

OPINION OF ADVOCATE GENERAL
TESAURO

delivered on 12 December 1996 ^{*}

1. In these proceedings the Bundesfinanzhof (Federal Finance Court) has made references to the Court for preliminary rulings on the tariff classification of potato starch contained in a food product having an acetyl content of up to 0.74% by weight.

rather esterified starch,¹ which, under the provisions in force, did not give rise to any entitlement to the export refunds and monetary compensatory amounts provided for in respect of native potato starch.

Facts and proceedings

2. Between March 1987 and February 1988, Ludwig Wünsche & Co. ('Wünsche'), a company incorporated under the laws of Germany whose registered office is in Hamburg, requested customs clearance for considerable quantities of Perfectamyl KKS, a product intended for export to third countries, from customs offices in various places in Germany. That product was declared as a food preparation containing 96.5% potato starch (Case C-275/95) or as potato starch with a starch content equal to or greater than 78% (Cases C-274/95 and C-276/95). Following checks carried out on the starch used in the manufacture of the exported products, the customs office (Hauptzollamt Hamburg-Jonas; 'the Hauptzollamt') concluded that Wünsche had not exported native potato starch, but

Consequently, the Hauptzollamt, on the one hand, ordered Wünsche to repay the sums unduly received (Cases C-275/95 and C-276/95) and, on the other hand, refused to pay it the export refunds and monetary compensatory amounts requested (Case C-274/95).

The Finanzgericht (Finance Court), before which Wünsche brought the matter, upheld those decisions. According to the analyses carried out, the exported products contained potato starch with an esterification level greater than 0.5% (0.61% in Case C-275/95, 0.74% in Case C-276/95 and 0.67% in Case C-274/95), and should therefore be regarded as esterified starch and classified under heading No 39.06 of the Common Customs

^{*} Original language: Italian.

1 — According to the orders for reference, esterification is to be understood as any process effecting a chemical change in native starch by means of the use of organic or inorganic acids.

Tariff ('CCT') and under subheading No 3505 10 50 of the Combined Nomenclature ('CN').

3. Wünsche appealed to the Bundesfinanzhof against the decision of the Finanzgericht, alleging that headings Nos 11.08 and 39.06 of the CCT and the corresponding subheadings Nos 1108 13 00 and 3505 10 50 of the CN had been wrongly interpreted. In support of its appeal, it relied on the judgment in *Emsland-Stärke*,² in which it was held that an acetyl content slightly higher than 0.5% did not preclude classification under the customs heading for native starch. It also argued that that ruling could not be read as subject to exceptions and/or limitations on account of the nature of the product under consideration.

For its part, the Hauptzollamt argues that *Emsland-Stärke* was concerned only with the classification of a product made up of a mixture of native starch and esters of potato starch, with the result that what was held in that case cannot apply to the product under consideration, which is, by contrast, a homogeneous product.

4. By orders of 20 June 1995, the Bundesfinanzhof stayed the three proceedings and referred two substantially similar questions to the Court for a preliminary ruling. By the

first, it asks whether the customs classification of esterified potato starch depends on its acetyl content and therefore on the extent of its esterification; if so, it asks what acetyl content would preclude esterified potato starch from being classified under heading No 11.08 A. IV of the CCT (and under the corresponding subheading No 1108 13 00 of the CN).

Relevant legislation

5. As regards the exports carried out by Wünsche during 1987 (Cases C-275/95 and C-276/95), the relevant version of the CCT is that resulting from Council Regulation (EEC) No 3618/86 of 24 November 1986, containing the most recent amendment to Regulation (EEC) No 3331/85.³

According to that regulation, starches are in principle to be classified under heading No 11.08, with potato starch coming under subheading No 11.08 A. IV; esterified starches, however, are to be classified under heading No 39.06 (subheading No 39.06 B. I). According to the explanatory notes to the

² — Case C-256/91 *Emsland-Stärke* [1993] ECR I-1857.

³ — OJ 1986 L 345, p. 1.

harmonized system⁴ relating to the latter heading, esterified starches include, for example, acetates of starch, used above all in the textile and paper industries, and nitrates of starch, used in the manufacture of explosives.

As regards the exports carried out by Wünsche in 1988 (Case C-274/95), the version of the CN applicable was adopted by Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.⁵ In it, starches are classified under heading No 1108 and potato starch, as such, under subheading No 1108 13 00. According to the relevant explanatory notes, heading No 1108 does not include dextrans and other modified starches, which are covered by heading No 3505. Subheading No 3505 10 50, under which esterified or etherified starches are classified, comes under that heading.

