OPINION OF ADVOCATE GENERAL LÉGER

delivered on 11 June 1998 *

1. The question referred to the Court for a preliminary ruling in this case concerns the criteria to be met by a motor vehicle in order for it to come under heading 9705 of the Combined Nomenclature (hereinafter 'the CN'), [1] which relates in particular to collections and collectors' pieces of historical or ethnographic interest.

The facts, the main proceedings and the relevant Community provisions

2. On 29 April 1991 Mr Clees applied to the appropriate customs office for clearance for free circulation of a second-hand Mercedes-Benz 300 SL motor car, manufactured in 1956, as a collectors' piece of historical interest falling under heading 9705.

3. Chapter 97 of the CN is entitled 'Works of art, collectors' pieces and antiques'. Heading 9705 of that chapter is worded as follows:

'Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest'.

4. The customs office inspected the vehicle and made the following determination: 'Chassis number found to correspond. The motor vehicle has a special design feature in the form of gull-wing doors. Alongside the rarity value of the vehicle, it is of historical interest on account of its design (manufactured in 1956). 9705 0000 0003'.

5. The customs office initially cleared the vehicle, by notice of assessment dated 29 April 1991, as requested by Mr Clees. However, on 16 July 1992 it sent him an amended notice claiming import duties, on the ground that the vehicle had been mistakenly classified under heading 9705 of the CN

* Original language: French.

1 — Combined nomenclature as established by Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

and had to be treated as a second-hand vehicle, thus falling under heading 8703, in accordance with the judgment in *Daiber*. [2]

6. In that judgment, [3] the Court interpreted Heading No 99.05 of the Common Customs Tariff (hereinafter 'the CCT') which applied before the entry into force of the CN introduced by Regulation No 2658/87, a heading worded in very similar terms to heading 9705, [4] as follows:

'— Collectors' pieces within the meaning of Heading No 99.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.

— Collectors' pieces which evidence a significant step in the evolution of human achievements or illustrate a period of that evolution are to be regarded as being of historical or ethnographic interest for the purposes of Heading No 99.05 of the Common Customs Tariff.' [5]

7. The objection lodged by Mr Clees against the decision by the customs office, in which he sought classification of the vehicle under heading 9705 of the CN, was rejected on 1 February 1993.

8. Mr Clees brought proceedings contesting that rejection before the Finanzgericht (Finance Court) Düsseldorf.

9. That court took the view, first of all, that the conditions concerning historical interest laid down by the Court of Justice in *Daiber*, cited above, were not met, as neither the gull-wing doors nor the vehicle design in any way evidenced a significant step in the evolution of human achievements or illustrated a period of that evolution. [6]

10. The court added that doubt had, in any event, been cast on that interpretation of heading 9705 following the adoption by the

2 — Case 200/84 *Daiber* v *Hauptzollamt Reutlingen* [1985] ECR 3363.

3 — As well as in the judgment delivered on the same day in Case 252/84 *Collector Guns* v *Hauptzollamt Koblenz* [1985] ECR 3387, on the interpretation of the same tariff heading.

4 — The English-language version of Heading 99.05 of the CCT, set out in the Annex to Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (OJ, English Special Edition 1968 (I), p. 275), is in fact in identical terms to heading 9705 of the CN.

5 — Paragraph 25, emphasis added.

6 — Fourth paragraph of Section II of the order for reference.

Commission in 1996 of explanatory notes on heading 9705. [7]

11. Paragraph 1 of those notes states:

'This heading includes motor vehicles as collectors' pieces of historical interest if they meet the criteria set out in the judgment of the Court of Justice of the European Communities in Case 200/84, and therefore:

— possess a certain scarcity value,

— are not normally used for their original purpose,

— are the subject of special transactions outside the normal trade in similar utility articles,

— are of high value and

— illustrate a significant step in the evolution of human achievements or a period of that evolution.

