Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

7 April 2022 *

(Reference for a preliminary ruling – Common Customs Tariff – Combined Nomenclature – Classification of goods – Headings 1302, 3301 and 3302 – Extracted vanilla oleoresin – Excise duties – Directive 92/83/EEC – Exemptions – Article 27(1)(e) – Definition of 'flavour' – Directive 92/12/EEC – Excise Committee of the European Commission – Powers)

In Case C-668/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 7 July 2020, received at the Court on 8 December 2020, in the proceedings

Y GmbH

v

Hauptzollamt,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, C. Lycourgos (Rapporteur), President of the Fourth Chamber, and L.S. Rossi, Judge,

Advocate General: G. Pitruzzella,

Registrar: M. Krausenböck,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Y GmbH, by H. Bleier, Rechtsanwalt,

– the Hauptzollamt, by B. Geyer, acting as Agent,

– the Czech Government, by M. Smolek, O. Serdula and J. Vláčil, acting as Agents,

– the European Commission, by C. Perrin and M. Salyková and by R. Pethke, acting as Agents,

* Language of the case: German.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of subheadings 1302 19 05, 3301 90 30 and 3302 10 90 of the Combined Nomenclature set out in 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), as amended by Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 (OJ 2015 L 285, p. 1) ('the CN'), and of Article 27(1)(e) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

2 The request has been made in proceedings between Y GmbH and the Hauptzollamt (Principal Customs Office, Germany) concerning the obligation of the applicant in the main proceedings to pay customs duties and excise duties relating to importation into the territory of the European Union of vanilla oleoresin.

Legal context

European Union law

3 The Harmonized Commodity Description and Coding System ('the HS') was drawn up by the Customs Cooperation Council, now the World Customs Organisation (WCO), established by the International Convention concluded at Brussels on 14 June 1983. That international convention, with its amending protocol of 24 June 1986, was approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The CN is based on the HS. The CN takes the six-digit headings and subheadings from the HS. Only the seventh and eighth figures create further subheadings which are specific to it.

4 Subsection A, entitled 'General rules for the interpretation of the CN', of Section I, entitled 'General rules', of Part One of the CN, containing the preliminary provisions, provides:

'Classification of goods in the [CN] shall be governed by the following principles.

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

…'

5 Part Two of the CN, entitled 'Schedule of customs duties', includes Section II, entitled 'Vegetable products', which includes, inter alia, Chapter 13 of the CN, entitled 'Lac; gums, resins and other vegetable saps and extracts', Section IV, entitled 'Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes', which includes, inter alia, Chapter 22 of

the CN, entitled 'Beverages, spirits and vinegar', and Section VI, entitled 'Products of the chemical or allied industries', which includes Chapter 33 of the CN, entitled 'Essential oils and resinoids; perfumery, cosmetic or toilet preparations'.

6 Chapter 13 of the CN includes the following headings and subheadings:

'…

1301	Lac; natural gums, resins, gum-resins and oleoresins (for example, balsams):
1301 20 00	– Gum Arabic
1301 90 00	– Other
1302	Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, whether or not modified, derived from vegetable products.
	– Vegetable saps and extracts:
…	…
1302 19	– – Other
1302 19 05	– – – Vanilla oleoresin

…'

7 Note 1(ij) to Chapter 13 of the CN states that:

'Heading 1302 applies, inter alia, to liquorice extract and extract of pyrethrum, extract of hops, extract of aloes and opium.

The heading does not apply to:

…

(ij) Essential oils, concretes, absolutes, resinoids, extracted oleoresins, aqueous distillates or aqueous solutions of essential oils or preparations based on odoriferous substances of a kind used for the manufacture of beverages (Chapter 33)'.

