On those grounds,

THE COURT

in answer to the question referred to it by the Finanzgericht Berlin by order of 25 March 1975 hereby rules:

1. **An examination of the question raised has not disclosed any factor such as to affect the validity of Regulation (EEC) No 1709/74 of the Commission;**

2. **Under Regulation (EEC) No 1709/74 of the Commission, cherries put up in a mixture of water and ethyl alcohol must be classified under subheading 20.06 B 1 of the Common Customs Tariff.**

Lecourt Monaco Kutscher Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 11 November 1975

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 22 OCTOBER 1975 [1]

Mr President,
Members of the Court,

The German limited partnership Bagusat KG imports from Yugoslavia cherries intended for the chocolate industry. This fruit is preserved in a flavoured mixture of water and ethyl alcohol.

On 9 September 1974 it submitted a consignment of 30 barrels containing this product to the Berlin-Packhof customs office and stated in its declaration that it came under heading No 08.11 of the Common Customs Tariff relating to 'Fruit provisionally preserved (for example, by sulphur

1 – Translated from the French.

dioxide gas, in brine, in sulphur water or in other preservative solutions), but *unsuitable in that state for immediate consumption'.*

The *ad valorem* duty relating to that heading amounts to 11 %.

The customs authorities, however, classified the goods under heading 20.06 which, under the general description 'Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit', refers in particular under subheading B 1 to preserved fruit containing added spirit. The rate applicable is then 32 %.

This is the origin of the proceedings brought by the Bagusat undertaking before the Finanzgericht Berlin.

This Court has already on many occasions had to take cognizance by means of the procedure laid down in Article 177 of the Treaty of the problem of tariff classification involving either the Notes and Classification Opinions laid down by the Brussels Convention on Customs Nomenclature or the Community Explanatory Notes.

But in the present case it is no longer these notes and opinions the interpretation of which is in question but the validity of Regulation No 1709/74 of 2 July 1974 by which the Commission, acting within the framework of the powers which were conferred upon it by Regulation No 97/69 of the Council on measures to be taken for the uniform application of the nomenclature of the Common Customs Tariff, itself decided in accordance with the opinion of the Committee on Common Customs Tariff Nomenclature that cherries put up in a mixture of water and ethyl alcohol come under heading 20.06 B I within the meaning of this tariff as fruit suitable for immediate consumption.

The action of the Commission is explained by the fact that on 16 January 1973 the Bundesfinanzhof had classified the products in question under heading 08.11 in a preliminary opinion, thus annulling a decision taken by the German customs authorities.

The Commission therefore adopted the regulation in question in order to re-establish what it regards as the correct interpretation of the Common Customs Tariff.

In support of its direct appeal to the Finanzgericht Berlin the plaintiff in the main action contested the validity of that regulation on the ground that the Commission exceeded the limits of the powers which were conferred upon it by the Council and took a decision contrary to the logical structure of the Common Customs Tariff.

The German court stayed the proceedings and requests this Court to give a ruling on the following two questions:

1. Are cherries, which are put up in a mixture of water and ethyl alcohol and which were imported into the territory of Berlin (West) on 9 September 1974, that is, after Regulation (EEC) No 1709/74 came into force, to be classified under heading No 08.11 of the Common Customs Tariff or subheading 20.06 B 1?
2. Is the regulation in question valid in so far as it classifies goods under the latter subheading?

In fact, I share the opinion of the Commission that the solution to the problem of tariff classification which has been referred to this Court depends upon the reply to the second question.

If you accept, in fact, that the regulation is an exact interpretation of the will of the Community legislature expressed by the Council in the Common Customs Tariff there is no doubt that this regulation, which is binding and directly applicable, compels customs authorities and national courts to classify the

product in question in accordance with its provisions.

I shall therefore turn my attention to an examination of the validity of that regulation. The regulations which the Commission is empowered by the Council to adopt to ensure the uniform application of the Common Customs Tariff certainly cannot escape all judical review and the Court of Justice alone has jurisdiction finally to assess their validity. Uniformity need not mean arbitrariness.

The review by the Court must be concerned with the external validity of the regulation as well as its internal validity.

As to the first point, it is not contested that the Commission has been expressly empowered by the Council to adopt regulations to specify the contents of headings or subheadings of the Common Customs Tariff, provided that in so doing it merely specifies or clarifies the provisions of the tariff without modifying them or distorting their scope which is determined by the Council alone.

According to the recitals in the preamble to Regulation No 97/69 of the Council, the measures which are necessary for classifying certain goods in the Tariff and which the Commission has thus been instructed to adopt relate to a particularly technical field; close cooperation is required between the Member States and the Commission when drawing them up.

For this reason a Committee on Common Customs Tariff Nomenclature was set up composed of representatives of these States and presided over by a representative of the Commission. The procedure according to which the powers devolving upon the latter are exercised is not unlike that of the management committees within the framework of the common organizations of the market in agricultural products.

The Commission can in fact adopt the provisions in question only after receiving the opinion of the Committee on Nomenclature and on condition that they are in accordance with that opinion.

Failing this, it is for the Council to give a ruling.

Before adopting Regulation No 1079/74, the Commission did not omit to obtain the opinion of the Committee; it complied with it.

