OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 30 OCTOBER 1975 [1]

Mr President,
Member of the Court,

In the reference for a preliminary ruling which is today before the Court, what is at issue is the validity of Regulation No 1/71 of the Council of 17 December 1970 (OJ L 1 of 1. 1. 1971) which came into force 1 January 1971. By means of this regulation an Additional Note was incorporated into Chapter 90 of the Customs Tariff on imports according to which 'Apparatus for the automatic reproduction of documents by means of static electricity equipped with an optical picture-recording system is also included in subdivision A of heading 90.07'.

When on 28 April 1971 the plaintiff in the main action, the Customs Agent of the Netherlands Railways, presented for clearance an imported apparatus for the automatic reproduction of documents by means of static electricity equipped with an optical picture-recording system it was classified on the basis of this provision. Accordingly a duty amounting to 14 % was levied.

The customs agent does not agree with this treatment. He takes the view that the apparatus should have been classified under heading 84.54 ('Other office machines') and that accordingly the duty rate of 7·2 %, applicable since 1 January 1971, should have been applied. In this connexion he relied upon a decision of the Tariefcommissie of 2 February 1970 which in the case of apparatus of this kind had precisely this effect. At that time this was the basis of reasoning: machinery generally falls within Section XVI of the Common Customs Tariff. Articles falling within Chapter 90 do not, in the light of the instructions preceeding that section, belong to it, and according to the Brussels Explanatory Notes the heading 90.07 only includes apparatus operating on the basis of a normal photographic process; copying machines on the other hand are not photographic apparatus. It is not therefore wrong to include it in Section XVI and especially in Chapter 84. Since however it is not possible to classify it under 84.35 (Printing machinery) it can only be put under heading 84.64 B (Other office machines) since such machines are for use in offices. The customs agent moreover point to the fact that the customs duties for goods falling within heading 84.54 were bound under GATT agreements (with effect from 1 January 1971 and at the rate of 7·2 %). Accordingly, pursuant to Article 2 of GATT and notwithstanding the classification laid down by Regulation No 1/71 of the Council customs duties should not be levied at rates in excess of those bound under GATT for goods falling under heading 84.54.

The Inspector of Customs & Excise however rejected the customs agent's complaint, pointing to an opinion given by the International Customs Council in December 1965, that such appliances fall within heading 90.07 A. This resulted in an appeal by the customs agent to the Tariefcommissie. In the course of the proceedings the Tariefcommissie felt entitled to voice reservations as to the validity of Regulation No 1/71 of the Council. On the one hand, the Tarifcommissie based itself on the fact that appliances such as those mentioned in the Additional Note to Chapter 90 do not fall within the description contained in this tariff heading. Furthermore the Tariefcommissie considers it relevant that the rate of duty under tariff heading 84.54 was bound within the framework

1 — Translated from the German.

of GATT and that the Netherlands courts on the basis of Article 60 and 65 of the Netherlands Constitution are obliged to apply international agreements which are capable of directly binding the individual. The final questions with which the Tariefcommissie is concerned is whether in making Regulation No 1/71, the Council had not infringed the obligations assumed by the Member States as part of the Convention on Nomenclature for the Classification of Goods in Customs Tariffs which provides that no changes must be made to headings and to chapter notes which might result in the scope of a heading being modified.

Bearing these considerations in mind the Tariefcommissie by decision of 11 June 1974, served on the parties on 15 April 1975, stayed the proceedings and pursuant to Article 177 of the EEC Treaty referred the following questions to the Court for a preliminary ruling.