8 Chapter 22 of the CN includes heading 2207, which reads as follows:

'2207	Undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol or higher; ethyl alcohol and other spirits, denatured, of any strength.
2207 10 00	– Undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol or higher
2207 20 00	– Ethyl alcohol and other spirits, denatured, of any strength

…'

9 Chapter 33 of the CN includes the following headings and subheadings:

‘…

3301	Essential oils (terpeneless or not), including concretes and absolutes; resinoids; extracted oleoresins; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by-products of the deterpenation of essential oils; aqueous distillates and aqueous solutions of essential oils.
…	…
3301 30 00	– Resinoids
3301 90	– Other:
3301 90 10	– – Terpenic by-products of the deterpenation of essential oils
	– – Extracted oleoresins:
3301 90 21	– – – Of liquorice and hops
3301 90 30	– – – Other
…	…
3302	Mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry; other preparations based on odoriferous substances, of a kind used for the manufacture of beverages
3302 10	– Of a kind used in the food or drink industries
	– – Of a kind used in the drink industries
	– – – Preparations containing all flavouring agents characterising a beverage
3302 10 10	– – – – Of an actual alcoholic strength by volume exceeding 0,5%
…	…
3302 10 90	– – Of a kind used in the food industries

…’

10 In accordance with Notes 1 and 2 to Chapter 33:

‘1. This chapter does not cover:
(a) Natural oleoresins or vegetable extracts of heading 1301 or 1302;

…

2. The expression “odoriferous substances” in heading 3302 refers only to the substances of heading 3301, to odoriferous constituents isolated from those substances or to synthetic aromatics.

…’

Explanatory Notes to the CN and Explanatory Notes to the HS

11 The Explanatory Notes to the Combined Nomenclature of the European Union (OJ 2019 C 119, p. 1) ('the Explanatory Notes to the CN') state, with regard to heading 1302:

'Vegetable extracts of heading 1302 are crude raw vegetable materials obtained by, for instance, solvent extraction, which are not further chemically modified or processed. However, inert additives (for example, anti-caking agents) and processing related to standardisation, or physical treatment, such as drying or filtration, are allowed.'

12 The explanatory notes published by the WCO ('the Explanatory Notes to the HS') provide, with regard to heading 1302:

'(A) Vegetable saps and extracts.

The heading covers vegetable saps (vegetable products usually obtained by natural exudation or incision) and extracts (vegetable products extracted from the original vegetable material by solvents), provided that they are not specified or included in more specific headings of the Nomenclature (see list of exclusions at the end of Part (A) of this Explanatory Note).

These saps and extracts differ from the essential oils, resinoids and extracted oleoresins of heading 33.01, in that, apart from volatile odoriferous constituents, they contain a far higher proportion of other plant substances (e.g., chlorophyll, tannins, bitter principles, carbohydrates and other extractive matter).

The saps and extracts classified here include:

…

(21) Vanilla oleoresin (sometimes erroneously known as "vanilla resinoid" or "vanilla extract").

Saps are usually thickened or solidified. Extracts may be in liquid, paste or solid form. "Tinctures" are extracts still dissolved in the alcohol by means of which they are extracted; the so-called "fluid extracts" are solutions of extracts in, for example, alcohol, glycerol or mineral oil. Tinctures and fluid extracts are generally standardised (for instance, pyrethrum extract may be standardised by adding mineral oil to produce commercial grades with a standard pyrethrins content of, e.g., 2%, 20% or 25%). Solid extracts are obtained by evaporating the solvent. Inert substances are sometimes added to certain extracts so that they can be more easily reduced to powder (e.g., belladonna extract, to which powdered gum Arabic is added), or to obtain a standard strength (for instance, certain quantities of starch are added to opium in order to obtain a product containing a known portion of morphine). The addition of such substances does not affect the classification of these solid extracts. However, extracts may not be subjected to additional extraction cycles or to purification processes, such as chromatographic purification, that increase or decrease certain compounds or compound classes to a degree that cannot be achieved solely by means of initial solvent extraction.

…

The vegetable saps and extracts of this heading are generally raw materials for various manufactured products. They are excluded from the heading when, because of the addition of other substances, they have the character of food preparations, medicaments, etc. They are also excluded from the heading when they are highly refined or purified, e.g., by means of chromatographic purification, ultrafiltration, or additional extraction cycles (e.g. liquid-liquid extraction) following initial extraction.

