

consistency, after the addition of water and refrigeration, is such that it does not break up too rapidly at ambient temperatures and which retains its freshness for a sufficiently long period.

Touffait

Mackenzie Stuart

Everling

Delivered in open court in Luxembourg on 14 January 1982.

For the Registrar

H. A. Rühl

Principal Administrator

A. Touffait

President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 19 NOVEMBER 1981¹

*Mr President,
Members of the Court,*

The reference for a preliminary ruling on which I am giving my opinion today arises from the following facts:

The plaintiff in the main action, a Belgian undertaking, in January and February 1975 applied to the Zollamt [Customs Office] Aachen—Autobahn Süd for customs clearance into free circulation of a number of consignments of re-solidified butter amounting in all to some 80 tonnes which it had bought in accordance with the procedure laid down in Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 on the disposal of butter at a reduced price

to certain Community processing undertakings (Official Journal, English Special Edition 1972 (II), p. 559) and had imported from Belgium into the Federal Republic of Germany. At the same time the purchaser of the goods, the German undertaking, Dr Otto Suwelack Nachfolger KG, applied for the goods to be placed under customs control since it intended to use the re-solidified butter for the manufacture of edible ices in accordance with the provisions of the said regulation. In accordance with these applications the customs office charged, on the basis of that destination in accordance with Article 20 of Regulation No 1259/72, as amended by Regulation (EEC) No 1570/74 (Official Journal L 167 of 22 June 1974, p. 29) monetary compensatory amounts at the reduced rate of 50 %, amounting in all to DM 37 927.09.

¹ — Translated from the German

The product manufactured by the purchaser, a powder for the preparation of edible ices, was analysed by the Zolltechnische Prüfungs- und Lehranstalt München [Customs Laboratory and Training College, Munich] and by the Institut für Chemie der Bundesanstalt für Milchwissenschaft Kiel [Chemistry Institute of the Federal Milk Research Establishment, Kiel] in order to check whether it conformed with the third indent of Article 6 (1) (c) of Regulation No 1259/72 as amended by Regulation (EEC) No 2815/72 of 22 December 1972 (Official Journal, English Special Edition 1972 (30-31 December), p. 5). Under that provision butter sold in accordance with Regulation No 1259/72 may be processed only into

“powder for the preparation of edible ices falling within subheadings Nos ex 18.06 D or ex 21.07 F of the Common Customs Tariff, of a milkfat content of less than 32 % and suitable for consumption without any treatment other than the addition of water and refrigeration”.

The reports by both institutes on the analysis — for the details of the reports I refer to the grounds of the order making the reference — criticized in particular the low standard of flavour and sweetening of the product, its insufficient content in thickening and emulsifying agents and the instability of the beaten mixture. When the product was taken out of the refrigerator it collapsed immediately and quickly melted. In that state it did not display the creamy characteristic usually found in edible ices; instead there was a clear and immediate separation into the frozen and liquid parts and unmelted particles of the powder were visible. Accordingly, the product could not be considered, in accordance with the concepts of the trade, as an edible ice suitable for consumption.

On the basis of those results the competent authority, the Zollamt Coesfeld, a branch of the Hauptzollamt [Principal Customs Office] Gronau, the defendant, demanded, by a notice of 18 March 1976, the remainder of the monetary compensatory amount, which came to DM 37 918.80, on the ground that the concentrated butter had not been used for the declared purpose because an edible ice could not be produced under the required conditions from the powder.

After the plaintiff was unsuccessful in the objection which it lodged against the notice it brought an action, its main claim being that, within the framework of the disposal at a reduced price of concentrated butter of reduced value, the objective by reason of which favourable conditions were granted was sufficiently attained when a product of a determined composition was obtained which was “unsuitable for consumption” on the addition of water and refrigeration. On the other hand it is not important whether it is accepted by consumers as an edible ice. The meaning of the words “suitable for consumption” is the same as “capable of being consumed” or “consumable” or “not unsuitable for human consumption”. On the other hand the words cannot be equated with the terms “pleasing to the taste” since it cannot be the duty of an authority to ascertain whether a product is accepted as “palatable” by the consumer. The words must furthermore receive an interpretation which is uniform throughout the Community, which means that a product is considered as suitable for consumption as an edible ice if it corresponds to the requirements of only a single Member State. However, the powder manufactured by the Suwelack undertaking is, as a certificate issued by the Institut National Belge pour le Lait et les Produits Laitiers [Belgian National Institute for Milk and Milk Products] shows, suitable for consumption in Belgium.

