clature for the Classification of Goods in Customs Tariffs are an authorative source for the purposes of the interpretation of the headings to the Common Customs Tariff.

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Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 8 December 1970.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 17 NOVEMBER 1970[1]

Mr President,
Members of the Court,

The national proceedings from which the questions with which I have to deal today have arisen concern the correctness of a binding customs tariff notification issued to the plaintiff company by the Oberfinanzdirektion Munich on 24 October 1968. The classification relates to a product described as 'Voltem' baking emulsifier, consisting as to 51.35% of sucrose and in addition of approximately three parts fat in the form of triglycerides and two parts diacetyltartaric-acid-ester. This product is used in the manufacture of bakery products, in a quantity usually of about 2% to 3% in relation to flour. It is used as an emulsifier and stabilizer to ensure dough with a stable yeast, a greater volume of bakery product and a finer porosity and crumb in bread. The classification at issue related to tariff heading 38.19 of the Common Customs Tariff the products of which are described as 'chemical products and preparations of the chemical or allied industries (including those consisting of natural products), not elsewhere specified or included, residual products of the chemical or allied industries, not elsewhere specified or included'. With this tariff classification the products in question would have been subject solely to the import duty prescribed in the Common Customs Tariff which covers food preparations not elsewhere specified or included containing sugar, dairy products, cereals or cereal-based products. In this case, according to Article 10 of Regulation No 160/66 of the Council of 27 October 1966 (OJ 1966, p. 336) laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products, as amended by Regulations Nos 61/67 and 80/67 (OJ 1967, pp. 837 and 1593) a higher level than the normal rate of duty was payable on imports from third countries as 'food preparations, etc.' come within the scope of application of this regulation. As you know, such levies serve *inter alia* to cover 'the incidence of the difference between the prices' of the processed base products 'in the importing Member State and the prices prevailing for imports from third States'.
Faced with these alternatives the Oberfinanzdirektion Munich decided, in its

1 — Translated from the German.

binding customs tariff notification of 24 October 1968, that in view of the fact that the Voltem baking emulsifier was composed of nutritive substances it could only be classified under tariff heading 21.07, that is to say, as a 'food preparation'.

However, Deutsche Bakels did not agree with this. It considers Voltem to be a chemical product and accordingly demands that it be classified under tariff heading 38.19. In order to obtain rectification of the customs tariff notification it made a direct appeal (Sprungklage) to the Bundesfinanzhof. In support of its view it relied on the wording of the Explanatory Notes to the Brussels Nomenclature which were published by the Customs Cooperation Council under the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 and under the Convention, concluded at the same time, concerning the Establishment of a Customs Cooperation Council. There the note relating to tariff heading 21.07, 'Food preparations, not elsewhere specified or included', states: 'Provided that they are not covered by any other heading of the Nomenclature, the present heading covers: ... (B) Preparations used because of their nutritional or flavouring properties, in the making of beverages or foodstuffs. The heading however excludes all preparations which, because of their ingredients and the small proportions in which they are normally used, are clearly added for other purposes. Examples are meat-tenderizing products, emulsifiers, stabilizers, clarifiers, softeners, etc., whether or not mixed with foodstuffs (sugar, milk powder, etc.), used as a vehicle to facilitate dosing (generally heading 38.19)'. From this Deutsche Bakels deduced that tariff heading 21.07 only covered preparations which are intended for human nutrition and which because of their nutritive value or taste are used in the manufacture of foodstuffs for human consumption. On the other hand, preparations which, because of the nature of their ingredients and the small quantity in which they are normally used, are expressly added for purposes other than those just described, such as, for example, emulsifiers and stabilizers, even when mixed with foodstuffs, and which were intended to serve as vehicles to facilitate dosing, usually came under tariff heading 38.19. Consequently, since the sugar contained in Voltem merely served as a vehicle to facilitate or enable dosing and since Voltem was only used in the small quantity of 1% to 2% and served purposes other than nutrition and flavouring, it could only be classified under tariff heading 38.19. In reply, the Oberfinanzdirektion reiterated in the proceedings the view laid down in its customs tariff notification. It relied in particular on the German explanatory notes to the customs tariff. According to those notes, preparations from nutritive substances were excluded from tariff heading 38.19, which only covered additives for baking which consist of monoglycerides and diglycerides and substances other than nutritive substances. However, as Voltem was composed of nutritive substances it had to be classified under tariff heading 21.07.