…

The heading excludes essential oils, resinoids and extracted oleoresins (heading 33.01). … Extracted oleoresins differ from the extracts provided for in this heading in that they (1) are obtained from natural cellular raw plant materials (almost always spices or aromatic plants), either by organic solvent extraction or by super-critical fluid extraction, and (2) contain volatile odoriferous principles together with non-volatile flavouring principles, which define the characteristic odour or flavour of the spice or aromatic plant.

The heading further excludes the following vegetable products, classified under more specific headings of the Nomenclature:

(a) Natural gums, resins, gum-resins and oleoresins (heading 13.01).

…’

13 As regards Chapter 33, the Explanatory Notes to the HS state:

‘1. This Chapter does not cover:

(a) Natural oleoresins or vegetable extracts of heading 13.01 or 13.02;

…

2. The expression “odoriferous substances” in heading 33.02 refers only to the substances of heading 33.01, to odoriferous constituents isolated from those substances or to synthetic aromatics. …

The essential oils and extracted oleoresins of heading 33.01 are all extracted from plant materials. …’

14 As regards heading 3301, the Explanatory Notes to the HS state:

‘…

Extracted oleoresins, also known in trade as “prepared oleoresins” or “spice oleoresins”, are obtained from natural cellular raw plant materials (usually spices or aromatic plants), either by organic solvent extraction or by super-critical fluid extraction. These extracts contain volatile odoriferous principles (e.g., essential oils) and non-volatile flavouring principles (e.g., resins, fatty oils, pungency constituents), which define the characteristic odour or flavour of the spice or aromatic plant. The essential oil content of these extracted oleoresins varies considerably depending on the spice or aromatic plant. These products are used principally as flavouring agents in the food industry.

The heading excludes:

(a) Natural oleoresins (heading 13.01).

(b) Vegetable extracts, not elsewhere specified or included (e.g., water-extracted oleoresins), which contain volatile ingredients and generally (apart from odoriferous substances) a far higher proportion of other plant substances (heading 13.02).

…

Essential oils, resinoids and extracted oleoresins sometimes contain small quantities of solvent used in their extraction (e.g., ethyl alcohol), but this does not remove them from the scope of the heading.

Essential oils, resinoids and extracted oleoresins which have been merely standardised by the removal or addition of a portion of the principal ingredients remain classified in this heading provided the composition of the standardised product remains within the normal range found in that kind of product in its natural state. However, an essential oil, resinoid or extracted oleoresin which has been fractionated or otherwise modified (other than by the removal of terpenic hydrocarbons), so that the composition of the resulting product is significantly different from that of the original product, is excluded (generally heading 33.02). The heading further excludes products put up with added diluents or carriers such as vegetable oil, dextrose or starch (generally heading 33.02).

The principal essential oils, resinoids and extracted oleoresins are listed in the Annex to the Explanatory Notes to this Chapter.

…

In addition to the exclusions referred to above this heading also excludes:

(a) Vanilla oleoresin (sometimes erroneously known as “vanilla resinoid” or “vanilla extract”) (heading 13.02).

…’

15 As regards heading 3302, the Explanatory Notes to the HS state:

‘This heading covers the following mixtures provided they are of a kind used as raw materials in the perfumery, food or drink industries (e.g., in confectionery, food or drink flavourings) or in other industries (e.g., soap-making):

…

(3) Mixtures of extracted oleoresins.

…

(6) Mixtures of one or more odoriferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics) combined with added diluents or carriers such as vegetable oil, dextrose or starch.

(7) Mixtures, whether or not combined with a diluent or carrier or containing alcohol, of products of other Chapters (e.g., spices) with one or more odoriferous substances (essential oils, resinoids, extracted oleoresins or synthetic aromatics), provided these substances form the basis of the mixture.

Products obtained by the removal of one or more of the ingredients of an essential oil, resinoid or extracted oleoresin so that the composition of the resulting product is significantly different from that of the original product are also mixtures of this heading. …'

Directive 92/83

16 Article 20 of Directive 92/83 states:

'For the purposes of this Directive the term "ethyl alcohol" covers:

– all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,

– products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22% vol.,

– potable spirits containing products, whether in solution or not.'