The IVth Senate of the Finanzgericht [Finance Court] Münster before which proceedings were instituted in the matter by an order of 16 January 1981 stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

“1. What properties must be possessed by ‘edible ices ... suitable for consumption’ within the meaning of the third indent of Article 6 (1) (c) of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 on the disposal of butter at a reduced price to certain Community processing undertakings (Official Journal, English Special Edition 1972 (II), p. 559) as amended by Regulation (EEC) No 2815/72 of the Commission of 22 December 1972 (Official Journal, English Special Edition 1972 (30-31 December), p. 5) and as last amended by Regulation (EEC) No 2819/74 of the Commission of 8 November 1974 (Official Journal L 301, p. 21)? Is it sufficient for the frozen product to be ‘consumable’, ‘not inedible’, or ‘not unsuitable for human consumption’ or ‘not harmful to health’?

Or must it in addition meet consumer expectations or trade conceptions, in other words, must it be accepted by the consumer as ordinary edible ice which is customarily bought and sold?

2. If consumer expectations or trade conceptions are the test is it sufficient for the product to meet consumer expectations or trade conceptions in the State where it is processed, in any EEC Member State, or even in a non-member country; or must it meet consumer

expectations or trade conceptions prevailing in all Member States?

3. Does the answer depend on whether the product is marketable in one of those States or in all EEC Member States under the respective food regulations applying there?”

By these questions, which for practical reasons require to be subsequently discussed together, the court making the reference wishes to establish which supplementary requirements are to be attached to the criterion of “suitability for consumption”, in addition to those already contained in the provision in question, as a condition of the attainment of the prescribed destination of the product.

In this connection it should first of all be recalled that Regulation No 1259/72 does not contain either a comprehensive definition of edible ices or of the powder in question and instead refers in principle to subheadings ex 18.06 B and ex 21.07 C of the Common Customs Tariff or in the case of powder to headings ex 18.06 D and 21.07 F of the Common Customs Tariff. Accordingly, as the Commission properly points out, it is necessary, apart from establishing first of all whether the prescribed milkfat content has been attained, that the powder in question should in fact constitute a product falling within tariff subheadings ex 18.06 D or ex 21.07 F which, by the addition of water and refrigeration alone is transformed into an edible ice which must be classified in tariff subheadings ex 18.06 B or 21.07 C. The court making the reference in this connection properly accepted that, as in particular the Explanatory Notes of the Customs Tariff Committee of the European Communities on the Common Customs Tariff indicate, only modest requirements may be laid down as to the nature of an “edible ice” within the meaning of these tariff subheadings.

Nevertheless even classification in tariff headings 18.06 "Chocolate and other food preparations containing cocoa" and 12.07 "Food preparations not elsewhere specified or included" shows that the end product in question must be one which is not unsuitable for human consumption. The very description of the product as an "edible ice" strengthens that impression. A product, of whose the description the word "edible" forms part, must in fact, as I have already stated in my opinion of 2 December 1975 in Case 53/75, (*Belgian State v Jean Nicolas Vander-taelen and Dirk Leopold Maes* [1975] ECR 1657), simply on the basis of its kind and taste be suitable and intended for immediate consumption.

It follows directly from these considerations that, if the said additional criterion of "suitability for consumption" is not to be regarded as a pure tautology, these conditions, contrary to the opinion of the plaintiff, must be accorded a different meaning.

The correctness of that view is made clear by perusal of the wording of the provision in question. When it is stated in that provision that the powder for the preparation of edible ices must be suitable for consumption without any treatment other than the addition of water and refrigeration it can only mean, taken in its context, that the end product must be suitable for consumption as an edible ice. In other words the product in question must be one which can be offered directly to the consumer as an edible ice without further processing apart from the addition of water and refrigeration. As the Commission has properly pointed out, with regard to

edible ices the consumer must be understood in principle as the final consumer since edible ices are usually not used for the manufacture of other products. There must accordingly be a requirement that the final consumer should be able in fact to recognize the product in question as an edible ice and not as some other food or confectionery and that that product must be consumable in the form of an edible ice.

Finally, it is made even clearer in the last version of this regulation, Regulation No 262/79 (Official Journal L 41 of 16 February 1979, p. 1 et seq.), that the product in question may be consumed directly by the consumer as ice cream; in that version, although the versions in the other Community languages remain unaltered, the German text no longer contains the word "verbrauchsfähig" ["suitable for consumption"] but "verbrauchsfertig" ["ready for consumption"].

