OPINION OF ADVOCATE GENERAL TESAURO

delivered on 16 December 1992 *

Mr President,
Members of the Court,

1. In the present case, the Bundesfinanzhof has referred to the Court four questions for a preliminary ruling on the classification for the purposes of the Combined Nomenclature of an amylaceous product (with a starch content of 99% and acetyl content of 0.65% by weight, determined by the Ewers method) made up of native potato starch mixed with neutralized potato starch from which the acetaldehyde has been removed.

The product in question is intended for use in the paper and textile industries and is also fit, by its nature, for human consumption, although it may not be used in foodstuffs under the national legislation.

2. It should be noted at the outset that starches are in principle classified in Chapter 11 of the Combined Nomenclature (products of the milling industry: malt, starches, inulin, wheat gluten) and that potato starch as such is mentioned more particularly in subheading No 1108 13 00.

However, note 1(b) to the chapter in question states that it does not cover prepared flours, meals or starches of heading No 1901, so that it is necessary, by way of preliminary, to ascertain whether the product in question might be classifiable under the latter heading.

In that connection, help may be available from the explanatory notes on the harmonized system, [1] according to which heading No 1901, relating in particular to food preparations based on starch not specified or included elsewhere, covers a number of food preparations with a basis of flour or meal, starch or malt extract, which derive their essential character from such materials. Those preparations, the explanatory notes go on to say, are often used for the rapid preparation of beverages, gruels, infant foods and dietetic foods, and may also constitute intermediary preparations for the food industry.

Whilst it is true that the physical characteristics of the product in question are no obstacle to its classification under heading No 1901, it should nevertheless be noted that that heading appears to relate specifically to products intended for the food industry, whilst the amylaceous mixture at issue, although in principle fit for human consumption, does not in fact appear to be intended for that purpose and the national

1 — The Court has held that the explanatory notes, although not capable of altering the text of the customs tariff, are an important aid to interpretation, enabling the content of the various customs headings and subheadings to be clarified or particularized.

* Original language: Italian.

legislation even seems to prohibit its marketing as a foodstuff.

3. Before reaching the conclusion that the product in question, which is a mixture of potato starch and potato starch ester, may be classified under subheading No 1108 13 00, which specifically covers only potato starch, it is necessary to ascertain whether there are any other headings of the Combined Nomenclature which are better suited to that product.

The plaintiff in the main proceedings maintains in particular that an amylaceous mixture of the kind described above would be better classified under subheading No 3505 10 50, covering esterified or etherified starches.

According to the explanatory notes for the harmonized system for heading 3505, dextrin and the other modified starches covered by that heading are obtained by the transformation of starches through the action of heat, chemicals (for example acids, alkalis) or diastase and starch modified, for example, by oxidation, esterification or etherification. As examples of esterified starches, the explanatory notes mention starch acetates used in the paper or textile industries and starch nitrates used in the manufacture of explosives.

Again according to the explanatory notes, heading No 3505 does not include starches that are not prepared (heading No 1108) or glazings and dressings based on starches or dextrins of a kind used in the paper, textile, leather or like industries (heading No 3809).

4. It is therefore necessary to establish whether the product in question may be regarded, for the purpose of customs tariff classification, as modified starch and, more particularly, starch modified by esterification.

It must be borne in mind that, according to the order for reference, the process used in the present case does not give rise to genuine esterification of the starch since, before being mixed with the native starch, the potato starch ester has had the acetaldehyde removed and been neutralized.

Moreover, as regards the objection made by the plaintiff in the main proceedings to the effect that the product in question is not externally distinguishable from a potato starch ester with a low degree of substitution, it must be observed that, as is apparent from the case-law of the Court, [2] the fact that two products do not possess objective properties or characteristics capable of distinguishing one from the other does not mean that they cannot be treated differently, according to other objective factors of which evidence can be given.

5. It is true that, according to general rule 3(b) for the interpretation of the Combined Nomenclature, mixtures and composite goods consisting of different materials or made up of different components may be classified by reference to the material or component which gives them their essential character.

2 — See the judgment in Case 149/73 *Witt* [1973] ECR 1587.

However, as the Commission has rightly pointed out, the respective proportions of the starch ester and the native starch give the impression that it is the latter which gives the product its character. And there is nothing in the order for reference to indicate that the potato starch ester in the mixture gives it its essential character, whereas an expert's report prepared by the Federal Research Institute for Cereal and Potato Processing cited by the national court indicates that the character of the native starch is not altered by dry mixing with the potato starch ester.