17 Article 27 of Directive 92/83, in Section VII thereof, entitled 'Exemptions', reads as follows:

'1. Member States shall exempt the products covered by this Directive from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

…

(e) when used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol.;

…'

Directive 92/12

18 Article 24 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 (OJ 2003 L 122, p. 36) ('Directive 92/12'), provided:

'1. The [European] Commission shall be assisted by a committee referred to as the "Committee on Excise Duties".

2. The measures necessary for the application of Articles 5, 7, 15b, 18, 19 and 23 shall be adopted in accordance with the procedure laid down in paragraph 3.

…

4. In addition to the measures referred to in paragraph 2, the Committee shall examine the matters raised by its chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of [Union] provisions on excise duties.

5. The committee shall adopt its rules of procedure.'

Directive 2008/118/EC

19 Article 43(1) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12 (OJ 2009 L 9, p. 12) provides:

'The Commission shall be assisted by a committee referred to as the "Committee on Excise Duty".'

20 Article 44 of Directive 2008/118 states:

'The Committee on Excise Duty shall, in addition to its tasks under Article 43, examine the matters raised by its chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of [Union] provisions on excise duty.'

Guideline No 458 of the Commission's Committee on Excise Duty of 19 November 2003

21 It is apparent in particular from Guideline No 458 of the Commission's Committee on Excise Duty of 19 November 2003 that 'the delegations accept almost unanimously that the exemption provided for in Article 27(1)(e) of [Directive 92/83] applies from the production stage or the importation onwards to flavourings of CN codes 1302 1930, 2106 9020 and 3302, in the versions in force at the time [these guidelines are] adopted'.

German law

22 Paragraph 130 of the Gesetz über das Branntweinmonopol (Branntweinmonopolgesetz – BranntwMonG) (Law on the monopoly in spirits), of 8 April 1922 (RGBl. 1922 I, p. 335), in the version applicable to the dispute in the main proceedings ('the BranntwMonG'), states:

'(1) Spirits and goods (products) containing spirits are subject to duty on spirits in the tax territory …

(4) Goods containing spirits within the meaning of subparagraph (1) differ from the alcoholic goods of Chapter 22 of the [CN]; they are manufactured using spirit or contain spirit and their alcohol strength exceeds 1.2% by volume in the case of liquid goods or 1% by mass in the case of non-liquid goods.

…'

23 Under Paragraph 152(1)(5) of the BranntwMonG, in force until 31 December 2017, which transposed Article 27(1)(e) of Directive 92/83 into German law:

'Products shall be exempt from duty where they are used commercially …

5. undenatured in the manufacture of flavours for flavouring

(a) beverages with an alcohol strength not exceeding 1.2% vol.;

(b) other foodstuffs, except spirits and other alcoholic beverages …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

24 The applicant in the main proceedings imported into Germany a runny and golden brown product with a strong smell of vanilla, consisting of approximately 85% ethanol, 10% water, 4.8% dry residue and having an average vanilla content of 0.5% ('the goods at issue in the main proceedings'). In order to obtain such goods, an intermediate product is first extracted from the vanilla bean using ethanol ('the intermediate product'). That strongly aromatic, viscous, dark brown intermediate product is then diluted with alcohol and water in order to obtain the goods at issue in the main proceedings.

25 On 10 February 2016, the applicant in the main proceedings declared those goods for release for free circulation under subheading 3302 10 90 of the CN.

26 On 25 April 2016, the Hauptzollamt with jurisdiction took the view that the goods should be classified under subheading 1302 19 05 of the CN and, therefore, that they were also subject to duty on spirits under German law. Accordingly, it recovered customs duties and excise duties.

27 The Finanzgericht (Finance Court, Germany) with jurisdiction confirmed that the goods at issue in the main proceedings fell under subheading 1302 19 05 of the CN and, therefore, that the imposition of customs and excise duties was lawful. The applicant in the main proceedings brought an

appeal on a point of law against the judgment of the Finanzgericht (Finance Court) before the referring court, the Bundesfinanzhof (Federal Finance Court, Germany), taking the view that those goods should be classified under subheading 3302 10 90 of the CN.