The meaning and objective of the system laid down in Regulation No 1259/72 may further be invoked in support of this view. As the recitals in the preamble show it was intended by these provisions to dispose of large stocks of intervention butter by creating an incentive through the low selling price for the use of butter instead of other fats, which in themselves are cheaper, for the production of specified processed products. In such a system there is naturally a risk that the cheaper butter will be misused and thereby displace other butter in the market. In order to prevent this "a system of supervision should be set up", as is stated in the recitals in the preamble, to ensure "that the butter is not diverted from its destination".

Supervision can however also be ensured by specifying as precisely as possible the products for which the butter may be used, as was done in the case of the regulation.

Since in the case of powders there is, however, a particularly serious risk of their ultimately being used for purposes other than the production of ices the regulation requires with regard to these products that edible ices suitable for consumption must be obtained by the addition of water and refrigeration alone. If, on the other hand, as the plaintiff in the main action considers, it were sufficient that the product should be required to be classified in sub-headings ex 18.06 D or ex 21.07 F of the Common Customs Tariff and in addition be "eatable" the provision in question would not attain the protective objective in view since the goods which fulfilled these conditions could immediately be applied for purposes other than the manufacture of ices.

The further question accordingly arises as to which requirements are to be prescribed for defining the words "edible ices . . . suitable for consumption" within the meaning of the third indent of Article 6 (1) (c) of the regulation in question. The purpose of that provision is naturally not to provide a comprehensive definition of the words "edible ices" but rather to lay down certain minimum requirements which must be fulfilled for the purposes of Community law if a product is to be classified as an edible ice suitable for consumption within the meaning of that regulation.

In this connection it is unnecessary for me to place further emphasis on the fact that Community law, as an independent legal order, is not intended in principle to define terms in relation to a given national legal system. Instead the only

proper course that can be adopted is to determine the meaning of suitability for consumption in relation to ices in accordance with the minimum requirements with regard to consumers in the Community, without any regard at all for the various provisions concerning food in the Member States. As the Commission properly points out the national provisions concerning ice cream should in this connection be treated as relevant only in so far as requirements of Regulation No 1259/72 are not complied with, if a particular product, having regard to its characteristics, may not be marketed in any Member State of the Community although the consumer would accept that product as an edible ice.

When the question is then raised what minimum criteria must be observed for the consumer to accept a product as an edible ice it is necessary to require, as has the Commission, that the product should display certain minimum characteristics as to taste, of one kind or another. This follows directly from the fact that edible ices are not a food in the narrower sense but a confection. A product which has no perceptible flavouring, or almost none, or sweetening accordingly does not correspond to the demands which the consumer makes of edible ices.

The Commission must further be considered correct in that it is not in accordance with a consumer's minimum demands for edible ices that a product should on melting break up very quickly into two clearly distinct components, one liquid and the other solid. Accordingly, this characteristic is of decisive importance in determining the suitability for consumption of edible ices.

Since the observance of these minimum requirements can be ascertained at any time without major difficulties by the

authorities and institutions entrusted with the implementation of the regulation such observance, to consider a further argument of the plaintiff, is not in fact objectionable from the point of view of practicality.

On the other hand, as the plaintiff and the Commission both emphasize, no decisive weight may be given to the product's other characteristics mentioned in the order making the reference, for example the vanillin content usual in the trade, the extent of beating etc., because of the existence of regional and national peculiarities. This must also apply to the somewhat subjective expectations as to

consistency and acceptability of taste which, on grounds of legal certainty, cannot be accorded any relevance in the interpretation of the present legal concepts.

Since the facts which have been set out above fulfil the said criteria for the court making the reference to reach a decision whether the product in question which is obtained by the addition of water and refrigeration must be considered as an edible ice it is unnecessary to give further consideration to the other characteristics which an edible ice may require to display in order to be suitable for consumption.

I am accordingly of the opinion that the question from the Finanzgericht Münster should be answered as follows:

1. Only those products which can be processed without any treatment, other than the addition of water and refrigeration, into edible ices falling within subheadings Nos ex 18.06 B and ex 21.07 C of the Common Customs Tariff and which are accepted by the consumer as edible ices may be considered as powders falling within subheadings Nos ex 18.06 D or ex 21.07 F of the Common Customs Tariff for the preparation of edible ices within the meaning of the third indent of Article 6 (1) (c) of Regulation (EEC) No 1259/72 of the Commission, as amended by Regulation (EEC) No 2815/72 of the Commission.
2. Suitability for consumption as edible ices within the meaning of the said regulation is determined, without regard for particular national provisions, in accordance with the minimum demands from the point of view of the consumer in the Community. In this connection it is relevant that with regard to taste a product displays a clearly perceptible sweetness or flavouring and on melting does not in a very short time break up into two separate components, one liquid and the other a solid residue.