OPINION OF ADVOCATE GENERAL TESAURO

delivered on 26 February 1992 *

Mr President,
Members of the Court,

1. In these proceedings the Court has been asked to interpret Article 1 of Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries. [1]

The measure in question, which was adopted in order to remedy the serious disturbances to which the Community market was exposed as a result of the marketing at abnormally low prices of Morello cherries imported from non-member countries, lays down a minimum price for the importation of Morello cherries into the Community and provides for the imposition of a countervailing charge on products which do not respect that price.

Article 1(1) of the regulation provides in particular for a lower minimum price for frozen Morello cherries and for Morello cherries not containing added sugar and for a higher minimum price for Morello cherries in syrup, which are identified as follows:

'...

ex 20.06 Fruit otherwise prepared or preserved, whether or not containing added sugar:

B. II. Not containing added spirit:

a) containing added sugar, in immediate packings of a net capacity of more than 1 kg:

ex 8. Morello cherries in syrup

b) containing added sugar, in immediate packings of a net capacity of 1 kg or less:

ex. 8. Morello cherries in syrup

...'.

2. It appears from the order for reference that between July and September 1985 Parma Handelsgesellschaft ('Parma'), the plaintiff in the main proceedings, imported from Yugoslavia several consignments of stewed Morello cherries, described in the customs declarations as 'fruit otherwise prepared or preserved, not containing added alcohol or sugar, own sugar content between 9% and 13%, in immediate packings of a net capacity of 1 kg or more' or simply as 'fruit, not containing added sugar'.

* Original language: Italian.

1 — OJ 1985 L 156, p. 13. See also Commission Regulation (EEC) No 1712/85 of 21 June 1985 amending the German, Greek, English, French, Italian and Dutch versions of Regulation (EEC) No 1626/85, OJ 1985 L 163, p. 46.

Hauptzollamt (principal customs office) Bad Reichenhall considered that the products in question were to be regarded as being 'Morello cherries in syrup' for which the minimum price had not been complied with, and imposed a countervailing charge pursuant to Regulation No 1626/85.

In the proceedings before the Finanzgericht (Finance Court) München, Parma claimed, in the first place, that it had not imported Morello cherries in syrup but Morello cherries in water and, secondly, that the minimum price should have been calculated on the basis of the weight of the cherries alone, without taking account of the liquid in which they were contained.

The Finanzgericht considered that the determination of the dispute hinged on the interpretation of Regulation No 1626/85. It therefore stayed the proceedings and referred two questions to the Court of Justice for a preliminary ruling.

3. In the first of those questions, the national court asks whether Article 1(1) of Regulation No 1626/85 is to be interpreted as meaning that Morello cherries in a liquid derived from heating those cherries in water which for that reason has a sugar content greater than 9% must be classified as Morello cherries in syrup under subheadings 20.06 B II a) 8 or 20.06 B II b) 8 of the Common Customs Tariff ('CCT').

I would first state that, as Parma and the Commission rightly observe, the question as formulated must be construed, in the light of the order for reference, as meaning that the national court wishes to establish, not so much whether the Morello cherries in question fall within subheading 20.06 B II a) or b) of the CCT, but rather whether they should be regarded as 'Morello cherries in syrup' for the purposes of Regulation No 1626/85.

In that regard, the plaintiff in the main proceedings observes *inter alia* that subheading 20.06 B II a) 8 is concerned in general with fruit containing added sugar, whilst the purpose of the specific mention of 'Morello cherries in syrup' in Article 1(1) of Regulation No 1626/85 is to distinguish, within the class of Morello cherries containing added sugar, Morello cherries contained in syrup, for the sole purpose of applying the minimum-price rules. The difference between the two products lies in the fact that sugar is actually added to 'Morello cherries in syrup'.

Although that interpretation does seem at first sight to be borne out to a degree by the wording of the relevant provision, it does not stand up to more careful scrutiny.

4. I would start by saying that Regulation No 1626/85 does not specify what is to be understood by syrup or by Morello cherries in syrup and that it is therefore necessary to that end to consider the more general legislative context of which the regulation at issue forms a part.

I would observe in that connection that heading 20.06 of the CCT, [2] to which

2 — At the material time, the CCT was laid down in Council Regulation (EEC) No 3400/84 of 27 November 1984 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1984 L 320, p. 1).

Regulation No 1626/85 refers, covers fruit, whether or not containing added sugar, and that it appears from Additional Note 3 to Chapter 20 of the CCT that products classified under heading 20.06 are to be considered as 'containing added sugar' when the sugar content thereof exceeds by weight 13% in the case of pineapples and grapes and 9% in the case of other fruit.