28 The referring court expresses doubts as to the interpretation to be given to subheadings 1302 19 05, 3301 90 30 and 3302 10 90 of the CN and Article 27(1)(e) of Directive 92/83.

29 In the first place, that court notes, first, that heading 1302 of the CN includes vegetable saps and extracts, provided that, according to the Explanatory Notes to the HS, they are not specified or included in more specific headings. Again according to those explanatory notes, vegetable saps and extracts differ, in particular, from oleoresins, in that, apart from volatile odoriferous constituents, they contain a far higher proportion of vegetable materials.

30 In that regard, the referring court notes that the intermediate product, extracted from the vanilla bean using a solvent, could be regarded as a vegetable extract. Nevertheless, since that intermediate product is then diluted into a considerable quantity of water and alcohol, that court is doubtful whether the goods at issue in the main proceedings can still be regarded as a vegetable extract within the meaning of heading 1302 of the CN.

31 The referring court emphasises, in particular, that, according to the Explanatory Notes to the HS, vegetable extracts are excluded from heading 1302 when, because of the addition of other substances, they have the character of food preparations, and that even if, in accordance with the Explanatory Notes to the CN, as regards heading 1302, processing related to standardisation does not preclude the product from being classified under that heading, it is not clear that, when a product is as diluted as significantly as the one at issue in the main proceedings, that processing may still be regarded as standardisation, even if that dilution, as the applicant in the main proceedings attests, is to adjust the vanilla content to 0.5%.

32 Secondly, the referring court notes that extracted oleoresins are expressly referred to in heading 3301 of the CN and that the goods at issue in the main proceedings contain the objective constituents mentioned in the Explanatory Notes to the HS such that those goods can be classified under that heading. In addition, Note 1(ij) to Chapter 13 of the CN excludes all extracted oleoresins from that chapter and, consequently, also from heading 1302 of the CN.

33 However, that court also notes that Note 1(a) to Chapter 33 of the CN states, conversely, that vegetable extracts under heading 1302 are excluded from that chapter and, therefore, from heading 3301 of the CN.

34 Thirdly, that court is uncertain about the distinction between heading 3301 and heading 3302 of the CN. Having regard to the Explanatory Notes to the HS, it takes the view that heading 3302 covers not only mixtures of several extracted oleoresins, but also mixtures of one or more odoriferous substances with added diluents, such that it might also be possible to classify the goods at issue in the main proceedings under that heading, in so far as, in the present case, vanilla oleoresin, which is based on an odoriferous substance, has been diluted by adding alcohol and water.

35 In the second place, the referring court notes that, since the goods at issue in the main proceedings contain spirits, they are, as a rule, subject to the excise duty provided for in Paragraph 130(1), first sentence, and (4) of the BranntwMonG. However, it is still necessary to determine whether those goods may benefit from the exemption provided for under the former Paragraph 152(1)(5) of the

BranntwMonG, since, to answer that question, it is necessary to interpret Article 27(1)(e) of Directive 92/83, which that national provision transposed, and, more specifically, to determine what is to be understood by 'flavours', within the meaning of Article 27(1)(e).

36 In that regard, the referring court states that the Commission's Committee on Excise Duty, in Guideline No 458 of 19 November 2003, considered that such an exemption applied from the production stage or the importation onwards to flavourings of subheadings 1302 19 30, 2106 90 20 and 3302 of the CN, in the versions in force at that time.

37 According to that court, that guidance would preclude the goods at issue in the main proceedings from being exempted from the duty on spirits if they were to be classified under subheading 1302 19 05 or heading 3301 of the CN. By contrast, those goods would benefit from that exemption if they were classified under heading 3302 of the CN, even though goods of that heading may contain more alcohol than those falling within heading 3301.

38 The referring court is uncertain, however, whether the Commission's Committee on Excise Duty is able to limit the scope of Article 27(1)(e) of Directive 92/83 in that way. It takes the view that the powers conferred on that committee do not authorise it to limit the scope of that provision.

