Article 5 of Regulation No 802/68, and do not confer a Community origin on the said product according to that regulation.

Kutscher Pescatore Mertens de Wilmars

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Delivered in open court in Luxembourg on 26 January 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 12 JANUARY 1977

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Verwaltungsgericht of Hamburg. The question it raises, shortly stated, is whether casein which has been imported from the Soviet Union in the raw state and has been cleaned, ground, graded and re-packed in Hamburg is a product of Soviet origin or of German origin. The question is one of interpretation of Council Regulation (EEC) No 802/68 of 27 June 1968 'on the common definition of the concept of the origin of goods'. (OJ L 148 of 28. 6. 1968).

The preamble to the Regulation explains that 'Member States have to determine or verify the origin of imported goods whenever application of the Common Customs Tariff, of quantitative restrictions or of any other provisions applicable to trade so requires' and also to 'certify the origin of exported goods in all cases where such certification is required by the authorities of the importing countries, in particular where advantages derive from that certification'. It goes on to record that there is no international definition of the concept of the origin of goods and to point out the necessity of drawing up, on the subject, rules common to all the Member States. It then states that 'goods produced wholly in a particular country and not containing products imported from other countries are to be considered as originating in that country,' but that 'the manufacture of any one product tends increasingly to be carried out by undertakings located in different countries;' that 'it must therefore be determined which of those countries is to be considered as the country of origin of the product in question;' and that 'there are good grounds for accepting as the country of origin that in which the last substantial process or operation that was economically justified was performed'.

The preamble also records the view of the authors of the Regulation that uniform application of its provisions should be ensured and that a Committee should be set up 'with the object of organizing close and effective cooperation between the Commission and the Member States'.

Articles 1, 2 and 3 of the Regulation define the scope of its application. They are not directly material in the present case. Article 4 provides that 'Goods wholly obtained or produced in one country shall be considered as originating in that country'. It then defines in detail the phrase 'goods wholly obtained or produced in one country'.

The provision on which this case turns is Article 5, which is in these terms:

'A product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture.'

Article 10 provides, among other things, that certificates of origin for goods originating in and exported from the Community are to certify that the goods originated in the Community or 'when the needs of the export trade so require' that the goods originated in a particular Member State.

The only other provisions of the Regulation that I need mention are those providing for cooperation between the Commission and the Member States in its application, particularly those prescribing the constitution and functions of the Committee fore-shadowed in the preamble.

Article 11 provides:

'Each Member State shall inform the Commission of the steps taken by its central administration for the purposes of applying this Regulation, and of any problems which have arisen in connection with its application. The Commission shall forthwith communicate this information to the other Member States.'

Article 12 sets up the Committee, which is called 'the Committee on Origin', and provides that it 'shall consist of representatives of the Member States, with a representative of the Commission acting as Chairman' and that it shall draw up its own rules of procedure.

Article 13 provides:

'The Committee may examine all questions relating to the application of this Regulation referred to it by its Chairman, either on his own initiative or at the request of a representative of a Member State.'

Lastly Article 14 prescribes a procedure, not unlike the 'Management Committee procedure' familiar in the agricultural field, for the adoption of provisions required for applying, among others, Articles 4 and 5. Under this procedure the Commission submits a draft, on which the Committee may deliver an opinion. If the Committee's opinion is favourable, the Commission adopts the provisions envisaged in the draft. If the opinion is adverse, or if the Committee delivers no opinion, the Commission submits a proposal to the Council, but if the Council does not act within three months the Commission adopts the provisions it has proposed.