1. In the light of *inter alia the* aforementioned considerations is it permissible for apparatus such as that in question in these proceedings – which in the opinion of the Tariff Commission does not come within the description of heading 90.07 but which does in fact completely comply with the literal description of another heading, that is to say heading 84.54, so as to render Note 1 (1) of classification XVI as it stood at the time of the importation, inapplicable – to be brought by the means of a regulation of the Council of the EEC on an additional note to Chapter 90 within heading 90.07 without a text of this heading being appropriately adapted?
   If the answer to this question is in the negative, must this result in legal effect being denied to the Additional Note to Chapter 90 which was inserted as from 1 January 1971 and again withdrawn as from 1 January 1972 and which reads:
   'Apparatus for the automatic reproduction of documents by means of static electicity equipped with an optical picture-recording system is also included in subdivision A of heading 90.07?'
2. In the light of the fact that on the basis of Articles 60 and 65 of the Constitution of the Kingdom of the Netherlands agreements with other powers and with organizations in international law have legally binding force after they have come into existence in the prescribed manner and have been published, further in the light of the fact that the GATT Treaty, to which the Netherlands are a party, constitutes such an agreement and finally in the light of the fact that the aforementioned heading 84.54 together with the duty attaching thereto, was bound on the occasion of the so-called Kennedy Round within the framework of GATT, is it permissible contrary to the aforementioned binding and without any provision being made in relation to the Netherlands, for a higher duty to be charged in respect of the goods falling within this heading by classifying this product under another chapter and another heading by means of a regulation of the Council of the EEC?
   In the light of the priority of the Treaty obligations of the Community over acts of its organs – independently of the question whether a GATT provision is or is not suited to create rights in relation to the citizen upon which he can rely before a court – is not a Netherlands court bound in cases which are submitted to it to apply GATT provisions which are suitable for direct application even though it may thereby come into conflict with Community law?
3. Does not the Council by the making of an additional note such as is involved in this case come into conflict with the obligations assumed by Member States within the framework of the Convention of 15 December 1960 in the matter of nomenclature for the classification of

goods in customs tariffs — see in particular Article II (b) (ii) — involving a prohibition on the making of amendments to the notes relating to the chapters and sections which might change the purport of the chapters, sections and headings contained in the nomenclature?

On the individual points the following remarks seem in my view appropriate.

1. The first question

At the root of the first question lies the idea that apparatus such as that in question in the main action could not under the wording and description of the Common Customs Tariff have been classified under 90.07 but only under 84.54; that accordingly the regulation of the Council, the validity of which is now in question, had brought about an alteration in the legal position.

This starting point seems to be very questionable.

One could possibly think in terms of a change of law in relation to the aforementioned decision of the Tariefcommissie of 2 February 1970. That decision however related to imports which had taken place in the year 1967, before the application of the Common Customs Tariff. Moreover, even though considerations of Community law might have carried weight when the decision was come to, for the reason that the adaptation of the national customs tariff to the Common Customs Tariff was on the point of being concluded, it cannot be accepted that the decision could in any way constitute a binding standard of reference, no appeal to the Court having been made at that time.

It must also be said that the tariff classification ordered by the Council certainly accords with the view the International Customs Council took in 1965 in relation to similar photographic copying machines. This is important since such views also constitute an important aid to interpretation within the framework of Community law (cf. Case 14/70, *Deutsche Bakels GmbH* v *Oberfinanzdirektion München,* judgment of 8 December 1970 [1970] ECR 1001). Furthermore, it seems clear that this view was generally followed; one can indeed think in terms of there having been such an established practice even before the adoption of the regulation of the Council which is now in question. This certainly argues strongly against the assumption that the regulation of the Council had led to a change in the law.

The fact that in addition as we have heard, the Nomenclature Committee had not been entirely satisfied with the solution referred to but rather that it had considered necessary a solution which would allow the inclusion in Chapter 90 of all apparatus for the reproduction of documents by means of static electricity, in no way changes the abovementioned situation. For it was only on 9 June 1970 that the solution which was considered necessary was incorporated, on the basis of a proposal going back to 1969, into an appropriate recommendation of the Customs Council changing heading 90.10 and it only applied with effect from 1 January 1972 (cf. Regulation No 1/72 of the Council (OJ L 1 of 1. 1. 1972) amending Regulation No 950/68 (OJ L 172 of 22. 7. 1968; English Special Edition 1968 (I), p. 275)). Besides it is not unimportant that consequent on the fixing of a special rate of customs duties and on the basis of the new classification the same charge as that under heading 90.07 A is applied.