39 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is subheading 1302 19 05 of the [CN] to be interpreted as meaning that an extracted vanilla oleoresin diluted with ethanol and water consisting of approximately 90% (v/v) or 85% (m/m) ethanol, up to 10% (m/m) water, 4.8% (m/m) dry residue and 0.5% (m/m) vanilla is to be classified under that subheading even though, according to Note 1(ij) to Chapter 13 of the CN, heading 1302 of the CN does not apply to extracted oleoresins?

(2) Do extracted oleoresins within the meaning of subheading 3301 90 30 of the CN include the goods described in the first question referred?

(3) Is subheading 3302 10 90 of the CN to be interpreted as meaning that the goods described in the first question referred are to be classified as mixtures of [odoriferous] substances and mixtures (including alcohol solutions) with a basis of one or more of these substances, of a kind used in the food industry?

(4) Do flavours within the meaning of Article 27(1)(e) of [Directive 92/83] include goods of subheading 1302 19 05 of the CN or extracted oleoresins of subheading 3301 90 30 of the CN?'

Consideration of the questions referred

The first to third questions

40 By its first to third questions, which it is appropriate to examine together, the referring court asks, in essence, whether the CN must be interpreted as meaning that a product consisting of approximately 85% ethanol, 10% water, 4.8% dry residue and having an average vanilla content of

0.5%, which is obtained by diluting in water and ethanol an intermediate product itself extracted from vanilla bean using ethanol, falls under subheading 1302 19 05, subheading 3301 90 30 or subheading 3302 10 90 of that nomenclature.

41 As a preliminary point, it should be noted that, first, heading 1302 in Chapter 13 of the CN covers, inter alia, vegetable extracts, with subheading 1302 19 05 of the CN referring, more specifically, to vanilla oleoresin.

42 Secondly, heading 3301 in Chapter 33 of the CN covers, inter alia, extracted oleoresins, with subheading 3301 90 30 of the CN covering, more specifically, extracted oleoresins other than those of liquorice and hops.

43 Thirdly, Chapter 33 of the CN also incorporates heading 3302, which covers, inter alia, mixtures of odoriferous substances and mixtures, including alcoholic solutions, with a basis of one or more of those substances, of a kind used as raw materials in industry. Subheading 3302 10 90 of the CN covers, inter alia, such mixtures when they are of a kind used in the food industries.

44 Fourthly, it should be noted that, in accordance with General Rule 1 of the CN, classification for the purpose of customs duties is, in principle, to be determined according to the terms of the headings and any relative section or chapter notes.

45 In the light of those preliminary findings, it should be noted, in the first, place that (i) in accordance with Note 1, second paragraph, point (ij) to Chapter 13 of the CN, heading 1302 of that nomenclature does not apply to 'extracted oleoresins' covered by heading 3301 of the CN and (ii) that under Note 1(a) to Chapter 33 of the CN, that chapter does not cover 'vegetable extracts' falling under heading 1302 of the CN.

46 Therefore, in accordance with the exemption provided for in Note 1, second paragraph, point (ij) to Chapter 13 of the CN, in order for the goods at issue in the main proceedings to fall outside subheading 1302 19 05 of the CN – which, as noted in paragraph 41 of the present judgment, covers vanilla oleoresin but must be regarded as an extracted oleoresin within the meaning of heading 3301 of the CN or as a mixture of odoriferous substances or mixture with a basis of one of those substances within the meaning of heading 3302 of the CN – those goods must not, in any event, comprise a vegetable extract within the meaning of heading 1302 of the CN.

47 However, that is not the case. It would appear that those goods must be regarded as a vegetable extract within the meaning of heading 1302 of the CN and, more specifically, as vanilla oleoresin within the meaning of subheading 1302 19 05 thereof.

48 In that regard, it should be noted that the fact that the Explanatory Notes to the HS state that heading 1302 thereof refers only to vegetable extracts not elsewhere specified or included does not, in itself, preclude goods such as those at issue in the main proceedings from being regarded as a vegetable extract within the meaning of heading 1302 of the CN, on the ground that those goods could fall under more specific headings and, more specifically, headings 3301 and 3302 of the CN.

