OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 9 FEBRUARY 1984 [1]

Mr President,
Members of the Court,

A — The Seventh Senate of the Bundesfinanzhof [Federal Finance Court] has referred to the Court under Article 177 of the EEC Treaty a question on the tariff classification of a product described as follows: an article consisting of a fabric made of PVC monofil 0.9 mm thick, laid direct from a spinning nozzle in the form of coils and hardened and joined together by heat treatment with the aid of a spray. The product, which is described by the plaintiff in the main action, the company 3M Deutschland GmbH; as a "mat for trapping dirt" ("Schmutzfangmatte"), is to be imported from the United States in strips 90 cm and 120 cm wide and 610 cm long for use as a floor covering.

Upon application by the plaintiff, the Oberfinanzdirektion [Principal Revenue Office] Frankfurt am Main issued a binding customs tariff notification on 7 April 1982, in which it classified the goods as "carpets, carpeting, rugs, mats and matting other than knotted carpets, other than coir mats and matting and other than tufted carpets, not woven, of synthetic textile fibres", under subheading 58.02 A II (b) of the Common Customs Tariff, for which there is a conventional rate of duty of 14.5%. The plaintiff lodged an objection against that classification and claimed that the product should be classified as a bonded fabric under tariff heading No 59.03, to which a conventional rate of duty of 9.5% applies.

By decision of 19 August 1982, the Oberfinanzdirektion rejected the objection, stating in essence that articles made of bonded fabrics were excluded in principle from Chapter 58 of the Common Customs Tariff by virtue of Note 1 to that chapter; however, if they were carpets or similar articles *they* remained in principle within the scope of Chapter 58 by virtue of Note 2 to that chapter, which was more specific. Having regard to business usage and to the Explanatory Notes to the Customs Cooperation Council Nomenclature relating to tariff heading No 58.02 (Volume 2, Section XI), the "mat for trapping dirt" was considered to meet the conditions for a classification as a "carpet" or "rug" laid down in Note 2 to Chapter 58 and under tariff heading No 58.02.

In the proceedings which it instituted against that decision before the Bundesfinanzhof the plaintiff again claimed that the product in question should be classified under tariff heading No 59.03, arguing principally that it followed from Note 2 to Chapter 58, from the wording of that chapter and also from the Explanatory Notes to tariff heading No 58.02 that, in determining the meaning of the word "carpet" or "rug", regard should be had not only to the intended use of the product as in the case of floor coverings but also to its make-up and method of manufacture.

The Seventh Senate of the Bundesfinanzhof took the view that the answer to the question concerning the correct application of the Common Customs Tariff depended on clarification of the relationship between Notes 1 and 2 to Chapter 58 and also, possibly, on the interpretation of Note 2 to that chapter; accordingly, by order of 21 April 1983, it referred to the Court of Justice for a

1 — Translated from the German.

preliminary ruling the question whether a product of the kind described at the beginning of this Opinion should be classified under heading No 58.02 or heading No 59.03 of the Common Customs Tariff.

B — On this question my opinion is as follows:

1. The Bundesfinanzhof, the parties to the main action and the Commission, which has submitted its observations on the reference, all agree that, considered from the viewpoint of its *make-up and method of manufacture*, the product in dispute must be regarded as falling amongst the "*bonded fibre fabrics, similar bonded yarn fabrics, and articles of such fabrics ...*" referred to in tariff heading No 59.03. The rule contained in Note 1 to Chapter 58, which is designed to prevent alternative classifications, provides expressly in that respect that, in addition to the goods specifically referred to in that note, any other goods falling within Chapter 59 are not covered by Chapter 58.

A different result would follow if the product in question were to be considered solely from the viewpoint of its undisputed use as a floor covering. Since the *wording* of tariff heading No 58.02, which is the relevant heading in this connection, refers only to "other *carpets, carpeting, rugs, mats and matting*", it remains to be considered whether classification under that tariff heading is required by Note 2 to Chapter 58. That note reads as follows:

"In headings Nos 58.01 and 58.02, the words 'carpets' and 'rugs' are to be taken *to extend to similar articles having the characteristics of floor coverings but intended for use for other purposes.* These headings are to be taken not to apply to felt carpets, which fall within Chapter 59."

According to the national court, that provision is open to two possible interpretations. It may apply only to articles which, though similar to carpets, are not used as floor coverings but for other purposes, for instance as wall hangings. Alternatively, it may be regarded as a *lex specialis* derogating from Note 1 and including *all* articles which are similar to carpets even though Note 1 requires that in principle they be classified under Chapter 59.