Thus the Bundesfinanzhof is faced with a problem of tariff classification which, at the relevant date of the customs tariff notification, could not be solved by means of explanatory provisions of Community law (as you know, such explanatory provisions for tariff heading 21.07 were first issued in the Regulation of the Commission of 21 January 1970 (OJ L10 1970, p. 9). In view of the fact that the case concerned a problem of Community law, namely the differentiation between two headings of the Common Customs Tariff contained in Regulation (EEC) No 950/68 (OJ L172 1968, p. 1) one of which moreover is mentioned in Regulation No 160/66 of the Council laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products, the Bundesfinanzhof by an order of 25 February 1970, stayed the proceedings and referred the following questions for a preliminary ruling in accordance with Article 177 of the EEC Treaty:

'1. If explanatory notes at the Community level have not yet been issued for the headings of the Common Customs Tariff, can explanatory notes issued by the national authorities be recognized

as a binding interpretation of these tariff headings?

2. If Question 1 is answered in the negative: if explanatory notes at the Community level have not yet been issued for headings of the Common Customs Tariff, is their interpretation determined by the Explanatory Notes to the Brussels Nomenclature of 1955 relating to these headings?

3. If Question 2 is answered in the nega tive: how is the distinction to be made between 'food preparations' under heading 38.19 of the Common Customs Tariff? Is the decisive element for this distinction the use (to which the product may mainly be put), the (predominant) attribute of taste or its content in food substances?'

After taking into consideration the written observations submitted by the Federal German Government, the Commission of the European Economic Community and the plaintiff, and in view of the oral submissions of the parties to the proceedings, I should like to submit the following views on the problems raised.

1. As far as the first question is concerned, that is to say, whether it is possible to issue a binding interpretation of the tariff headings of the Common Customs Tariff in *national* explanatory provisions, my answer can be quite short. All that is necessary with regard to this point has in fact been said in previous decisions of the Court, namely, in the judgments in Case 40/69 ([1970] E.C.R.) and Case 74/69 ([1970] E.C.R.), as all those concerned in the proceedings have agreed. Nor were any reasons indicated which would justify a change in this case-law.
Thus it is agreed that in the interest of the uniform operation of the common agricultural market throughout the Member States the descriptions of goods under the relevant tariff headings of the Common Customs Tariff must have the same scope, and that in view of Community import duties (as laid down in regulations under Article 189 of the EEC Treaty) the Member States no longer have any sovereignty in tariff matters. Even where there are no provisions of Community law elucidating headings of the customs tariff which have been incorporated in such regulations (which was the case at the relevant date in the present proceedings before the enactment of Commission Regulation (EEC) No 107/70), national measures implementing the regulations cannot under any circumstances be adopted to affect or alter the scope of the provisions of Community law. Thus independent provisions of national law in this field, that is to say, binding rules of interpretation concerning the scope of descriptions of goods, which would have to be applied, where there are difficulties of classification for tariff purposes, are precluded. If these principles adopted by the Court apply to the descriptions of goods coming under the agricultural market organizations, they must also apply to the regulation at issue here, Regulation No 160/66 of the Council laying down the trade arrangements for certain goods resulting from the processing of agricultural products and its system of levies, for it is closely connected in its subject-matter with the agricultural market organizations and constitutes a necessary complement to them.
I do not think that there is any need for further discussion on this point and I therefore suggest that the first question should be answered in the negative.

2. With its second question the Bundesfinanzhof would like to know whether the explanatory notes to the Brussels Nomenclature of 1955 are decisive for the purposes of interpretation in the absence of any explanatory provisions of Community law for the tariff headings of the Common Customs Tariff. On this question, too, the parties have reached essentially the same conclusions (I shall deal with the differences in their views later).
The question arises from the fact that all the Member States of the Community are parties to the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 and are consequently obliged to base their own customs tariffs on the model

customs tariff set out in the schedule to the Convention. The question further arises from the fact that the Brussels Nomenclature was also adopted by the Common Customs Tariff upon which the trade rules at issue here are based. However, it must be stressed that the Brussels Nomenclature only contains the principal headings and that its descriptions of products are necessarily formulated in a very general manner. Therefore the Brussels Customs Council, which was set up under the Convention, concluded at the same time, regarding the Establishment of a Customs Cooperation Council, was granted the power to prepare detailed official explanatory notes and definitions for certain products to ensure the uniform interpretation and application of the Nomenclature. To resort to such explanatory notes in doubtful cases of tariff classification under the Common Customs Tariff must accordingly be natural (as I have already stated, moreover, in my opinions in Case 40/69 (1970 E.C.R.) and Cases 72/69 and 74/69 (1970 E.C.R.).