According to the explanatory notes of the harmonized system relating to heading No 3505, dextrans and other modified starches covered by that heading are products resulting from the transformation of starches

brought about by the action of heat, of chemical products (acids, alkalis, etc.) or of enzyme activity, as for starches modified by, for example, oxidization, esterification or etherification. For those products, the explanatory notes give, by way of example, acetates of starch used in the textile or paper industry and nitrates of starch used in the manufacture of explosives. Again according to the abovementioned explanatory notes, heading No 3505 does not include unmodified starches, which come under heading No 1108.

It should be noted, moreover, that, according to paragraph 3 of the annex to Commission Regulation (EEC) No 28/90 of 4 January 1990 on the classification of certain goods in the codes 1108 11 00, 1108 12 00, 1108 13 00 and 1108 14 00 of the Combined Nomenclature and repealing Regulation (EEC) No 1463/87,⁶ which is not applicable *ratione temporis* to the facts of this case, '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 the following characteristics: starch content (determined by the Ewers method): 95% or more by weight on the dry product; acetyl content (determined by the enzymatic method): less than 0.5% by weight on the dry product' must be classified under subheading No 1108 13 00. Need it be added that that provision follows the preceding

4 — According to the case-law of the Court, explanatory notes, whilst they may not amend the wording of the CCT, are an important aid for interpretation in that they enable the contents of the customs headings and subheadings to be specified or explained: see, to this effect, Joined Cases C-106/94 and C-139/94 *Colin and Dupré* [1995] ECR I-4759, paragraph 21.

5 — OJ 1987 L 256, p. 1.

6 — OJ 1990 L 3, p. 9.

Commission Regulation (EEC) No 1463/87 of 26 May 1987 on the classification of products made up of maize starch under subheading No 11.08 A. I of the CCT.⁷

The two questions

6. First of all, it must be noted that the relevant headings of the CCT, on the one hand, and of the CN, on the other, are worded substantially similarly, so that remarks made with regard to one may equally apply to the other. That said, it should be noted that, as the Court has consistently held,⁸ the decisive criterion for the classification of goods for customs purposes is, in general, to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the CCT and of the notes to the sections and chapters.

That, as we know, serves the dual purpose of ensuring legal certainty and ease of verification. Since what is missing, however, both from the headings and subheadings under consideration and from the explanatory notes, is guidance for answering the question, it is necessary to verify whether acetyl content is one of the characteristics or objective properties of the product in question and, if so, whether it is a determinative factor for the purposes of classification.

7. As may be inferred from the order for reference, the national court seems to consider that the classification of an esterified starch does not depend on its acetyl content, but rather on the fact that the starch has been subjected to a chemical process of esterification: whenever there has been such a chemical process, the substance should be classified as an esterified starch, irrespective of its acetyl content and hence of its degree of esterification.

8. That view, however, is at odds with the case-law of the Court, which, in *Emsland-Stärke*, ruled on the interpretation of the customs headings considered here, also in the light of the provisions of Regulation No 28/90.

In that judgment, the Court specifically stated that 'the acetyl content of starch is an indicator of the extent to which substitution has taken place: the higher the acetyl content, the more extensive the modification of the starch. Starch with a very low acetyl content may therefore be close to native starch'.⁹

To my mind, it may be inferred from that passage that acetyl content is a determinative characteristic for assessing whether an esterified starch may still be regarded, for the purposes of its classification, as a native starch or whether it should be taken to be esterified starch. That proposition is moreover borne out from the systematic point of view both

⁷ — OJ 1987 L 138, p. 36.

⁸ — Case 40/88 *Weber* [1989] ECR 1395, paragraph 13.

⁹ — *Emsland-Stärke*, cited above, paragraph 34.

by Regulation No 1463/87 and by the later Regulation No 28/90, which expressly include acetyl content among the characteristics of starches to be taken into consideration for the purposes of their classification. Under Article 1 and paragraph 3 of the annex to that regulation, moreover, it follows that the mere chemical characterization of a starch *quà* esterified starch does not prevent it from being classified under subheading No 1108 13 00, native starches. In order to distinguish between esterified starches and native starches, the primary factor is, in fact, acetyl content, which will generally determine whether the starch should be classified as esterified or as native.