2. The interpretation of Note 2 as a *lex specialis* is, however, as the Commission has rightly pointed out, open to the general objection that the wording of the note contains no indication that it is in any way intended to derogate from Note 1 and restrict its application. Furthermore, a *literal interpretation based on a closer grammatical analysis of the passage* in all the Community languages makes it clear, even though the different language versions are not identical in meaning, that tariff headings Nos 58.01 and 58.02 only apply to articles which are similar to carpets if, while being intended for other uses, they have at least *the characteristics of carpets and carpeting.* The reference to a possible different use of articles similar to carpets is particularly clear in the Danish, French and Dutch versions, where it is stated that they must be articles which are not intended to be placed on the floor. Those texts are sufficient to make it clear that the note is intended to include under tariff headings Nos 58.01 and 58.02 products which display the characteristics of carpets and carpeting within the meaning of those headings, even if they are used otherwise

than as floor coverings. Conversely, it follows that the scope of the provision does not extend to products which are intended for use as a floor covering but do not have the same characteristics as carpets and carpeting. The decisive question is therefore whether the product in dispute has those *characteristics.*

3. As all the parties to the proceedings have rightly noted, the Common Customs Tariff *does not contain any description of those characteristics.* Only the Explanatory Notes to the Customs Cooperation Council Nomenclature (Section XI; heading No 58.02, Part A, first paragraph) provide any guidance on the point, stating that articles which are classifiable as carpets or rugs under this tariff heading are "sufficiently thick, stiff and strong to be used as floor coverings." On the basis of those characteristics the product in dispute would fail to be classified as a carpet or rug within the meaning of tariff heading No 58.02.

As the national court correctly pointed out, however, that explanatory note does not rule out the possibility that, in deciding whether a product is to be treated as being similar to a carpet, other characteristics may also play a role. Furthermore, it considers that, even if the argument of the Oberfinanzdirektion is followed and those characteristics are taken to be conclusive, there would still remain the question of the compatibility of the Explanatory Notes with Note 2 to Chapter 58, which, as a legal provision, takes precedence.

(a) An answer to the question as to which characteristics distinguish a carpet or similar article may in my opinion be found by considering *everyday speech* and *business usage.* It is true that, as tariff headings Nos 58.01 and 58.02 show, the words "carpets" and "rugs", which do not always themselves have a very clear definition, are given a number of different renderings in the various language versions. However, it follows generally from a consideration of everyday speech and business usage that, as the plaintiff has argued, the words "carpets" and "rugs" are to be distinguished from the words "floor covering" by the fact that, in addition to the *intended use,* the *method of manufacture and make-up* are important in the case of the former . . .

(b) It is quite clear from the *system adopted for the classification of goods* under tariff headings Nos *58.01 and 58.02* that a carpet or rug within the meaning of those tariff headings is distinguished by other characteristics besides those described in the above-mentioned eplanatory notes. Tariff heading No 58.01 covers "carpets, carpeting and rugs, knotted . . .", whereas "other carpets, carpeting, rugs, mats and matting, . . ." are assigned to tariff heading No 58.02. Accordingly, tariff heading No 58.02 is subdivided into "carpets, carpeting, rugs, mats and matting" (subheading 58.02 A) and " 'Kelem', 'Schumacks' and 'Karamanie' rugs and the like" (subheading 58.02 B). Tariff subheading 58.02 A contains further subdivision, namely I "Coir mats and matting" and II "Other". Tariff subheading 58.02 A II is further subdivided into (a) "Tufted carpets, carpeting, rugs, mats and matting" and (b) "Other", that is to say, not tufted. All the products which are expressly referred to under the two tariff headings display, as indeed the Customs Co-operation Council's Explanatory Notes indicate, a common defining characteristic which distinguishes their method of manufacture from that of other *floor coverings.* That characteristic is that they all consist of materials which either have been manufactured by knotting, weaving, netting or knitting or at any rate give that impression. By contrast, *bonded fabrics,* as is shown by the Customs Cooperation Council's Explanatory Notes (Section XI, heading No 59.03, first paragraph), are characterized

by the fact that they are made by forming, by carding or otherwise, a sheet consisting of one or more webs of textile fibres, which may be parallel, cross-laid or laid at random. The fibres are then assembled by means of a *bonding substance or by self-adhesion*, that is to say, by a chemical process or by heat treatment. Consequently, it would be contrary to the system of classification to assign floor coverings made from such materials, which are fundamentally different from the articles mentioned under tariff headings Nos 58.01 and 58.02 by reason of their method of manufacture, to tariff subheading 58.02 A II (b) as "other" carpets or rugs, that is to say, ones which are not tufted. This follows all the more from the fact that further hand-made carpets are referred to immediately thereafter in tariff subheading 58.02 B.

(c) Another common characteristic which distinguishes the products referred to in tariff headings Nos 58.01 and 58.02 from those covered by Chapter 59 is that, in addition to any other use, they have, to differing degrees, a *decorative function*. As is clear from the title of Chapter 58, that chapter covers: "Carpets, mats, matting and tapestries; pile and chenille fabrics; narrow fabrics; trimmings; tulle and other net fabrics, lace; embroidery." The articles which fall under Chapter 59 are: "Wadding and felt; twine, cordage, ropes and cables; special fabrics; impregnated and coated fabrics; textile articles of a kind suitable for industrial use." Neither of the parties maintains, however, that the floor covering to which this action relates is intended to serve not only as a mat for trapping dirt but also as a decoration.