However, this finding cannot of course suffice in the present case. Further details are necessary (and here I must go into the differences in the views of the parties that I have already mentioned).

The first consideration is that not only is a reference to the Explanatory Notes to the Brussels Nomenclature possible but also the classification opinions which are issued by the Nomenclature Committee of the Customs Cooperation Council for certain products. Its existence is due to the fact that even the Explanatory Notes to the Brussels Nomenclature are not yet precise enough and need further explanation with regard to particular products. Moreover, the novelty of certain products or the use of new scientific and technical knowledge may make a development of the explanatory notes necessary. In this respect also, that is to say, to prepare the way for a new tariff classification practice, the classification opinions (contrary to the views of the plaintiff) play an important part. Thus the Federal German Government and the Commission rightly claim that the classification opinions should be taken into account in the absence of clear explanatory provisions of Community law.

A second consideration is even more important. Since the Brussels Customs Cooperation Council undeniably has no legislative powers, no power to take decisions, there can certainly be no question of the Explanatory Notes to the Brussels Nomenclature being binding in law. At most the Member States are indirectly bound to observe them because it must be accepted that there is a duty to apply the customs nomenclature in a uniform manner. National practice has obviously hitherto taken this line since the Explanatory Notes to the Brussels Nomenclature have largely been adopted as the basis of national explanatory provisions and usually been followed by customs authorities. Seen in this light, the Explanatory Notes to the Brussels Nomenclature may thus be regarded as having at most a certain *degree of authority* (and moreover it is solely in respect of this that the Bundesfinanzhof makes its enquiry), that is to say, it may merely be said that it is advisable to take into consideration the Explanatory Notes to the Brussels Nomenclature as an aid to interpretation, as expert guidance in the solution of questions of tariff classification. This limitation is important in so far as, in spite of the absence of particular explanatory provisions of Community law, clear indications may occasionally be derived from Community law in some other way leading to an interpretation diverging from Explanatory Notes to the Brussels Nomenclature. Here general tariff classification provisions or special interpretation provisions play an important part. However, in addition to this, the fact that in particular regulations in the field of agriculture reference is made to the tariff headings of the Common Customs Tariff can be of significance. Of course this means that the special interests with which such regulations are concerned must be taken into account in the interpretation of the descriptions of goods. A change of meaning may thus occasionally ensue, one which departs to a certain degree from that of the Common Customs Tariff. I shall deal with this aspect in detail when I come to discuss the answer to the third question.

Thus it is only a combination of all these considerations which will permit a meaningful answer to be given to the second question, and which nevertheless undoubtedly detracts from the clarity of that answer. To summarize, I would therefore submit: in the absence of special explanatory provisions of Community law, or where these contain gaps, the Explanatory Notes to the Brussels Nomenclature and the classification opinions issued by the Brussels Customs Council are of great weight for the purposes of the application of the Common Customs Tariff, in the sense that they are an authoritative, although not binding, aid to guidance and interpretation (which also seems to accord with the foreword to the Commission's explanatory provisions). However, they must give way when provisions of Community law conclusively and clearly demand a different tariff classification.

3. Accordingly, since it is not possible to answer the second question to the effect that the Explanatory Notes to the Brussels Nomenclature are exclusively authoritative, the third question put by the Bundesfinanzhof must be examined. However, it is not necessary to ascertain general criteria for differentiating between the terms 'food preparations' and 'chemical preparations' (which the wording of the question might suggest). This would extend far beyond the cause of the present proceedings and moreover, as the plaintiff rightly points out, would be far from easy, in view of the diversity of the products in question. We must concentrate on products of the kind at issue in the main proceedings, that is to say, baking additives, and attempt to answer the question of differentiation with this limitation.

You will remember the positions adopted by the parties on this question. On the one hand, there is the view of the Federal German Government and the Commission that the criteria applicable lead to the classification of the baking additive as food preparations. The plaintiff on the other hand advocates the application of a method whereby the baking additive imported by it must be classified as a chemical preparation. Let us see then how we can resolve this dispute.