Moreover, according to the explanatory notes of the Customs Cooperation Council, heading 20.06 also covers fruit in syrup. [3]

Furthermore and also according to the explanatory notes of the Customs Cooperation Council on heading 17.02 (other sugars in solid form; sugar syrups not containing added flavouring or colouring matter ...), the term 'syrups' covers 'syrups of all sugars (... and aqueous solutions other than aqueous solutions of chemically pure sugars of heading 29.43) provided they do not contain added flavouring or colouring matter' and there is nothing to authorize the exclusion from that definition of syrups obtained using the sugars contained in Morello cherries.

Next, the definitions given of 'cherries in syrup' and 'sugar syrup' in Article 1(2) of Commission Regulation (EEC) No 1599/84 of 5 June 1984 laying down detailed rules for the application of the system of production aid for products processed from fruit and vegetables [4] are equally significant. According to that provision, 'cherries in syrup' means 'cherries, pitted or not, having undergone a heat treatment, packed in hermetically sealed containers with a covering liquid of sugar syrup and falling within subheading 20.06 B II a) 8 or 20.06 B II b) 8 of the Common Customs Tariff', whilst 'sugar syrup' means 'a liquid in which water is combined with sugars and has a total sugar content determined after homogenization of not less than: 9% in respect of cherries in syrup'.

In the light of the legislative context described above, I consider therefore that Morello cherries in a liquid obtained by heating them in water which has a sugar content in excess of 9% must be regarded as being Morello cherries in syrup also for the purposes of Regulation No 1626/85, irrespective as to whether additional sugars have been added.

5. That conclusion is supported, moreover, by the fact that, as the Commission rightly observes, a different criterion for the classification of the product in question, based not simply on sugar content but on the origin of the sugars themselves, would be difficult for the controlling customs authorities to apply.

In contrast, the argument, relied on by Parma, to the effect that the liquid in question does not have any intrinsic value in so far as it is not normally used by consumers and has the sole function of ensuring satisfactory conservation of the Morello cherries does not appear decisive.

3 — The explanatory notes to the CCT nomenclature constitute an important tool for interpretation which enables the content of the various tariff headings and subheadings to be specified and clarified (see most recently the judgment of 30 January 1992 in Case 14/91 *Sucrest* [1992] ECR I-441, paragraph 10).

4 — OJ 1984 L 152, p. 16.

In that regard, it should be observed that, as the Court has consistently held, the decisive criterion for the customs classification of goods must be sought generally in their objective characteristics and qualities; [5] furthermore, the intended use of goods, which is not an inherent quality of that product, cannot be used as an objective criterion for the purposes of its Common Customs Tariff classification at the time of importation, since it is impossible at that time to determine the actual use to which the goods will be put. [6]

6. In its second question, the Finanzgericht asks whether Article 1(1) of Regulation No 1626/85 is to be interpreted as meaning that, in order to calculate the minimum import price for Morello cherries in syrup, account has to be taken of the combined weight of the Morello cherries and the syrup.

The answer to this question is in fact closely connected with the answer to the first question and does not seem to me to be subject to any room for uncertainty. If, as I consider, it is taken that Morello cherries contained in a liquid with a sugar content in excess of 9% are to be regarded as being Morello cherries in syrup for the purposes of Regulation No 1626/85, it is only too obvious that, in order to calculate the minimum import price, account must be taken of the overall weight of the product, that is to say the combined weight of the Morello cherries and the syrup.

7. In the light of the above considerations, I therefore propose that the Court should answer the questions put by the Finanzgericht München as follows:

(1) Article 1(1) of Regulation (EEC) No 1626/85, as amended by Regulation (EEC) No 1712/85, should be interpreted as meaning that the price fixed for Morello cherries in syrup must also be applied to Morello cherries contained in a liquid obtained by heating the cherries in water and containing, as a result, a level of sugar in excess of 9%.

(2) Article 1(1) of Regulation (EEC) No 1626/85, as amended by Regulation (EEC) No 1712/85, should be interpreted as meaning that, in order to calculate the minimum import price for Morello cherries in syrup, account must be taken of the combined weight of the Morello cherries and the syrup.

5 — Judgment in Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127, paragraph 11 (summary publication); judgment in Case C-228/89 *Farfalla Flemming* [1990] ECR I-3387, paragraph 13.

6 — Judgment in Case 222/85 *Kleiderwerke Hela Lampe* [1986] ECR 2449, paragraph 15; judgment in Case 90/85 *Mikx* v *Minister van Economische Zaken* [1986] ECR 1695, paragraph 15.