In view of the fact that a motor vehicle is basically a utility article with a relatively short life, and subject to constant technical development, then the foregoing preconditions underlying the above [judgment], in so far as they are not obviously contradicted by the facts, can be taken to apply in respect of:

— *vehicles in their original state, without substantial changes to the chassis, steering or braking system, engine, etc., at least 30 years old and of a model or type which is no longer in production,*

— all vehicles manufactured before 1950, even if not in running order.' [8]

7 — Ibidem, fifth paragraph of Section II. OJ 1996 C 127, p. 3.

8 — Emphasis added.

12. The national court considered that those explanatory notes also applied to imports made before the date of publication where, as in the case before it, the wording of the relevant CN heading had remained unchanged. [9]

13. It found that '... [those] notes are not appropriate for fleshing out the essential element of historical interest required by the case-law [of the Court]' [10] and added that 'it simply cannot be that any motor vehicle no longer in production, at least 30 years old, in its original state and of high value', criteria laid down in the explanatory notes, 'is supposed to be capable of evidencing a significant step in the evolution of human achievements', [11] in accordance with the formulation adopted in *Daiber*, cited above.

The question referred to the Court

14. Since the Finanzgericht Düsseldorf considered that it was necessary, in the interest of the uniform application of Community law, to clarify the exact scope of the explanatory notes, it stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is heading 9705 of the combined nomenclature, contained in Annex I to Regulation (EEC) No 2658/87, as amended by Regulation (EEC) No 2472/90, to be interpreted as meaning that as a rule motor vehicles as collectors' pieces of historical interest are required merely to be:

— in their original state, without substantial changes to the chassis, steering or braking system, engine, etc;

— at least 30 years old; and

— of a model or type which is no longer in production?'

The reply to the question referred to the Court

15. In order to interpret a heading of the CN it is necessary to examine its content and intended aim.

16. It is settled case-law that 'in the interests of legal certainty and ease of verification, the

9 — Seventh paragraph of Section II of the order for reference.
10 — Ibidem, 11th paragraph of Section II.
11 — Ibidem, 13th paragraph of Section II.

decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN ... There are also explanatory notes drawn up, as regards the CN, by the European Commission and, as regards the Harmonised Commodity Description and Coding System, by the Customs Cooperation Council, which may be an important aid to the interpretation of the scope of the various tariff headings but which do not have legally binding force ...'. [12]

17. The Court's interpretation in *Daiber*, [13] consistent with that case-law, of Heading No 99.05 of the CCT, which was in force at the time of the facts at issue in that case, seems to be capable of being applied to the present case because of the respective contents of the tariff headings and the nature and characteristics of the article in question.

18. In both cases, the subject-matter of the dispute before the national court is the tariff classification of a second-hand top-of-the-range motor vehicle whose owner applies for clearance for free circulation. Both vehicles were manufactured in the mid-1950s and are no longer in production.

19. According to *Daiber*, the aim of Chapter 99 of the CCT is to facilitate international trade in objects of cultural and educational value, [14] which must equally apply to Chapter 97 of the CN, given the similarity in the wording of the two tariff headings.

20. However, the Finanzgericht Düsseldorf considers that that judgment cannot be transposed to this case. In its view, there is some doubt as to whether the explanatory notes are consistent with the Court's interpretation of the CCT.

21. It is therefore asking the Court to clarify its interpretation of the CCT, so as to check that the objective criteria adopted by the Commission in its explanatory notes are in line with that interpretation and that those notes do not distort the meaning and scope of the tariff heading at issue.

22. The Commission explains that it adopted the explanatory notes in order to ensure that the CN was applied uniformly. Its uniform application was being affected by the different interpretations placed by the customs authorities and national courts on the concept of historical or ethnographic interest as defined by the Court. [15]

12 — Case C-270/96 *Laboratoires Sarget* v *FIRS* [1998] ECR I-1121, paragraph 16. See also Case C-201/96 *LTM* v *FIRS* [1997] ECR I-6147, paragraph 17.

13 — See point 6 above.

14 — *Daiber*, paragraph 15.

15 — See the second paragraph of the quotation at point 6 above.