It seems suitable firstly to make a few observations regarding the texts of the Customs Cooperation Council which, as I have said, can be authoritative for the purposes of tariff classification. According to the explanatory notes to tariff heading 21.07 mentioned at the outset, food preparations are 'preparations which are used because of their nutritional or flavouring properties in the making of beverages or foodstuffs'.

The notes further state that (possibly of particular importance with regard to baking additives) the heading excludes 'preparations which, because of their ingredients and the small proportions in which they are normally used, are clearly added for other purposes'. Accordingly the classification depends on the use, the specific effects and the quantity normally used. As against this, the 1967 classification opinions classify certain baking additives as food preparations. This was because they are used *inter alia* to a considerable extent in food, but also because of their essential composition. As you know, the Federal German Government and the Commission rely strongly on these classification opinions. In their view they should form the beginning of a new tariff classification practice to which the explanatory notes will have to be adjusted shortly.

Two questions then arise from these notes. First, it must be considered whether the classification opinions, which, as more recent and more specific pronouncements, take precedence over the notes, also cover the products at issue in the main proceedings (in which case it would not be necessary to examine the views on interpretation submitted by the Commission derived in particular from the Community agricultural regulations and pointing in the same direction). Secondly, it must be asked whether the basic rules of the Brussels Explanatory Notes to tariff heading 21.07 or their exception clauses apply to baking additives of the kind at issue here (for the answer to this question, too, might make an examination of the considerations on tariff matters derived from the Community regulations superfluous).

As you know, as far as the first question is concerned, the parties disagree. The plaintiff contended that the classification opinions related to a different case: the baking additives imported by it have a substantially different composition and are always used in small quantities only. Therefore the classification opinion could not be applied. The Federal German Government and the Commission, on the other hand, regard the differences as irrelevant. However, these disputed questions cannot be solved here, for they depend not only on problems concerning the proportions of additives required in use but also on the comparability of chemical components (namely, on the one hand, the mono- and diglycerides mentioned in the classification opinions, and, on the other hand, the diacetyl-tartaric-acid-ester described by the plaintiff as characteristic of Voltem). Nevertheless, such problems must be solved by the German court and accordingly, as I have mentioned, the examination of tariff classification may possibly be shortened. Accordingly, for the present purposes it only remains to hold that nothing can be extracted directly from the classification opinions for the solution of the proceedings before this Court.

Thus with regard to the questions raised by the Federal German Government and the Commission in relation to the Brussels explanatory notes, the following observations must be made. If I understand correctly, the Federal German Government wishes to apply the first sentence of the Brussels explanatory notes relating to tariff heading 21.07 to the baking additive at issue because, as a pure emulsifying agent, it is also intended to improve the taste. However, it seems to me obvious that this argument cannot be sustained, for that sentence expressly mentions '*properties* of taste' (Geschmacks*eigenschaften*), that is to say, qualities that the baking additive itself must have. Therefore, the argument of the Federal German Government can scarcely justify the tariff classification that it advocates. On the other hand, the Commission seems to have doubts about the applicability of the exceptional provisions in the Brussels explanatory notes, that is to say, the applicability of the sentence that states: 'The heading however excludes all preparations which, because of their ingredients and the small proportions in which they are normally used, are *clearly* added for other purposes'. The Commission is not convinced that baking additives of the kind at issue here are clearly used for other reasons than because of their nutritive value or because of their qualities of taste. The Commission is, on the contrary, of the view that it *is not possible* to decide beyond all doubt for what reasons and to what extent such baking additives are used. Since Voltem is mainly composed of sugar and fat it is possible that it might be used to a greater extent in bakery products in the manufacture of which sugar and fat played a part, and thus might be used to improve the taste. The plaintiff emphatically disputes this and claims that if the characteristic component of Voltem, diacetyl-tartaric-acid-ester, is used in larger quantities it causes a deterioration in taste and therefore can only be used in small quantities. The fact that manufacturing costs for diacetyl-tartaric-acid-ester are considerably greater than those for sugar and fat and finally the fact that according to the national food law, diacetyl-tartaric-acid-ester is classified as an additive ('Fremdstoff') and is only permitted in limited amounts in certain bakery products, have the same effect. Nevertheless, the solution of this dispute, as is immediately obvious, must also be left to the German court. Thus, in other words, in view of the questions of fact in dispute, it cannot be held, within the scope of the proceedings for a preliminary ruling, that the considerations mentioned by the Commission with regard to the Brussels explanatory notes conclusively lead to a solution to the question of tariff classification in the sense advocated by the Commission.

