suffice for arriving at the conclusion that the products in question in the main action do not constitute ice-cream.

It is a fact that in the course of the proceedings good reasons emerged for taking the last-mentioned point of view. In this respect importance must be attached to what the Commission has submitted in relation to the necessity of observing the wording of headings in interpreting the Common Customs Tariff as well as in relation to the fact that where there is no definition of a term in the Common Customs Tariff, one ought to proceed from the normal meaning of the terms used and that one may well give consideration to this. According to this submission a product the description of which contains the term 'Speise' (consumable) [1] must on the basis of its kind and taste be suitable and intended for immediate consumption. It also seems to be generally admitted that due to its water-content, ice-cream will melt at a temperature of approximately 0° C and that goods which due to too high a fat content do not possess this characteristic should not according to trade usage be called 'ice-cream'. Now since it may be assumed that the products involved in the main action do not comply with these criteria, it may be that for the purpose of judging the issue in the national proceedings, it is enough to see whether they are present.

However, taking the same view as the Commission, I consider that for the sake of a reasoned answer to the question referred it is appropriate to go on to examine whether, as regards the concept 'ice-cream' one cannot — if only on legal grounds — discern further criteria which existed already before the coming into force of the beforementioned regulation of the Council.

1 — Translator's note: in the German version of the Common Customs Tariff 'ice-cream' is rendered as 'Speiseeis', literally, 'ice for consumption'.

If I may anticipate my conclusion, such criteria do indeed clearly exist. In my view the Commission has convincingly shown that already before the coming into force of its Regulation No 495/69 there existed provisions in Community law from which one could derive reliable data for ascertaining the concept 'ice-cream'.

Important in this respect are the trading rules in respect of certain processed agricultural products which were introduced by Regulation No 160/66 of the Council of 27 October 1966. These rules are characterized by the fact that — I shall not have to deal with this in greater detail since we have already come across these rules with greater frequency — that under this regulation and as regards the portion attributable to the levies and the so-called variable component, the import duties on processed agricultural products are calculated on the basis of the content of basic products contained in the processed products. However, in applying these rules it soon emerged that on account of the variety of the products comprised within a heading it proved possible in a number of cases to lay down a fixed percentage of basic products. On the contrary it was necessary to make a differentiation according to groups of products, that is, to establish subheadings. This applied *inter alia* to the headings 18.06 and 21.07 referred to in the annex to Regulation No 160/66, which at that time were alone relevant to ice-cream.

For that reason the Council made on 18 November 1967 Regulation No 83/67 'establishing tariff specifications relating to goods covered by Regulation No 160/66 of the Council and for determining the fixed components applicable to such quotas and the quantities of basic products to be taken as having been incorporated in their manufacture' (OJ L 81 of 26. 4. 1967). Its particular interest lies in the fact that this is the first occasion on which in its Annexes the concept 'ice-cream' emerges. In respect of this class of goods subheadings — that is to say, 18.06 B I and 21.07 C, depending on whether they did or did not contain elements of cocoa — were created in Annex I. These headings were correspondingly subdivided in accordance with the milkfat content — the cocoa element can be disregarded: (a) comprises ice-cream with a milkfat content of less than 3 % by weight, (b) such ice-cream with a milkfat content equal to or greater than 3 % and less than 7 % and (c) ice-cream with a milkfat content equal to or greater than 7 %. In relation thereto Annex II of the regulation sets out the fixed quantities of basic products which are relevant for calculating the variable components. In the case of the heading relevant to these proceedings — ice-cream with a milkfat content equal to or greater than 7 % — these amount to 20 kg of sugar and 25 kg of milk in powder form. It does not seem to be in dispute that the latter corresponds to a milkfat content of 9·1 %.

From this one can conclude that in the case of ice-cream with a high milkfat content the figures given are typical of the normal ingredients. If one further bears in mind that one is dealing with fixed standards which allow variations by way of addition or subtraction and if one therefore applies a necessary safety margin, then even though this margin is generous, i.e. even if one proceeds from the basis of doubling the milkfat content — the proportion of sugar is irrelevant in the present case — one can at the most be dealing with a milkfat content of 18 %. Indeed, whilst the tariff heading in question mentions no upper limit, this would appear to be the maximum content. What is decisive on this point is quite simply that otherwise the purpose of the provision, which is to ensure that the basic products utilized are covered in the most effective manner, could not be achieved, the provision could lack balance and then it would be possible to evade the relevant levy. It can be seen

that this is a correct view if one looks at the rates of levy which applied at that time. Thus is has been shown by the Commission that at the beginning of 1969 there was payable in respect of heading 18.06 B II (b), i.e. goods with an average milkfat content of 9·1 %, a variable component amounting to 20·385 u.a. per 100 kg, whilst the variable component in respect of tariff heading 18.06 D II (c) covering goods with a milkfat content of 26 % or more by weight amounted to 124 u.a. per 100 kg.

Thus it can indeed be said in relation to the second question that even in respect of the period before the entry into force of Regulation No 495/69 of the Commission, it is possible to discern reliable criteria for defining the concept 'ice-cream', that is to say, first by falling back on trade usage and by taking into account the meaning of the terms used and secondly by referring to the regulation of the Council issued for the purpose of regulating the trade in processed agricultural products and the nomenclature of which, it might be added, was by and large incorporated in the Common Customs Tariff (Regulation No 950/68).

Since for the purposes of the national proceedings these findings will suffice it is not in my view necessary to examine — as was suggested by the Commission — whether one can use as aids to interpretation regulations made at a later date, explanatory notes of the Nomenclature Committee or Chapters 18 and 21 of the Common Customs Tariff of 1970, or a draft directive of the Commission of September 1970.

III — By way of summary I therefore suggest that the question referred by the Belgium Cour de Cassation be answered as follows:

1. Regulation No 495/69 of the Commission of 18 March 1969 is of a legislative nature. Since it was provided in express terms that is should come into force on 22 March 1969, it cannot apply to goods imported before that date.

2. Food preparations in a frozen state which are suitable and intended for immediate consumption are to be regarded as ice-cream within the meaning of subheadings 18.06 B and 21.07 C of the Common Customs Tariff. The essential feature of such preparations is that they melt at a temperature of 0° C and that their milkfat content does not exceed 20 % by weight.