23. According to the Commission, the three criteria which it has laid down are consistent with the Court's case-law, as they help to explain the clearly abstract and subjective condition as to the historical interest that a motor vehicle may have. They do not replace all the conditions in the first subparagraph of paragraph 1 of the explanatory notes arising from *Daiber*. Also, the second subparagraph establishes a general presumption, which can be rebutted by demonstrating that the historical interest is not clear. [16]

24. The Commission suggests that the classification of motor vehicles under tariff heading 9705 be carried out on the basis of the conditions laid down in *Daiber*, with the existence of historical and ethnographic interest also being checked using the criteria in the explanatory notes.

25. Mr Clees shares that view. He adds that such an interpretation is consistent with the purpose of duty-free importation of collectors' pieces, which is to facilitate international trade in objects of cultural and educational value and to encourage the preservation of vehicles from the past, those vehicles being important in terms of cultural history. [17]

26. It should be pointed out first of all that the criteria in the explanatory notes were laid down by the Commission to promote the uniform application of heading 9705 by the customs authorities in respect of a particular category of goods, in this case motor vehicles.

27. Although not legally binding, those notes must not conflict with the provisions of the CCT — or the CN — or alter the meaning of such provisions. [18] If they do, the content of the tariff, as interpreted by the Court where relevant, must prevail over the Commission's construction of it.

28. Consistent explanatory notes, on the other hand, may serve to clarify the content of a tariff heading, including in cases where the facts at issue occurred before the notes were adopted.

29. The meaning and scope of a heading of the CN are not altered by the interpretation given by the Commission purely for guidance. Legal certainty is therefore not affected by applying an interpretation which, as in the

16 — Paragraphs 20 to 25 of the Commission's written observations.

17 — Pages 4 and 5 of the written observations.

18 — Joined Cases 69/76 and 70/76 *Dittmeyer* v *Hauptzollamt Hamburg-Waltershof* [1977] ECR 231, paragraph 4 et seq.; Case 798/79 *Hauptzollamt Köln-Rheinau* v *Chem-Tec* [1980] ECR 2639, paragraph 11 et seq.; Case C-35/93 *Develop Dr Eisbein* v *Hauptzollamt Stuttgart-West* [1994] ECR I-2655, paragraph 21 et seq.

present case, post dates the procedure for classifying the vehicle at issue, so long as it does not appear to be incompatible with the CN.

30. Moreover, when the Court is called upon to interpret the CCT, it regularly refers to notes subsequent to the facts at issue. [19]

31. The examples presented as conflicting by the national court in the order for reference contradict that case-law only ostensibly. [20] Although the Court's interpretation in *Stanner* [21] of a subheading of the CCT disregarded an explanatory note subsequent to the facts of the case, the grounds for so doing were that, in that instance, the note related to a nomenclature other than the one in force at the time of the facts at issue in the main proceedings. In *Merkur*, [22] having stated that the explanatory notes to the CCT were applicable subsequent to the matters at issue in the case, the Court none the less argued that their content and similarity with other explanatory notes confirmed the Court's interpretation of a tariff heading.

19 — See, in particular, Case C-395/93 *Neckermann Versand* v *Hauptzollamt Frankfurt am Main-Ost* [1994] ECR I-4027, paragraph 13, and Case C-164/95 *Eru Portuguesa* v *Alfândega de Lisboa* [1997] ECR I-3441, paragraph 20.

20 — Eighth paragraph of Section II of the order for reference.

21 — Case C-393/93 *Stanner* v *Hauptzollamt Bochum* [1994] ECR I-4011, paragraph 19.

22 — Case 106/75 *Merkur-Aussenhandel* v *Hauptzollamt Hamburg-Jonas* [1976] ECR 531, paragraph 4.

32. Thus, if the content of the disputed notes were to prove consistent with tariff heading 9705, their use in a tariff classification procedure initiated before the date of their adoption would not be precluded.

33. The next point is to dispel the ambiguity arising from the wording of paragraph 1 of the explanatory notes, which could be read as meaning that fulfilment of the three conditions in the first indent of the second subparagraph is sufficient to justify the tariff classification of a motor vehicle.

34. Those conditions are in fact intended only to enable the possible historical or ethnographic interest of a vehicle to be identified. They are not intended to replace the other conditions laid down in *Daiber* — relative rareness, article not used for its original purpose, special transactions outside the normal trade in similar utility articles, and high value — which enable collections or collectors' pieces to be distinguished from other articles or groups of articles.