The Commission has, over the years, adopted under the procedure prescribed by Article 14 a number of Regulations 'on determining the origin of certain kinds of goods. Each of these Regulations is cited and its effect analysed in paragraph 10 of the Commission's observations. A consideration of these

Regulations is helpful in that they illustrate the sorts of problems that can arise in the application of Article 5. To some of the examples they afford I shall revert. They also illustrate that there can be differences of view as to the application of Article 5 in particular cases. Thus, whilst most of the Regulations are expressed to be 'in accordance with the opinion of the Committee on Origin' — without of course stating in what cases that Committee was unanimous and in what cases a majority prevailed — the preamble to Regulation (EEC) No 964/71 of 10 May 1971 'on determining the origin of the meat and offals, fresh, chilled or frozen, of certain domestic animals (OJ L 104 of 11. 5. 1971) records the absence in that case of an Opinion of the Committee concurring with the Commission's proposals and the failure of the Council to act within its allotted three months.

We were told by Counsel for the Commission at the hearing that in practice a Regulation under Article 14 is adopted only where there is doubt or disagreement within the Committee on Origin as to the answer to a particular problem. In the absence of any such doubt or disagreement, it is considered sufficient to record the opinion of the Committee. This has been done, so far, in three cases, particulars of which are given in paragraph 11 of the Commission's observations. In the first case the Committee held that the sterilization of medical instruments was not a process or operation important enough to 'confer origin' under Article 5. In the second case it held on the other hand that the production of corned beef from imported fresh beef was such an operation. Those seem to me to have been indeed clear cases. The third case is the present one. On two occasions (in circumstances to which I shall come) the Committee has unanimously taken the view that the grinding, grading and re-packing of imported casein was not a process or operation apt to confer origin.

The Court has been asked, particularly by the Commission, to rule on the question of the legal standing or effect of such an opinion of the Committee. The Commission submits that, in this respect, there can be no distinction between an opinion of the Committee on Origin and an opinion of the Committee on Common Customs Tariff Nomenclature, which the Court, in Cases 98 and 99/75 *Carstens Keramik* v *Oberfinanzdirektion Frankfurt am Main* [1976] ECR at p. 252 (paragraph 12 of the Judgment), held to have no binding effect but to represent a 'valid indication' for the purposes of interpreting the Common Customs Tariff. I agree. There is no significant difference between the provisions of Articles 12, 13 and 14 of Regulation No 802/68 and those of Council Regulation (EEC) No 97/69 of 16 January 1969 setting up the Committee on Common Customs Tariff Nomenclature and prescribing its constitution and functions. It is clear that the former provisions do not confer on the Committee on Origin any power to express opinions having, in themselves, a legally binding effect, but equally clear that the Court cannot, in interpreting a provision such as Article 5, ignore what are in fact the views of the Commission and of the competent authorities in the Member States.

In paragraph 12 of its Observations the Commission refers to a third category of examples of cases in which Article 5 is uniformly applied in the Member States. This consists of cases where, without any intervention of the Commission or of the Committee on Origin, Member States have, to the Commission's knowledge, all adopted the same interpretation of that Article. Some of these examples were much relied upon in argument. Thus it is uniformly held that the mere grinding of coffee does not confer origin but that the production of decaffeinated (or, I assume, instant) coffee does. Those seem to me again clear cases. Another pair of examples is not to my mind quite so obvious: it is held that the breaking-up

of stone to produce ballast does not confer origin but that the cutting and polishing of diamonds does.

I turn to the facts of this case.

The Gesellschaft für Überseehandel mbH, which is the plaintiff in the proceedings before the Verwaltungsgericht, has for some years imported from the Soviet Union and from Poland unground casein. In this state the casein comes in fragments ranging in size from that of a pea to that of a hazel-nut and is of no use to any of the industries (such as manufacturers of glue, paint, chipboard, plastic packaging and so on) for which casein is a raw material. Before they can use it, it must first be cleaned and then finely ground to sizes which are described as '30, 60 or 90 mesh', or sometimes to a size prescribed by the user. This cleaning and grinding is undertaken by the plaintiff in an appropriately designed mill which it has in Hamburg. 'At the same time,' says the plaintiff in its pleading originating the proceedings in the Verwaltungsgericht, 'quality control is carried out in conjunction with the necessary grading process'. The ground casein is then, when packed, ready for delivery to the Plaintiff's customers. (I have taken those facts from that pleading in view of the form of the question referred to the Court by the Verwaltungsgericht).

