REPORT FOR THE HEARING
delivered in Case C-1/89 *

I — Facts and procedure

1. On 24 March 1987, Mrs Ingrid Raab, the plaintiff in the main proceedings, who runs an art gallery in Berlin, applied to the customs office at Tegel Airport, Berlin, for the clearance into free circulation of 36 photographs by the artist Robert Mapplethorpe, imported from the United States of America, which she had purchased for DM 66 783.30.

2. On 1 April 1987 the customs office classified the goods under Code No 4911 400 90 ('Photographs') of the Common Customs Tariff and charged customs duty at 5.8% in addition to import turnover tax at 14%.

3. Mrs Raab lodged an objection against that decision on the ground that the photographs in issue should have been considered as 'Original engravings, prints and lithographs' within the meaning of Heading No 99.02 of the Common Customs Tariff, entailing exemption from customs duty and subject to import turnover tax at 7%, or, in the alternative, should have been treated as 'Artists' screen prints' under subheading 49.11 B of the Common Customs Tariff for which, in accordance with Council Regulation (EEC) No 1945/86 of 18 June 1986 temporarily suspending the autonomous Common Customs Tariff duties on a number of industrial products (Official Journal 1986, L 174, p. 1), customs duties are suspended and which are subject to import turnover tax at 14%.

4. Following the dismissal of her objection, Mrs Raab brought an action before the Finanzgericht Berlin.

5. (a) In support of her action, Mrs Raab argued that the photographs in question constitute 'works of photographic art' and should have been classified under Chapter 99 of the Common Customs Tariff, which relates in particular to works of art. It was the intention of the legislature to give privileged treatment to all original works of art. Mapplethorpe's photographs, of which only a limited number of copies exist and the value of which is far greater than the value of the materials used, were taken from an artistically prepared original plate. Therefore, those photographs belong in the field of the graphic arts in the broader sense of the term and, as a consequence, should have been classified as 'Original engravings, prints and lithographs' under Heading No 99.02 of the Common Customs Tariff. That is apparent both from Note 4 to Chapter 99 of the Common Customs Tariff, under which, subject to Notes 1, 2 and 3, articles falling both within Chapter 99 and other chapters of the Common Customs Tariff must be classified in Chapter 99, and from the judgment of 15 May 1985 in Case 155/84 *Onnasch* v *Hauptzollamt Berlin-Packhof* [1985] ECR 1449, in which the Court gave a wide interpretation to the term 'Original sculptures and statuary, in any

* Language of the case: German.

material' in Heading No 99.03, so as to encompass all three-dimensional artistic productions, irrespective of the techniques and materials used. In particular, the Court confirmed the view of the Commission in that case that it would lead to an unfair result if a work of art had customs duty levied on its full value at the rate laid down for the material used, even when the value of the material was insignificant by comparison with the artistic value of the object.

(b) In the event that it was not possible to interpret the Common Customs Tariff in such a way that art photographs came under Heading No 99.02, Mrs Raab's argument in the alternative before the national court was that the principle of equality would be breached if artistic photographs were not treated in the same way as comparable works of art. Thus, inasmuch as the legislature had given favourable treatment to certain works of art in the field of the graphic arts which were not entirely executed by hand by the artist, when adopting Regulation No 1945/86 temporarily suspending customs duties for artists' screen prints, it should, in accordance with the principle of equality, have accorded exactly the same treatment to art photographs, which like screen prints, are works of art made using a mechanical or photomechanical process. That gap in the provisions in force should be filled by interpreting them in accordance with their spirit. Thus, Mrs Raab concluded that Mapplethorpe's art photographs, which are at least comparable to artists' screen prints, should, like those screen prints, be exempt from customs duties.

6. The Hauptzollamt Berlin-Packhof (hereinafter referred to as 'the Hauptzollamt'), the defendant in the main proceedings, contended that the action pending before the national court should be dismissed.

The Hauptzollamt considered that classification criteria, such as the artistic nature of goods, are unusable in practice. Moreover, taking into account the unequivocal wording of the provisions of the Common Customs Tariff, photographs should be classified, regardless of their artistic merit, only under Code No 4911 400 90. The case-law of the Court (the judgment in Case 155/84, cited above) is only applicable when doubts exist, but not when, as in the present case, the provisions of the Common Customs Tariff are unambiguous.