I consider it important to set out findings at the beginning of my examination for I am sure that only against this background is it possible to provide an appropriate answer to the questions referred.

As regards the content of the first question, primarily it asks for clarification whether it is permissible to

make provisions for classification by way of additional notes without the text of the relevant heading being suitably adapted. In this connexion it is obviously Community law which is intended to serve as the standard of reference although it has not been clearly stated which provision is relevant for this purpose.

The Council and the Commission have both been in agreement on this first question in taking the view that there can be no question of infringement of some principle of Community law. In my view this is a correct assessment of the situation.

Thus for one thing it is important that pursuant to Articles 28 and 113 of the EEC Treaty the fixing and amendment of the Common Customs Tariff and of its nomenclature fall exclusively within the competence of the Community. Regulation No 1/71 of the Council is in accordance with these provisions, especially so if one takes the view that it only has the purpose of definition and of authentic interpretation.

Also important is the conclusion which may be drawn from the case-law (Case 80/72, *NV Koninklijke Lassiefabrieken* v *Hoofdproductschap voor Akkerbouwprodukten,* judgment of 20 June 1973, [1973] ECR 635) that it is permissible for notes the binding nature of which results from the general provisions for interpreting the customs tariff to be added to the Common Customs Tariff and thus to be made an integral part thereof.

Finally, to incorporate goods in a heading by means of a note without adapting the text and without amending the nomenclature also cannot be said to amount to an infringement of the principles of good legislation. For this is a perfectly normal procedure and the system created by Regulation No 97/69 of the Council (OJ L 14 of 21. 1. 1969; Official Journal (English Special Edition) 1969 (I), p. 12), the usefulness of which cannot seriously be doubted, is also clearly based thereon.

If it is further borne in mind that an alteration of a nomenclature in the case of the simple clarification of the existing legal position leads to false conclusion that there had been an alteration of tariff rates then there can in the case of the first question only be a finding that for the reasons which it recites the legal validity of Regulation No 1/72 cannot be put in doubt.

2. The second question

The second question relates to the fact that the rate of duty under heading 84.54 was bound in GATT agreements. In this respect the Court is asked to clarify whether the inclusion of the relevant goods by means of a regulation of the Council under another heading involving a higher rate of duty amounts to an infringement of this binding. In particular the question is asked whether under its country's constitution the Netherlands court is not bound to apply GATT provisions which are suitable for direct application, even where Community law makes different provisions.

One could in relation to this question limit oneself to the finding that in fact the regulation of the Council in question had not brought about any change in the classification under the Common Customs Tariff, and consequently no increase in duty, so that there can be no question of a conflict with GATT rules.

If, however, one refrains from so doing and if one considers in detail the GATT problem which has been raised, then the following remarks seem appropriate.

I have the impression that the Tariefcommissie relies on national acceptance of what is binding as well as on the fact that such acceptance related to the national customs tariff and its application in a manner which the

Tariefcommissie considered correct. However this way of looking at the matter is in my view erroneous.

On this point it must in the first place be said that the Community has exclusive competence in the field of customs duties and that under Article XXIV of GATT the Common Customs Tariff took the place of the national tariffs as from 1 July 1968. Ever since the expiry of the transitional period the Community under Article 113 of the EEC Treaty is also competent in the matter of commercial policy, and even during the transitional period it already had, under Article 111, competence to negotiate with third countries on the Common Customs Tariff. Clearly, GATT and agreements made within its framework fall within this range. During the transitional period the Community, with the agreement of the GATT partners, took over the rights and duties of the Member States under the GATT agreement; as is shown by the judgment in Joined Cases 21 to 24/72 *(International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit,* Judgment of 12 December 1972, Rec. 1972, p. 1219), the Community is bound by GATT. As regards GATT concessions, these ware already being negotiated by the Community during the transitional period; the Community lists accordingly took the place of the concessionary lists of the Member States.