Many of the plaintiff's customers are in third countries, as the list which is Annex 1 to the plaintiff's observations shows. For its exports to them it is to the advantage of the plaintiff to have certificates showing the origin of its ground casein as being the Federal Republic of Germany. If the plaintiff is entitled to such certificates the authority responsible in the circumstances for issuing them is the Handelskammer (Chamber of Commerce) of Hamburg, which is the defendant before the Verwaltungsgericht. As its Counsel told us at the hearing, the defendant has always had difficulty in being sure how Article 5 should be applied to the plaintiff's product. Up to 1 June 1972 it issued certificates as requested by the plaintiff showing the casein in question to be of German origin. It then, however, ceased to do so. But in the following month it resumed doing so, presumably as the result of representations made by the plaintiff. In September 1975 it ceased doing so again, because, apparently, of doubts expressed by the Federal Government. There is a dispute between the parties as to whether the defendant was entitled to do that, having regard to the terms of a promise it gave to the plaintiff in July 1972. But no question as to that is referred to this Court.

The Federal Government submitted its doubts to the Committee on Origin, which, at its meeting held on 17 and 18 December 1975, gave it as its opinion that 'within the meaning of Article 5 of Regulation (EEC) No 802/68, the grinding, mixing and packing of casein did not constitute a sufficient degree of processing to confer upon the product obtained the origin of the country in which the operations took place'. (The minutes of that meeting as well as the document previously circulated to its members setting out the question raised by the German delegation are among the documents produced by the Commission to the Court at its request).

On 24 February 1976 the plaintiff's Counsel wrote to the Commission asking that the matter be reconsidered by the Committee, and setting out in full, in an annex, the facts and arguments on which the plaintiff relied. On 16 March 1976 the plaintiff commenced the present proceedings in the Verwaltungsgericht and a copy of its pleading in those proceedings was sent by its Counsel to the Commission to be added to the papers for the Committee. The substantive relief claimed by the plaintiff in those proceedings is a declaration that the defendant is bound to issue to the plaintiff certificates of origin 'in respect of casein imported from third countries

into the Federal Republic of Germany and ground therein'. On 28 May 1976 the Verwaltungsgericht made its order referring to this Court the question:

'Is untreated casein obtained in a third country, which has been rendered fit for use by being ground up in a Member State of the EEC in the way described by the plaintiff in this action to be regarded as originating in that Member State according to Article 5 of Regulation (EEC) No 802/68 of the Council?'

At its meeting held on 22 and 24 June 1976 the Committee on Origin, which had before it the two communications from the plaintiff's Counsel, unanimously decided to confirm its earlier opinion. It also took the view that no Regulation on the matter was necessary. (An extract from the draft minutes of that meeting and copies of the communications in question are also among the documents produced by the Commission at the Court's request).

The plaintiff complains that on neither occasion when the Committee expressed an opinion did it give any reasons. In my view, and in this too I agree with the Commission, since the Committee's opinion had no legal effect, it was not bound to state its reasons.

I turn to the question asked by the Verwaltungsgericht.

It is common ground between the plaintiff, the defendant and the Commission that, under the terms of Article 5, a process or operation in order to confer origin must fulfil four conditions. It must:

(1) have been the last substantial process or operation;
(2) have been economically justified;
(3) have been carried out in an undertaking equipped for the purpose; and
(4) have resulted in the manufacture of a new product or represent an important stage of manufacture.

It is also common ground that in this case the second and third conditions are satisfied: the grinding of the casein is economically justified and it is carried out in an undertaking equipped for the purpose. The argument is about the first and the fourth conditions.