Nor does it seem to me, in the light of what has been said, that subheading No 3505 10 90, which covers other modified starches, can come into play because that subheading also presupposes that the original product has undergone considerable modification. The explanatory notes give as an example dialdehyde starch and starch treated with formaldehyde or epichlorohydrin.

6. The national court then asks specifically whether the product in question, the use of which, it points out, is not apparent from its composition or presentation, can be classified under the appropriate subheading of heading No 3809 as another preparation of a kind used in the textile and paper industry with a basis of amylaceous substances not elsewhere specified or included.

I would observe that note 1(b) to Chapter 38 appears to rule out such a classification: it states clearly that that chapter does not include mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs.

But it is above all the explanatory notes that persuade me to exclude that possibility. According to them, heading No 3809 covers a wide range of products and preparations of a kind generally used during processing or finishing of yarns, fabrics, paper, paperboard, leather or similar materials.

Those notes also make it clear that such products fall within that heading because of their composition and presentation, which give them the specific use in the industries cited in the heading (textile, paper and leather) and similar industries.

However, that classification based on the use of the product, which in fact appears necessary for the purposes of classification under this specific tariff heading precisely because of the many possible ways of using starch-based products, is inappropriate to the product in question, which, as emphasized by the national court itself, does not appear, by virtue of its nature and presentation, to be specifically intended for use in the abovementioned chemical industries.

7. If headings Nos 1901, 3505 and 3809 are excluded, there is no alternative but to return to the starting point, that is to say heading

No 1108 and more particularly subheading No 1108 13 00, potato starch, as required by general rule 3(b), according to which mixtures may be classified by reference to the material which gives them their essential character.

According to the plaintiff in the main proceedings, however, such a classification of the product would be precluded by the Commission's classificatory Regulation No 28/90 of 4 January 1990. [3]

Pursuant to Article 1 and paragraph 3 of the annex to that regulation, subheading No 1108 13 00 is to include products in the form of fine white powder, consisting of a mixture of native potato starch and small quantities of acetylated potato starch or very weakly acetylated potato starch, and having a starch content by weight of 95% or more and an acetyl content by weight of less than 0.5%. The reasons set out in the annex indicate that, by virtue of their characteristics (notably their low acetyl content), those products should be regarded as starches under CN Code 1108 13 00 and not esterified starches under CN code 3505 10 50.

3 — OJ 1990 L 3, p. 9.

According to the plaintiff, those provisions confirm that the amylaceous product in question, having an acetyl content of 0.65%, falls to be classified under subheading No 3505 10 50.

8. In the first place I would point out that, as the Commission rightly observes, there is no reason to conclude that that regulation seeks to draw a distinction, based on acetyl content, between native starch to be classified under subheading No 1108 13 00 and esterified starch falling under heading No 3505 10 50; the regulation merely makes it clear that an amylaceous product having the characteristics described in the annex must in all cases be classified under subheading No 1108 13 00, but it does not give clear guidance as to the classification of an amylaceous product with an acetyl content slightly in excess of 0.5%.

Secondly, it must be borne in mind that the Commission classificatory regulation could not in any event modify the text or the scope of the Combined Nomenclature and that the Court has consistently held that the decisive criterion for the customs classification of products is to be based on their objective properties and characteristics, as described in the tariff heading and the notes relating to the sections or chapters of the Common Customs Tariff.

Although it may be true that the acetyl content of the starch is indicative of the degree of substitution that has taken place, in other words it discloses the extent to which the starch has been modified, it is also true that an acetyl content slightly higher than that indicated in paragraph 3 of the annex to Regulation No 28/90 is not in itself a sufficient factor to render the product at issue classifiable as esterified starch.

9. In the light of the foregoing considerations, I suggest that the Court give the following answer to the questions submitted by the Bundesfinanzhof:

The Combined Nomenclature must be interpreted as meaning that an amylaceous product (having a starch content of 99% and an acetyl content of 0.65%, determined by the Ewers method) made up of native potato starch mixed with neutralized potato starch ester from which the acetaldehyde has been removed, which is intended for use in the paper and textile industry and is also suitable, by virtue of its nature, for human consumption, although such consumption is not authorized by the national legislation on food products, must be classified under subheading No 1108 13 00.