OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 20 January 1994 *

Mr President,
Members of the Court,

1. The company, 3M Medica, imports into the Community a canvas cast shoe and a vinyl cast shoe (hereinafter together referred to as the 'cast shoes') under the following description: '"sandals" or "footwear" with outer soles of plastic and uppers of textile materials or plastics (webbing with visible plastic outer layer), declared to be designed for wearing on the foot over a plaster cast'. [1]

2. The two binding customs tariff notifications issued by the Oberfinanzdirektion (Principal Revenue Office), Frankfurt am Main, assigned these articles to subheadings 6404 19 90: ('other' footwear with outer soles of plastics and uppers of textile materials) and to heading 6402 91 90: ('other' footwear with outer soles and uppers of plastics).

3. By decision of 16 July 1992 the Oberfinanzdirektion rejected a complaint seeking to classify those articles under heading 9021 ('Orthopaedic appliances').

4. In response to the action brought by 3M Medica the Bundesfinanzhof (Federal Finance Court) has submitted to the Court two questions on whether (1) the term 'orthopaedic appliances' in heading 9021 includes footwear of that kind and (2) in the negative whether those articles may be deemed to be 'splints and other fracture appliances' or 'other' parts thereof.

5. I shall examine these two questions in turn.

6. It follows from paragraph A. 3 (a) of the General Rules for the interpretation of the combined nomenclature of the Common Customs Tariff [2] and from point 1 (d) of the Explanatory Notes to Chapter 64 (Footwear) [3] that the articles under examination

* Original language: French.

1 — Order of the national court, page 2 of the French translation.

2 — Commission Regulation (EEC) No 2587/91 of 26 July 1991 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1991 L 259, p. 11).

3 — Ibid., p. 412.

can come under subheadings 6404 1990 and 6402 9190 only if they do not fall under a more specific tariff heading, such as that relating to orthopaedic footwear.

7. In accordance with the Explanatory Notes [4] orthopaedic appliances coming under Chapter 90 are for:

'preventing or correcting bodily deformities;

supporting or holding organs following an illness or operation'.

8. In the words of the Explanatory Notes, those appliances include:

'...

(6) Orthopaedic footwear ... *made only to measure.*

(7) Special insoles made to measure.

(8) ...

(9) Orthopaedic foot appliances (talipes appliances, leg braces ... etc.)'. [5]

9. On the other hand 'simple protectors or devices designed to reduce pressure on certain parts of the foot' and 'mass-produced footwear the inner soles of which have been simply arched to alleviate flat-footedness' are excluded from Heading 9021. [6]

10. Thus, as the Commission points out, the items falling under this heading all have in common that they are especially adapted to the handicap which they are designed to overcome and that they are 'especially intended for a given person'. [7]

4 — Section XVIII, 90.212, p. 1497.

5 — Ibid. Emphasis added.

6 — Ibid. Emphasis added.

7 — Commission's observations, p. 10 of the French translation.

11. Thus, the Commission is right to point out that the cast shoes whereby walking is facilitated and comfort improved if a 'walking plaster' is worn,

(1) are not for correcting certain bodily deformities, or

(2) for supporting or holding organs following an illness or operation;

(3) are not appliances or items especially designed for a specific handicap and made to measure.

12. They may be assimilated to mass-produced inner soles [8] or to mass-produced footwear the inner soles of which are adapted to correct dropped arches, all articles which do not fall within Chapter 90.

13. I should add that manifestly these shoes cannot be assimilated to crutches (Heading 9021).

14. Whilst crutches are essential to enable a person with a physical handicap to walk that is not so in the case of the cast shoe which certainly improves the walking comfort of the person in plaster who could however get about without the aid of that shoe.

15. If they do not come within the category of 'orthopaedic appliances' may those shoes be regarded as '...fracture appliances' (subheading 9021 19 90) or as 'other' articles (subheading 9021 90 90) concerning such appliances? That issue is addressed in the second question.

16. Under the terms of the Explanatory Notes of the harmonized system [9] articles and appliances for fractures are '... used either to immobilize injured parts of the body, for extension or protection, or for setting fractures'.

17. As the Commission pointed out, 'the characteristic feature of these appliances is that they act directly on the organ affected'. [10]

18. It is clear that articles such as the cast shoes do not fall within that definition.

8 — See point 7 of the Explanatory notes, mentioned above.

9 — Heading 9021, (II), p. 1498.

10 — Observations, p. 11 of the French translation.

19. They could possibly come under 'Other' parts of orthopaedic and fracture appliances if the plaster to which they are adapted could be regarded as such.

20. However, this is not the case. The plaster cast applied to the fractured leg of a person cannot be reused and is of no commercial value. It is not a commercial product within the meaning of Chapter 90 of the Common Customs Tariff. It is significant that the Explanatory Notes concerning fracture appliances make no mention of it.

21. The two questions submitted must therefore be answered in the negative.

22. Consequently, I propose that the Court should rule that:

(1) the expression 'Orthopaedic appliances' in Heading 9021 of the Combined nomenclature must be interpreted as meaning that it does not include footwear of the type described in the order for reference;

(2) nor are those articles 'fracture appliances' or 'other' parts of orthopaedic or fracture appliances within the meaning of subheadings 9021 19 90 and 9021 90 90 of the combined nomenclature.