I will say at once that in my opinion the first condition is here satisfied. The defendant and the Commission submit that the plaintiff's activities do not constitute a 'substantial' process or operation. The Commission developed an argument in which, in order to contrast the significance of the first and fourth conditions, it submitted that, in order to determine whether an operation is 'substantial', one must look at it form the 'dynamic' point of view, i.e. consider the part played by that operation in the process of manufacture taken as a whole, whereas, in order to determine whether an operation has resulted in 'the manufacture of a new product' or represents 'an important stage of manufacture' (so as to satisfy the fourth condition), one must look at it from a 'static' point of view, i.e. compare the product existing before the operation with that existing after it. My Lords, it seems to me that this is pushing semantic analysis too far. To my mind a process or operation is 'substantial' if it is the opposite of insubstantial, i.e. if it is not negligible or not trivial. Indeed I think that the phrase 'the last substantial process or operation' in Article 5 is to be interpreted as a single phrase, in which the emphasis is on 'the last'.

In my opinion the difficult question in this case is whether the fourth condition is satisfied.

As to this the plaintiff does not suggest that ground casein is, as compared to raw casein, a 'new product'. So the whole question is whether the plaintiff's activities represent 'an important stage of manufacture' within the meaning of that phrase in Article 5.

That they represent an 'important stage of manufacture' in one sense at least is manifest, for, as the plaintiff emphasizes, unground casein is useless to the industries for which casein is a raw material. Nor is that point answered by saying that it merely demonstrates that those activities are 'economically justified'. The four conditions prescribed by Article 5 are to some extent overlapping, and it cannot be right to exclude facts that establish that one of them is satisfied from consideration when deciding whether another is satisfied.

In my opinion, however, it is not, alas, possible to dispose of the question on that simple basis. The phrase 'an important stage of manufacture' has to be interpreted in the context of Article 5 and, particularly, with regard to the purpose of that Article. On that footing the phrase must be taken to refer to a stage of manufacture important enough to determine the origin of the product in question.

It is here that the Regulations adopted by the Commission under Article 14 are helpful, in that they demonstrate how much that matter is one of degree and, in a borderline case, one of practical judgment. This is hardly surprising, for the word 'important', in itself, connotes a degree and is a relative term.

I shall not of course take Your Lordships through every one of those Regulations, nor do I make the mistake that I felt the Commission occasionally fell into of treating them as affording authoritative guidance on the interpretation of Article 5 even in circumstances where they do not directly apply. I shall refer to some of the provisions of some of those Regulations, simply by way of example.

It is interesting to contrast first the earliest and the latest of the Regulations in question, i.e. Regulation (EEC) No 641/69 of 3 April 1969 'on determining the origin of certain goods produced from eggs' (OJ L 83 of 4. 4. 1969) and Regulation (EEC) No 2026/73 of 25th July 1973 'on determining the origin of grape juice' (OJ L 206 of 27. 7. 1973). The former provides, to put it shortly, that to produce dried egg by drying eggs is a process that confers origin. The latter provides, to put it equally shortly, that to produce grape juice from grape must does not. Then there is Regulation (EEC) No 315/71 of 12 February 1971 'on determining the origin of base wines intended for the preparation of vermouth, and the origin of vermouth' (OJ L 36 of 13. 2. 1971). This provides that the addition to wine, in order to produce 'base wine', of must of fresh grapes, concentrated must, or alcohol, does not confer origin, but that the processing of 'base wine' into vermouth, by flavouring, does. No doubt this is right, but it shows how slender the dividing line can be.

Then there are Regulations that frankly rest on degree. Typical of these are Regulation (EEC) No 2632/70 of 23 December 1970 'on determining the origin of radio and television receivers' (OJ L 279 of 24. 12. 1970) and Regulation (EEC) No 861/71 of 27 April 1971 'on determining the origin of tape recorders' (OJ L 95 of 28. 4. 1971). Article 1 of each of these provides that the products to which it relates 'shall only be treated as having Community origin or the origin of the country in which they are manufactured if the increase in value they acquire there through assembly operations and, if it applies, through the incorporation of parts originating there, represents at least 45 % of the ex-works invoice price of the apparatus concerned'.