49 It is not in any way apparent from heading 1302 of the CN or from the notes thereto that that heading is to be regarded as a subsidiary heading, unlike certain CN headings which expressly set out such a characteristic. The Explanatory Notes to the HS are not binding and cannot therefore take precedence over the provisions of the CN or alter their content (see, to that effect, judgment of 3 March 2016, *Customs Support Holland*, C-144/15, EU:C:2016:133, paragraphs 28 and 47).

50 In any event, it follows from the Explanatory Notes to the HS that, as regards heading 1302 thereof, the more specific headings to which reference is made are those referred to at the end of Part (A) of the note concerned. The list of goods in that list does not mention the goods of headings 3301 or 3302 of the HS.

51 In the second place, it should be noted that, first, although it has been extracted from vanilla bean using ethanol, the intermediate product, referred to in paragraph 24 of the present judgment, may be classified as vanilla oleoresin within the meaning of heading 1302 19 05 of the CN.

52 The first paragraph of Note 1 to Chapter 13 of the CN expressly provides that 'extract of pyrethrum' falls under heading 1302 of the CN. According to the Explanatory Notes to the HS, that extract is obtained 'by extraction with an organic solvent', like the intermediate product referred to in paragraph 24 above.

53 In addition, heading 1301 of the CN refers, inter alia, to natural oleoresins. By contrast, vanilla oleoresin, within the meaning of CN subheading 1302 19 05, must therefore be regarded as a vegetable extract which is not obtained in a 'natural' manner, but by means of a technological extraction process, for instance by means of a solvent.

54 Such an interpretation is further confirmed by the Explanatory Notes to the CN, as regards heading 1302, which state that 'vegetable extracts of heading 1302 are crude raw vegetable materials obtained by, for instance, solvent extraction'.

55 Secondly, it is true that, as the referring court points out, in order to obtain the goods at issue in the main proceedings, that intermediate product is strongly diluted with ethanol and water. However, it should be noted, first of all, that, as the Explanatory Notes to the CN state as regards heading 1302, a vegetable extract will still fall under that heading even if it undergoes processing related to standardisation.

56 Similarly, the Explanatory Notes to the HS state, as regards heading 1302, that that heading also covers 'fluid extracts', namely '[generally standardised] solutions of [vegetable] extracts in … alcohol', to produce commercial grades with a standard vegetable extract content in the product.

57 Moreover, neither the provisions of the CN or the HS nor their explanatory notes set a maximum limit on the quantities of other products which can be used to standardise the vegetable extract in question.

58 It follows that when a vegetable extract is diluted in order to ensure its standardisation, the vegetable extract thus diluted can still fall under heading 1302 of the CN.

59 In the present case, it is apparent from the request for a preliminary ruling that, according to the importer of the goods at issue in the main proceedings, the dilution of the intermediate product with alcohol and water is intended precisely to adjust the vanilla content in those goods to 0.5% and, therefore, to standardise them.

60 In the third place, it should be noted that the Explanatory Notes to the HS state, as regards headings 1302 and 3301 of the HS, that vegetable extracts of heading 1302 differ from extracted oleoresins, within the meaning of heading 3301 of the HS, in that, apart from volatile odoriferous constituents, they contain ordinarily a far higher proportion of other plant substances than the extracted oleoresins of heading 3301 of the HS.

61 That appears to be the case for the goods at issue in the main proceedings, since the proportion of dry residues in vanilla bean is, according to the information provided by the referring court, nine times higher than the proportion of vanilla.

62 In view of the above considerations, the answer to the first to third questions is therefore that the CN must be interpreted as meaning that a product consisting of approximately 85% ethanol, 10% water, 4.8% dry residue and having an average vanilla content of 0.5% and which is obtained by diluting, for the purposes of standardisation, in water and ethanol an intermediate product itself extracted from vanilla bean using ethanol, falls under subheading 1302 19 05 of that nomenclature.