In this respect and in accordance with the rule that concessions are always made on the basis of the tarif applied by the partner granting them, the Community clearly referred to the Common Customs Tariff. It is therefore clear that the carrying into effect of the binding agreements no longer falls within the competence of the Member States. It is therefore no longer possible to rely on particular tariffs which were previously applied in the Member States. Likewise it is out of the question for conflict between GATT obligations and Community acts to be dealt with in accordance with provisions of the national constitutional law. To do so would undoubtedly require a common provision under Community law. However, looked at from the point of view of Community law there can be no question of an infringement of GATT rules and GATT agreements.

Beyond this however and going along with the Commission in this respect, I might refer to a further and by no means unimportant point. It is of significance in the event of there being any question of a conflict between Community law and GATT rules, especially in relation to the binding agreements. Such a conflict would in fact only be of importance in relation to national court proceedings really if it could be assumed that GATT and in particular Article II thereof which refers to customs concessions could give rise to individual rights. But it is precisely this which, on the basis of the Court's case law, it clearly does not do. I would refer in this connexion to the detailed arguments in the judgment in Cases 21 to 24/72, as well as in the judgment in Case 9/73 *(Carl Schlütter* v *Hauptzollamt Lörrach,* Judgment of 24 October 1973 [1973] ECR 1135) which deals particularly with Article II of GATT.

Accordingly in relation to the second question also it can be said with certainty that nothing emerged within its framework which could give rise to doubts as to the validity of Regulation No 1/71 of the Council.

3. The third question

In view of the third question one must lastly examine whether in adopting Regulation No 1/71 the Council offended against the obligations imposed on the Member States within the framework of the Convention on Nomenclature for the Classification of Goods in Customs Tariffs which came into force on 11 September 1959, or more specifically, whether there was a disregard of the obligations laid down in

Article II (b) (ii) to 'make no changes in the chapter or section notes in a manner modifying the scope of the chapters, sections and headings as laid down in the Nomenclature'

Basically, even on this point, in particular in the light of the opinion given in 1965 by the International Customs Council, it suffices to say that by means of the Additional Note to Chapter 90 the Council merely provided a clarification, an authentic interpretation, and thus did not change the classification or modify the scope of the tariff headings so it certainly did not also infringe the convention referred to.

If, however one wishes to go beyond this and also examine the question whether the convention is binding on the Community and whether it can give rise to rights of the individuals which must be taken into account in national proceedings against Community acts, then going along with the Commission's views, one can say the following.

On the one hand one might well proceed from the basis of the Community is bound by the convention. All nine Member States are contracting parties; since however the preparation and amendment of the nomenclature of the Common Customs Tariff falls within the exclusive competence of the Community, the Community has assumed the rights resulting from the convention and has accepted the obligations which flow therefrom. In this respect one can refer to the final recital in Regulation No 97/69 and to the decision of the Council of 21 June 1971 OJ 1971, L 137, p. 10). Also important is the fact that the Community participates as an observer in the activities of the International Customs Council and of the Nomenclature Committee.

On the other hand, as regards the question whether the convention gives rise to rights for the individual, considerations other than those taken into account under GATT can hardly apply. This has been shown in a convincing manner by the Commission, on the basis of references to the text and the purpose of the convention. For one thing, under Article II (a) of the convention there is not an unequivocal obligation for the customs tariff to be set up in precise conformity with the general scheme of the convention tariff. Obviously the nomenclature of the Common Customs Tariff is not identical with that of the convention. Further, Article IX provides that in the event of any dispute between the contracting parties concerning the interpretation or application of the convention this shall [so far as possible] be settled by negotiations between them. It also cannot be said that the Community has unilaterally recognized the direct applicability of the convention the main purpose of which is to facilitate co-operation between customs administrations.

In the context of the third question the validity in law of the regulation of the Council which is in question in these proceedings cannot therefore be put in doubt.

4. I would suggest therefore that these questions, referred by the Tariefcommissie, be answered to the effect that there is no basis for assuming that the insertion in Regulation No 1/71 of the Council of an Additional Note to Chapter 90 of the Common Customs Tariff is not effective in law.