35. Those other conditions are necessary, because they take account of the characteristics which a motor vehicle has to possess in order to be included in a collection, irrespective of its historical interest. An old vehicle

no longer in production might still be in normal use or be widely available. Its being commonplace is not compatible with inclusion in a collection, even if its technical or aesthetic features are such that it could illustrate the evolution of the car industry.

36. Possession of the characteristics set out in the second subparagraph of paragraph 1 of the explanatory notes is therefore not sufficient for a motor vehicle to be classified under heading 9705 of the CN; for such classification the other criteria laid down in *Daiber* and reiterated in the first subparagraph must be met.

37. It is also necessary to examine whether the conditions laid down by the Commission are capable of distinguishing the historical or ethnographic interest of a motor vehicle.

38. According to the Court's definition, in order for a motor vehicle to be regarded as being of historical or ethnographic interest it must have one of the following two qualities: either it must evidence a significant step in the evolution of human achievements, meaning that it occupies an important place in the history of those achievements because it was innovative in the past; or its existence must illustrate a period of that evolution, meaning that it simply attests to a past era.

39. The latter criterion is particularly wide, because a vehicle can fulfil it without necessarily having original features distinguishing it from other vehicles manufactured in the same period. It is sufficient for it to be representative of a particular period.

40. In both cases, those articles are evidence of the past. That is clearly the logic behind the Commission's explanatory notes.

41. The Commission's first requirement is that the vehicle be in its *original state*, without substantial changes to the chassis, steering or braking system, engine, etc.

42. It is natural for all historical character to be denied to a vehicle the majority of whose features, or whose most important components, have been replaced to the point where it is no longer possible to recognise the original vehicle in that article. Through being repaired or changed, such an article is likely to have lost part of its identity. In those circumstances, it could in no way be considered to attest to a period in history.

43. The objective of duty-free importation under Chapter 97 of the CN would be disregarded if collectors' pieces which had been

totally altered by substantial changes were to enjoy the same customs exemptions.

44. The Commission's notes also state that the vehicle must be of a model or type which is no longer in production and must be at least 30 years old.

45. The merits of those criteria cannot be established without considering, first, the proposition, set out by the Commission in its notes, on the role of technical development in the field of automobiles and, secondly, the fact that fulfilment of the three criteria gives rise only to a presumption that the article is of historical interest.

46. In its explanatory notes, the Commission rightly states that a motor vehicle is an article subject to constant technical development. [23] The rapid succession of technical innovations in the automobile industry consequently makes it an area which contains numerous examples illustrating the evolution of human achievements.

23 — Second subparagraph of paragraph 1.

47. Even then the vehicle, which must fulfil the criteria pertaining to collectors' pieces, must also meet the aforementioned conditions demonstrating that it attests to the past.

48. Those requirements appear to be well founded.

49. First, the condition regarding being *no longer in production* is explained by the fact that a vehicle which continues to be in production is still of current interest to its potential users. Its technical performance or aesthetic features are considered sufficiently interest-worthy for it to continue to be sold. The vehicle's currency therefore appreciably reduces its ability to illustrate a period in the past.

50. Furthermore, tariff classification under heading 9705 presupposes that the article in question is a collectors' piece, thereby requiring that the abovementioned conditions in *Daiber* be met, which include the condition that there must be a special market outside the normal trade in similar utility articles. Continued production of the same model or same type of vehicle would prevent the formation of such a market as the vehicles produced would feed new and second-hand markets similar to other motor vehicle markets, depriving the vehicle in question of the rarity inherent in collectors' pieces.

51. The respective aims of the CN and heading 9705 also justify the requirement that the vehicle no longer be in production.

52. In his Opinion in *Daiber* and *Collector Guns*, cited above, Advocate General Lenz pointed out that the function of the CCT was to protect production within the Community. Addressing the question of the type of production which was to be protected against the importation of articles such as those at issue, [24] he stated that there was no competition between such second-hand articles and goods then being produced in the Community. [25]

53. The objective of the CN to protect production would in fact be disregarded if the category of collectors' pieces under heading 9705, which are exempt from duty on that basis, were to include articles still in production. New vehicles would be allowed to compete with other types of motor vehicles when that is not the purpose of heading 9705, which is characterised by cultural concerns.