The fourth question

63 By its fourth question, the referring court asks, in essence, whether Article 27(1)(e) of Directive 92/83 must be interpreted as meaning that a vanilla oleoresin of subheading 1302 19 05 of the CN must be regarded as a 'flavour' within the meaning of that provision.

64 Article 27 of Directive 92/83 provides that Member States are to exempt the products covered by that directive from the excise duty established by that directive, inter alia, where those products are used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol.

65 As a preliminary point, it must be noted that it follows from the very wording of Article 27 that only products falling within the scope of Directive 92/83 are able to benefit from the exemption under Article 27. By contrast, it is irrelevant that those products comprise goods which do not, as such, fall under the scope of that directive (see, to that effect, judgments of 12 June 2008, *Gourmet Classic*, C-458/06, EU:C:2008:338, paragraphs 35 to 37, and of 9 December 2010, *Repertoire Culinaire*, C-163/09, EU:C:2010:752, paragraph 26).

66 Among the constituents of the goods at issue in the main proceedings, only ethanol appears to fall within the scope of Directive 92/83, under the first indent of Article 20 of that directive, read in conjunction with heading 2207 of the CN. It follows that only that ingredient may be exempted under Article 27 of that directive, on condition that it is used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol.

67 That being clarified, it should be noted that, since the concept of 'flavour' is not defined in either Directive 92/83 or in the CN, its meaning and scope must be determined in accordance with the usual meaning of that notion in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part (see, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 19, and the case-law cited).

68 In its usual meaning, the concept of 'flavour' refers to an ingredient which brings a specific taste or smell to a particular product. Such an interpretation is not, moreover, contradicted by the general scheme or objectives of Directive 92/83.

69 It follows that, in so far as it fulfils such a definition, which it is for the referring court to ascertain, a vanilla oleoresin must be regarded as a 'flavour' within the meaning of Article 27 of that directive, and that no excise duty may be levied on the ethanol which it contains when such a flavour is used for the preparation of foodstuffs or non-alcoholic beverages with an alcoholic strength not exceeding 1.2% vol.

70 That interpretation cannot be called into question by the guidelines adopted by the Commission's Committee on Excise Duties, which were mentioned by the referring court.

71 Even if those guidelines had intended to exclude vanilla oleoresins from the concept of 'flavour', within the meaning of Article 27 of Directive 92/83, the fact remains that the powers of that committee, as laid down on the date on which such guidelines were adopted, in Article 24(2) and (4) of Directive 92/12, were limited to the adoption of measures concerning the application of provisions of EU law on excise duties, without allowing that committee to amend those provisions or, consequently, to authorise it to restrict the scope of the concept of 'flavour' within the meaning of Article 27.

72 Nor do the powers of the Commission's Committee on Excise Duties, as now defined in Articles 43 and 44 of Directive 2008/118, which repealed Directive 92/83, permit it to restrict the scope of such a concept.

73 It follows from all the foregoing considerations that Article 27(1)(e) of Directive 92/83 must be interpreted as meaning that a vanilla oleoresin falling under subheading 1302 19 05 of the CN must be regarded as a 'flavour' within the meaning of that provision, provided that it constitutes an ingredient which brings a specific taste or smell to a particular product.

Costs

74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **The Combined Nomenclature set out in 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, as amended by Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015, must be interpreted as meaning that a product consisting of approximately 85% ethanol, 10% water, 4.8% dry residue and having an average vanilla content of 0.5%, which is obtained by diluting, for the purposes of standardisation, in water and ethanol an intermediate product itself extracted from vanilla bean using ethanol, falls under subheading 1302 19 05 of that nomenclature.**

2. **Article 27(1)(e) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages must be interpreted as meaning that a vanilla oleoresin falling under subheading 1302 19 05 of the Combined Nomenclature set out in Annex I to Regulation No 2658/87, as amended by Implementing Regulation 2015/1754, must be regarded as a 'flavour' within the meaning of that provision, provided that it constitutes an ingredient which brings a specific taste or smell to a particular product.**

[Signatures]