7. The Finanzgericht Berlin considered that the dispute raises a problem of interpretation of the relevant Community legislation, particularly having regard to the judgment of the Court in Case 155/84 (cited above), and by order of 8 November 1988 it stayed proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Are 36 photographs by the artist Robert Mapplethorpe, purchased together for the sum of DM 66 783.30, to be classified under Code No 4911 400 90 ('Photographs') or Code No 9902 000 00 ('Original engravings, prints and lithographs') or, in the alternative, are they to be classified under Code No 4911 500 10 ('Suspension of customs duties for artists' screen prints') of the Common Customs Tariff?'

8. The order of the Finanzgericht Berlin was received at the Court Registry on 3 January 1989.

9. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 7 April 1989 by the Commission of the European Communities, represented by its Legal Adviser, Jörn Sack.

10. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

11. Pursuant to Article 95(1) and (2) of the Rules of Procedure the Court, by decision of 21 June 1989, assigned the case to the Second Chamber.

II — Written observations submitted to the Court

The Commission makes the preliminary observation that the Finanzgericht's question should be reformulated in such a way that it asks whether Headings Nos 49.11 and 99.02 of the Common Customs Tariff must be interpreted as meaning that art photographs fall to be classified under the latter heading or, like artists' screen prints, under the former heading.

With regard to the substance of the case, the Commission is of the opinion that all photographs, including art photographs, come under subheading 49.11 B of the Common Customs Tariff.

(a) In support of that view, the Commission argues first that photography constitutes an independent art form and that photographic works are not mentioned in Chapter 99 of the Common Customs Tariff. Therefore, it is not possible to classify them in a heading of that chapter by way of interpretation, referring to the decision of the Court in Case 155/84 (cited above).

Furthermore, the provisions of Chapter 99 of the Common Customs Tariff cannot be applied by analogy, since it is expressly provided that photographs are to be classified under subheading 49.11 B. For the same reason, it is not possible to rely on Note 4 to Chapter 99 of the Common Customs Tariff.

Moreover, under Rule 1 of the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, the titles of sections, chapters and sub-chapters are provided for ease of reference only, so that it is not possible for Mrs Raab to invoke in support of her view the title of Chapter 99 of the Common Customs Tariff which refers, in general terms, to 'works of art'.

Finally, Regulation No 1945/86 cannot be applied in this case because it does not refer to photographs and, since it constitutes an exception to the general system of the Common Customs Tariff, reasoning by analogy is not possible.

(b) In the alternative, the Commission considers that the unequivocal rule of the Common Customs Tariff with regard to the classification of photographs does not constitute an infringement of the principle of equality of treatment.

Chapter 99 of the Common Customs Tariff refers only to works of art which are made

by hand by the artist, to the exclusion of works which, like photographs, are prepared, even in their original form, using technical equipment, even though, in the final analysis, art photographs are very close to the works which are part of the plastic arts mentioned in Chapter 99.

Moreover, the Commission maintains that, although the objects referred to in Chapter 99 of the Common Customs Tariff are almost always works of art, the same cannot be said for photographs. On the contrary, most photographs are not artistic. Moreover, it is very difficult to make a distinction between photographs which are commercial in nature and those which have artistic merit because artistic merit is defined essentially using subjective and variable criteria. The Commission concludes that the principle of equality of treatment is not breached where the legislature applies the same treatment to all photographs, regardless of their artistic nature, by providing that they always be classed under Heading No 49.11 of the Common Customs Tariff.

Finally, it would not be appropriate to apply the same treatment to artistic photographs and artists' screen prints. The latter stem from work done by hand by the artist and technical means of reproduction are used only to copy them, whereas photographs are prepared directly using a mechanical process.

In conclusion, the Commission proposes that the following answer be given to the Finanzgericht's question:

'The provisions of the Common Customs Tariff must be interpreted as meaning that photographs of all types, including those which constitute works of art, are to be classified under subheading 49.11 B.'

F. A. Schockweiler
Judge-Rapporteur