4. In any event, the existence of tariff heading No 59.10 — which applies to goods of the following description: "*Linoleum* and materials prepared on a textile base in a similar manner to linoleum, whether or not cut to shape or of a kind used as floor coverings; floor coverings consisting of a coating applied on a textile base, cut to shape or not" — shows that *not every floor covering is* to be regarded, irrespective of its make-up, as a *carpet or rug* within the meaning of tariff headings Nos 58.01 and 58.02.

5. Finally, the view that Note 2 to Chapter 58 should be interpreted as including only articles which have the characteristics of carpets and carpeting also receives confirmation from the *historical background* to the note. The *original wording* of the first sentence thereof was as follows:

"In headings numbered 58.01 and 58.02, the expression "carpets" — is to be taken to extend to table covers woven in the manner of carpets."

Thus, according to that text, only *table covers* woven in the manner of carpets were to be equated with carpets. The Interim Nomenclature Committee found that the wording was too narrow and recommended in a Draft Report dated 6 November 1953 (Document 1753 E (53)) that it should be replaced by the present wording. The purpose of this *revised text* was, as is stated in the Reasons for Proposed Amendments, first to *extend the definition* "to fabrics having the characteristics of floor coverings but intended for use for other purposes" and secondly to *replace the criterion of the method of weaving* by another, that of "having the characteristics of floor coverings." In order that such products should be distinguished from simple table linen or furnishing fabrics, the characteristics of floor coverings were defined by the criteria of "stiffness, thickness, strength, etc.", which evidently were subsequently incorporated into the Customs Cooperation Council's Explanatory Notes. However, this historical background shows particularly clearly

that the criteria which the notes provide for the definition of a carpet or rug are not exhaustive, but must be considered in conjunction with a specific method of manufacture.

6. A further line of argument is provided by the second sentence of Note 2 to Chapter 58, which states that *felt carpets* fall within Chapter 59. That provision again makes it clear that, in classifying a product as a carpet or rug for the purposes of tariff headings Nos 58.01 and 58.02, it is necessary to have regard *not so much to the product's intended use* as to its *make-up and method of manufacture.*

7. The conclusion which may be drawn from the review of the arguments up to this point is that on the basis of the above-mentioned criteria the product in dispute should be regarded as an article made of bonded fabrics within the meaning of tariff heading No 59.03. Furthermore, there appear to be no logical grounds for drawing a conclusion *a contrario* and applying a different rule to floor coverings made of bonded fabrics, which, in view of their make-up and method of manufacture, clearly have more in common with felt carpets than with the products specified under tariff headings Nos 58.01 and 58.02. The fact that floor coverings made of bonded fabrics are not expressly mentioned in the relevant sentence alongside felt carpets may likewise be explained, as the Commission has convincingly argued, by reference to the historical background. With the adoption of the Protocol of 1 July 1955 amending the Brussels Convention of 15 December 1950 on Nomenclature for the Classification of Goods in Customs Tariffs, which incorporated the amended version of the first sentence of Note 2 to Chapter 58, came the introduction of tariff heading No 59.03 — which is of relevance here — for bonded fabrics which, according to the Commission, were as yet little known and were probably assimilated to felt goods.

8. An objection which may be made against the legal construction which I have put forward is that the customs authorities of nine Member States have stated in reply to a question that they classify the product in dispute under tariff heading No 58.02 ("other carpets"). However, that approach is explicable by the fact that, on the one hand, as was shown earlier, the description of the characteristics of a carpet or rug contained in the Customs Cooperation Council's Explanatory Notes to tariff heading No 58.02 is incomplete and, on the other, the corresponding Notes to tariff heading No 59.03 expressly provide that "carpets and carpeting (heading No 58.02)" are excluded from tariff heading No 59.03. However, for the sake of practicability and a uniform application of the Customs Tariff, the customs authorities endeavour to follow the Explanatory Notes of the competent Nomenclature Committee.

The adoption of the above Notes is to be explained by the fact that the Nomenclature Committee of the Customs Cooperation Council decided by a majority at its 39th meeting in October 1977 to classify under tariff heading No 58.02 a product designated as "Nomad Cushiom", which is comparable to the product in dispute. That decision was taken to ensure the practical application of the Customs Tariff, but did not address the legal issues described earlier. At its 40th meeting in May 1978, the Nomenclature Committee finally adopted the Expla-

natory Note to tariff heading No 59.03, which states that carpets and carpeting (heading No 58.02) do not fall under tariff heading No 59.03. That Note is for guidance only. It is at variance with Note 1 to Chapter 58, which is a legally binding provision. Note 2 is not applicable to the product in question, the mat for trapping dirt. Consequently, I adhere to my conclusion that it should be classified under tariff heading No 59.03 in accordance with Note 1.

C — In conclusion I therefore propose that it be stated in reply to the question submitted by the Seventh Senate of the Bundesfinanzhof that the product in dispute should be classified under heading No 59.03 of the Common Customs Tariff.