Thus it only remains to examine whether any provisions of Community law, as indicated in the second question, require the classification of baking additives as food preparations, contrary to the classification apparently suggested by the Brussels explanatory notes. We therefore reach the part of the examination which, in spite of the provisional authority in principle of the Brussels explanatory notes, will have to be

carried out again on the basis of Community law.

In this connexion there must certainly be left out of account Commission Regulation (EEC) No 107/70 of 21 January 1970 regarding the classification of products under tariff heading 21.07 F of the Common Customs Tariff, which now makes the tariff classification of preparations which are intended to be added to flour or dough for the manufacture of baking products dependent on *quantitative criteria* and in the event of a preponderance of food components classifies them under tariff heading 21.07 (food preparations). This regulation did not come into force until 30 January 1970 and therefore had not yet come into existence at the relevant period in the present proceedings. As the plaintiff rightly maintains, it cannot be applied retroactively. Moreover, in my opinion, the reference made by the Commission to the wording and meaning of the relevant tariff headings and their position in the tariff system must be rejected, for it can scarcely be said precisely in view of the identical Brussels Nomenclature, and in particular of the abovementioned explanatory notes and classification opinions, that safe conclusions in the sense of a definite interpretation could be drawn from that reference.

Thus the only provision to be taken into account is Regulation No 160/66 of the Council laying down the trade arrangements for certain goods resulting from the processing of agricultural products which, in order to define its scope of application refers to certain headings of the Common Customs Tariff, including food preparations. Therefore, taking into account its object and the interests concerned we must ascertain whether the term 'food preparations' in relation to baking additives must be defined otherwise than in accordance with the Explanatory Notes to the Brussels Nomenclature. The Commission has convincingly described the purpose of the regulation. The special system of levies laid down in Regulation No 160/66 was instituted to protect the industry processing agricultural products and indirectly to protect agriculture. The necessity for it arose from the fact that manufacturers outside the Community can purchase the necessary agricultural products at lower world-market prices and thus have a competitive advantage over their competitors within the Common Market. If this was not taken into account extensive imports of processed agricultural products at favourable prices might considerably jeopardize the common organizations of the markets in agriculture. It may therefore be deduced from the interests concerned and the scheme of Regulation No 160/66 that the classification of a product depends not only on its suitability and purpose as food but also decisively on its food *content*. One can only be true to the meaning of the Regulation by including all goods which consist to a considerable extent of agricultural products and in which the proportion of agricultural products constitutes a factor determining the price. In this way, in fact, one arrives at the conclusion that *quantitative* criteria are authoritative, as both the Federal German Government and the Commission maintain. Thus the meaning and purpose of Regulation No 160/66 show that the criteria for the purposes of tariff classification that were subsequently expressly laid down in Regulation (EEC) No 107/70 of the Commission of 21 January 1970 are authoritative for baking additives. In other words, classification as a food preparation decisively depends on whether a product is used in food and is predominantly composed of food. The answer to the third question must be formulated accordingly. It will assist the German court ,to deal with the tariff classification at issue if the clarification of the question connected with the abovementioned customs tariff notifications has not already provided a clear solution. Contrary to the plaintiff's view, it is not necessary to refer to the general tariff classification provisions of the Community (tariff classification according to the substance determining the character or according to the greatest similarity), for this would only be necessary if a classification were not possible on the basis of a systematic interpretation of the relevant provisions.

4. To summarize I would therefore suggest the following answers to the questions put by the Bundesfinanzhof:

(a) Even where explanatory notes to the headings of the Common Customs Tariff have not yet been issued by the Community authorities, national explanatory provisions cannot have the effect of binding rules of interpretation.

(b) Where there are no explanatory notes under Community law for headings of the Common Customs Tariff, the Explanatory Notes to the Brussels Nomenclature including the Classification Opinions of the Brussels Customs Cooperation Council are an authoritative aid to interpretation and guidance in tariff classification questions if there are no indications in provisions of Community law (particularly in the field of agriculture) which call for a different tariff classification.

(c) Baking additives which are used in food must be classified as food preparations within the meaning of the Annex to Regulation No 160/66 of the Council of 27 October 1966 if they are predominantly composed of food.