Regulation (EEC) No 1039/71 of 24 May 1971 'on determining the origin of certain woven textile products' (OJ L 113 of 25. 5. 1971) is rich in examples of fine distinctions between different kinds of manufacturing processes. It also provides in effect that embroidery confers origin only 'if the embroidered area represents

at least 5 % of the total area of the embroidered product'.

I need not I think multiply examples further.

The defendant and the Commission likened the grinding process carried out by the plaintiff to the grinding of coffee or of pepper. I do not think that they can be equiparated, for casein is not ground in the grocer's shop or in the kitchen, as coffee often is, or at the table, as pepper is.

The Commission also relied to some extent on the fact that the grinding of casein does not alter its classification in the Common Customs Tariff (Heading 35.01) and is not referred to as affecting origin in trade conventions and agreements between the Community and third countries. But this, as the Commission itself, I think, recognized, is inconclusive.

The plaintiff for its part put in (as Annex 2 to its observations) the answers given by its customers to a questionnaire it sent to them on 28 May 1976, that is on the same day as the Verwaltungsgericht made its order for reference. I do not think that these answers assist the plaintiff. It is true that most of the customers in question, though by no means all, agreed that the plaintiff's activities constituted an important step in production. But the questionnaire was framed so as to invite that answer and moreover did not relate the question to that of origin. Indeed the questionnaire produced some odd results. For instance one customer agreed that the plaintiff's activities resulted in a 'new product' but did not agree that they were important.

What has at the end of the day persuaded me, after much hesitation, to reach the same conclusion as the Committee on Origin and the Commission is an argument put forward by the Commission based on the comparative importance of the processes resulting in the production of raw casein and the processes carried out by the plaintiff. There is no doubt, as I have said, that what the plaintiff does is important, but it appears that the processes whereby raw casein is manufactured are of preponderant importance in determining the quality and indeed the kind of casein produced. The Commission gave a description of those processes in its observations and that description was not challenged by the plaintiff. I need not, I think, go into technical details. Suffice it to say that, plainly, the quality and nature of the casein depends on a number of factors, such as the extent to which fat has been eliminated from the skimmed milk which is the raw material, the kind of coagulant used (sulfuric, lactic or hydrochloric acid, or rennet) and its purity and quantity, the temperature to which the mixture has been heated, the efficiency of the final drying process and so on.

Three small items of evidence seem to me to confirm that impression.

The first is a letter (which is in Annex 2 to the plaintiff's observations) written to the plaintiff by its main Japanese customer by way of commentary on the plaintiff's questionnaire, in which that customer clearly distinguishes between 'rennet casein users' and 'acid casein users'.

The second is a comment made by the German Government when referring its doubts to the Committee on Origin. It said, of the plaintiff's product: 'The ground casein is very clearly of interest to consumer circles other than those for whom the higher-grade EEC product is suitable, so that these producers do not lose any business'.

The third is the answers given by some of the plaintiff's customers to one of the questions contained in its questionnaire. This question followed one by which the

customer was asked to say whether he had, or would consider buying, a casein-mill himself. The question was:

'If yes, which price advantage do you need for the unground Casein to compensate your milling-expenses, the risk of dirt and the not equal quality from bag to bag?

2 %, 5 %, 10 %, 20 %'

Of the customers who answered that question (they were a minority) two answered 5 %, six answered 10 %, one answered 20 % and one 'More'. None of the plaintiff's customers in fact had a casein-mill or said they would consider buying one, but those answers do suggest that on the whole the cost of cleaning, grinding and grading is considered to form a small part of the total cost of ground casein.

In the result I am of the opinion that Your Lordships should answer the question referred to the Court by the Verwaltungsgericht by declaring that casein which has been obtained untreated from a third country and which has been cleaned, ground, graded and re-packed in a Member State of the EEC is not, under Article 5 of Regulation (EEC) No 802/68 of the Council, to be regarded as originating in that Member State.