54. Secondly, the requirement of a *minimum age for the vehicle* ties in with the same idea that, assuming it is no longer in production, a vehicle which is too recent cannot logically attest to the past.

55. The opportunity given to customs authorities and national courts to refer to a precise age facilitates the practical exercise of administrative action and that criterion must therefore be approved, at least in principle.

56. However, it may seem somewhat arbitrary to set the required age at 30 years, as the possibility that more recent vehicles may be of historical interest cannot be ruled out.

57. Tariff classification under heading 9705 of a vehicle less than 30 years old must be possible where it is demonstrated that, because of certain technical or aesthetic features which are now rare and symbolic of a period, that vehicle is already of historical or ethnographic interest.

58. The vehicle's ability now to evidence the evolution of human achievements in a particular field overshadows its date of production. As stated previously, the point which

24 — *Collector Guns* was concerned with different types of pistols and holsters.

25 — Section B.4 of the Opinion.

counts is that the vehicle in question is representative of the past because it constitutes an innovation or a step in that evolution.

59. So, a vehicle may, even if it is recent, be of historical interest if it is the last example of a period which has just ended. That interest would not be diminished just because the vehicle had not reached the required age.

60. The Commission's age criterion is not therefore to be considered as mandatory, but as a constituent of the presumption that a vehicle is of historical or ethnographic interest.

61. That approach is confirmed by the content of the Explanatory Notes to the Nomenclature of the Customs Cooperation Council, [26] by which, albeit in a previous version, the Court has already been closely guided in *Daiber*, in accordance with its settled case-law. [27]

62. The notes appearing in the 1996 version under heading 9705 refer to articles which have belonged to famous persons, which serves to illustrate the idea that, even if the case is marginal and quasi-anecdotal, a vehicle may be classified under heading 9705 even though it does not fulfil the age criterion, so long as there are certain circumstances to warrant doing so.

63. Conversely, as the explanatory notes state, fulfilment of the three criteria may not be enough for there to be historical interest. That is the case where the vehicle's specific character is not in any way linked to a period in the past, in the sense that the vehicle is not liable to evidence a significant step in the evolution of human achievements or illustrate a period of that evolution. [28]

64. In such circumstances, the competent authority will have to demonstrate that the factors put forward to support tariff classification under heading 9705 are not sufficient to warrant that classification.

26 — Those are explanatory notes produced by the Customs Cooperation Council within the framework of the International Convention on the Harmonised Commodity Description and Coding System to which the Community is a signatory. The CN is based on that Convention, but the Explanatory Notes to the CN, such as those underlying the question referred by the national court, 'do not take the place of the [former] but should be regarded as complementary to and used in conjunction with them' (Foreword to the Explanatory Notes to the Combined Nomenclature of the European Communities, OJ 1994 C 342, p. 1, at p. 7).

27 — See point 16 above.

28 — The notes state that the conditions laid down in *Daiber* can be taken to apply in so far as they are not obviously contradicted by the facts.

65. It therefore follows from the above that the conditions set out in the Commission's explanatory notes must be considered as no more than practical guidelines to facilitate identification of the historical or ethnographic interest of a motor vehicle, which can be countered by demonstrating the absence of that interest within the meaning attributed thereto by the Court in *Daiber*.

Conclusion

66. In the light of those considerations, I suggest that the Court give the following answer to the question referred for a preliminary ruling by the Finanzgericht Düsseldorf:

Heading 9705 in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff must be interpreted as meaning that a motor vehicle which is:

— in its original state, without substantial changes to its main components;

— of a model or type which is no longer in production; and

— more than 30 years old

is presumed to be of historical or ethnographic interest within the meaning of that provision.

However, a motor vehicle which fulfils those conditions is not of historical or ethnographic interest within the meaning of that provision where it does not appear to evidence a significant step in the evolution of human achievements or to illustrate a period of that evolution.