Further, as I have said, it must not have exceeded its powers by taking a decision which would prove to be contrary to rules categorically laid down by the Common Customs Tariff. An examination of the internal validity of the regulation must be broached from that angle. Nevertheless I think that in this field the power of review of this Court is limited and that a declaration of invalidity can be based only on a clear error or on misuse of powers. This Court cannot substitute its own evaluation for that of the Committee on Nomenclature.

Having made that observation, I shall broach the substance of the problem.

First of all we must acknowledge that certain arguments may at first sight justify classifying the products in question under heading 08.11.

First of all, the enumeration given by that tariff heading of fruit preservatives is not limitative and alcohol is a preservative; it is therefore possible that a mixture of water and ethyl alcohol may be only a provisional preservative, at least if the alcoholic strength of the mixture is relatively low.

But the first difficulty arises from the fact that above a certain alcoholic strength this mixture is an agent which can preserve not merely provisionally and for a period limited to the time strictly necessary for transporting and using the product but for a longer period, which is moreover an illustration of the rule that nothing lasts as long as what is temporary.

It appears that the mixture in question in the present case has sufficient alcoholometric strength for it to be regarded as such.

Certainly, it may be considered that Regulation No 1709/74 is in that respect somewhat obscure in that it does not specify what is to be understood by the expression 'alcoholic strength sufficient for preservation ... for a limited period'. It may nevertheless be deduced therefrom that that regulation is certainly not intended to apply to *all* mixtures of water and alcohol however low their alcoholic strength.

The second difficulty lies in the fact that not only does the alcohol used provisionally preserve the cherries, but that far from being removed or reduced — only the water is removed — it is found in the processed product and sold finally by chocolate manufacturers and is inclined to increase the value of that product.

Further, for the purpose of classification under heading 08.11 or on the other hand under heading 20.06, neither the method of packing nor the final *use* of the product are decisive in themselves.

It follows in fact both from the Explanatory Notes to the Brussels Nomenclature and from the Explanatory Notes to the Customs Tariff of the European Communities that although fruit under heading 08.11 is *intended mainly* for processing (for example jam and candied fruits), preparations under heading 20.06 are not necessarily and always intended for immediate consumption, but may equally be used in confectionery or the manufacture of jam or pastries.

In the same way, although the fruit to which heading 08.11 applies is generally put up in barrels, trays, etc., preparations to which heading 20.06 applies may be contained in cans, jars, barrels or vacuum packs.

On the other hand we find in the Notes to the Brussels Nomenclature an interesting note which confirms the interpretation which I am about to propose to you: heading 08.11 does not include a number of products more specifically mentioned under other headings even if, botanically speaking, those products are also fruit.

It is thus, finally, the suitability or unsuitability for immediate consumption which constitutes the ultimate criterion.

In this respect it must be mentioned that heading 08.11 concerns, according to the Explanatory Notes to the Brussels Nomenclature, only fruit which has been treated *solely* to ensure its provisional preservation during transport or storage prior to use, provided that it remains unsuitable for immediate consumption in that state. It follows from this that fruit which has been subjected to a process which, whatever may be the purpose to which the fruit is to be put, does not have the effect of making it unsuitable for immediate consumption in that state must not be classified under that heading.

Altough there is no doubt, apparently, that the product in question is not normally intended for direct consumption and although it is true that it is not sold in that form or sold in fact for that purpose these facts do not necessarily imply that the addition of a mixture of water and ethyl alcohol as a preservative has made it unsuitable for consumption. Even if the strength of this mixture can ensure preservation only for a limited period, the cherries are not because of this fact alone made unsuitable for direct consumption, provided that they are consumed before the preservation period expires.

The argument that the product thus treated accords neither with the taste nor the habits of consumers cannot be accepted. It aims in fact at having a subjective criterion adopted whilst objective considerations alone may be accepted to determine a tariff classification.

In these circumstances, it appears to me that the Commission has correctly interpreted the Common Customs Tariff by classifying the product in question under subheading 20.06 B 1.

Lastly, it seems to me that in any case the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff (Section I A 3) must be applied whereby:

'When for any reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

(b) .....

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which involves the highest rate of duty *and if this rate is the same for several headings, they shall be classified under that one of such headings which occurs latest in the nomenclature of the Tariff.'*

In view of this, reassured by the opinion of the Committee on Nomenclature, the Commission acted as a customs office would be required to do. From the beginning it has examined whether the products in the present case could be classified under heading 20.06 which is the most specific, which occurs latest and which involves the imposition of the highest duty. The possibility of classifying them under heading 08.11 was, so to speak, only of a subsidiary or residual nature.

Although the Commission, faced with differences of interpretation, tried to adopt a decision imposing a uniform application of the tariff, the fact that the classification accepted resulted in the highest rate of duty does not mean in any way that that this is a case of misuse of powers, otherwise such a misuse of powers would have its origin in the Common Customs Tariff itself.

In these circumstances, Regulation No 1709/74 cannot be declared invalid unless it appears clear that the classification of the products which was accepted in the present case is indefensible and that would only be the case if the preserving process to which the product in question was subjected made it not only unsuitable for immediate consumption but irreparably inedible.

My opinion therefore is that this Court should rule that the examination of the questions which have been referred has not revealed any factor which can affect the validity of Regulation No 1709/74 of the Commission of 2 July 1974 and that, in consequence, cherries put up in a mixture of water and ethyl alcohol which were imported into the Community after the entry into force of that regulation must be classified under tariff subheading 20.06 B I of the Common Customs Tariff.