That does not mean, however, as the Commission has rightly observed, that acetyl content is the only factor to be taken into consideration for the purposes of classifying a product. It cannot be ruled out a priori that changes in the properties and in the potential uses of a product brought about by processing (esterification) had the result of changing the relevance of the acetyl content by altering the nature of the product itself. If so, it will be for the national court, taking into account the particular facts of the case, to assess whether the conditions for classifying the starch in question as esterified or native have been met or not. Generally speaking, however, I agree with the Commission that acetyl content is, as a rule, a determinative classification criterion in the absence of objective factors reducing its importance.

9. Moreover, I do not consider that the scope of the Court's assertions may be limited to the case of *Emsland-Stärke*, in which the product in dispute was a mixture of native potato starch and esterified starch, yet was regarded as native starch in view of the respective proportions. The tenor of those assertions is not consonant with restrictive interpretations, since it should instead be considered that the Court intended to lay down a general principle in the light of, *inter alia*, the wording of paragraph 3 of the annex to Regulation No 28/90, which, for classification purposes, equates mixtures of native and acetylated starch with native starches with a low acetyl content.

Moreover, it is scarcely necessary to point out that mixtures and homogenous products with a low acetyl content, that is to say, slightly 'modified' products, were similarly equated by Regulation No 1463/87, which was repealed by Regulation No 28/90, with respect to maize starches. It appears to be confirmed, therefore, also from the systematic point of view, that there is no justification for treating mixtures differently from homogenous substances for present purposes, as the national court suggests.

10. The national court's second question, which seeks to establish the maximum threshold for acetyl above which starch must be considered esterified, is closely connected

with the first. In this connection, I would note, first of all, that the product in question has an acetyl content which varies between a minimum of 0.61% (Case C-275/95) and a maximum of 0.74% (Case C-276/95).¹⁰ As things stand, the question raised by the national court so as to enable it to resolve the dispute before it is whether those values are such as to enable the product at issue to be classified under the subheading for native starch.

Now, given that that statement, in common with those which I have already considered, is to be regarded as being of general scope and therefore applicable to any product, whether it is a mixture or — as in this case — a homogenous substance, it is hardly necessary to point out that the difference of 0.07% between the acetyl content of the product considered here and that of the product considered in *Emsland-Stärke* is so imperceptible as not to warrant a different answer here.

11. I would first point out that in *Emsland-Stärke* the Court held that an acetyl content slightly above the 0.5% mentioned in Regulation No 28/90 (more precisely 0.67%) was not sufficient to preclude classification of the relevant product under subheading No 1108 13 00. The Court held that '[t]here is nothing in the wording of Regulation No 28/90 to indicate that it 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 subheading No 3505 10 50. That regulation merely indicates that an amylaceous product having the characteristics described in its annex must in all cases be classified under subheading 1108 13 00. Moreover, the regulation gives no guidance as to the proper classification of an amylaceous product with an acetyl content slightly in excess of 0.5%.'¹¹

12. Naturally, when considering products which have a significantly higher acetyl content than the values considered here, different assessments cannot be ruled out.¹² Indeed, higher percentages of acetyl may change the essential characteristics of the product in such a way that, qualitatively, it is no longer native starch but esterified starch. However, as has already been seen,¹³ this is a matter for the national court, which has to determine, in the light of appropriate technical and scientific inquiries and of the particular features of the case, the effect of higher levels of acetyl for the purposes of the customs classification of the product.

10 — In Case C-274/95, however, the acetyl level was 0.67% and hence between those two values.

11 — *Emsland-Stärke*, paragraph 33.

12 — In this connection, I would point out that, in its submissions, Wünsche referred to findings of various scientific studies which purportedly show that starches with an acetyl content of less than 0.9% cannot be distinguished from natural starches.

13 — See point 7 above.

Conclusion

13. In the light of the foregoing, I propose that the Court should give the following answer to the questions referred by the Bundesfinanzhof:
 - (1) The classification of esterified potato starch under heading No 11.08 A. IV of the Common Customs Tariff (and under subheading No 1108 13 00 of the Combined Nomenclature) or under heading No 39.06 B. I of the Common Customs Tariff (and under subheading No 3505 10 50 of the Combined Nomenclature) depends in the first place on its acetyl content and hence on the degree of its esterification.
 - (2) The Common Customs Tariff and the Combined Nomenclature must be interpreted as meaning that a homogenous starch product, intended for human consumption, made up of native potato starch with an acetyl content of between 0.67% and 0.74% by weight, must be classified under heading No 11.08 A. IV of the Common Customs Tariff (and under subheading No 1108 13 00 of the Combined Nomenclature).