

OPINION OF MR ADVOCATE GENERAL TESAURO  
delivered on 7 March 1991 \*

*Mr. President,  
Members of the Court,*

notwithstanding the fact that not only 'part'  
but almost all of the lactose been removed.

The Bundesfinanzhof has referred to the Court for a preliminary ruling a question on the interpretation of the combined nomenclature,<sup>1</sup> asking in particular whether powdered whey obtained by ultrafiltration, containing 76.6% protein, 2.1% milk fat and 5% lactose, and no sugar, is to be classified as a 'product consisting of natural milk constituents' not included under other headings (tariff subheading 0404 90 33) or as 'whey' (subheading 0404 10 11).

As the relevant rules stand at the present time, the answer is straightforward: the reduction of the lactose content to 5% cannot be regarded as removal of just part of the lactose and therefore whey displaying the characteristics of the product at issue here cannot be classified under subheading 0404 10. That view is confirmed — and certainly not undermined — by the fact, which emerges from the documents before the Court, that whilst it has been decided within the nomenclature committee and the committee for the harmonized system that, under the rules at present in force, substantially modified whey must be classified under the residual subheading 0404 90, it has on the other hand been agreed to recommend that in future whey which has been *in any way modified* should be classified under subheading 0404 10 and that the wording of the classifications should be amended accordingly. The Customs Cooperation Council has decided to accept that suggestion and recommended on 5 July 1989 that the Member States make the necessary changes to the relevant provisions of the nomenclature.

It should be noted in the first place that whey, which is derived from milk by the removal of fats and casein, is classified under tariff subheading 0404 10. Its normal composition includes a substantial percentage of lactose (over 60%), in addition to protein and milk salts. The corresponding explanatory note states that whey is whey even when 'part of' the lactose has been removed. Moreover, the Court has consistently held that the classification of products is not affected by the fact that they have undergone processing which has not changed the essential composition of the basic product (most recently the judgement in Case 40/88 *Weber* [1989] ECR 1395, paragraphs 19 and 20).

The issue is thus whether a product in which the lactose component has been reduced to 5% may be classified as whey,

It is therefore quite clear that, pending that amendment, whey having the characteristics of the product at issue is to be classified under the residual subheading 0404 90.

\* Original language: Italian.

<sup>1</sup> — Commission Regulation (EEC) No 3174/88 of 21 September 1988 (OJ 1988 L 298, p. 1).

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For those reasons, I suggest that the Court reply as follows to the Bundesfinanzhof:

'The combined nomenclature, as set out in Regulation (EEC) No 3174/88, must be interpreted as meaning that powdered whey obtained by ultrafiltration and containing 76.6% protein, 2.1% fat and 5% lactose, without sugar, must be classified under subheading 0404 90 33.'