JUDGMENT OF THE COURT (Fourth Chamber)
14 December 1995 *

In Joined Cases C-106/94 and C-139/94,

REFERENCES to the Court under Article 177 of the EC Treaty by the Cour d'Appel, Bourges (France) and the Tribunal de Grande Instance, Paris for a preliminary ruling in the criminal proceedings before that court against

Patrick Colin,

attended by Distrithera SARL (C-106/94)

and

Daniel Dupré

attended by Laboratoires Valda SA (C-139/94)

on the interpretation, in Case C-106/94, of the Common Customs Tariff as regards the classification of tonic beverages and throat pastilles and, in Case C-139/94, of Commission Regulation (EEC) No 717/85 of 19 March 1985 on the classification of goods within subheading 17.04 D I of the Common Customs Tariff

* Language of the case: French.

(OJ 1985 L 78, p. 13) and Chapter 30 of the Common Customs Tariff and the Combined Nomenclature as regards the classification of throat pastilles,

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris, President of the Chamber, P. J. G. Kapteyn and J. L. Murray (Rapporteur), Judges,

Advocate General: M. B. Elmer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

in Case C-106/94,

— the French Government, by Nicolas Eybalin, Secretary of Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director in the same directorate, acting as Agents,

— the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, acting as Agent,

in Case C-139/94,

— Daniel Dupré, attended by Laboratoires Valda SA, by Jean Nicolas and Sylvie Deniniolle, of the Paris Bar,

— the French Government, by Philippe Martinet, Secretary of Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director in the same directorate, acting as Agents,

— the Commission of the European Communities, by Blanca Rodríguez Galindo, of its Legal Service, and Jean-Francis Pasquier, a French expert seconded to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Patrick Colin, attended by Distrithera SARL, represented by Pierre Courtois, of the Paris Bar, Daniel Dupré, attended by Laboratoires Valda SA, represented by Sylvie Deniniolle and Jean Nicolas, and of the Commission, represented by Hendrik van Lier and Jean-Francis Pasquier, at the hearing on 26 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 16 March 1995,

gives the following

Judgment

1 By judgment of 3 February 1994, received at the Court on 29 March 1994, the Cour d'Appel, Bourges, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of the Common Customs Tariff ('CCT') in relation to the classification of tonic beverages and throat pastilles.

2 By interlocutory judgment of 2 March 1994, received at the Court on 24 May 1994, the Tribunal de Grande Instance (Regional Court), Paris, referred to the Court for a preliminary ruling under Article 177 of the Treaty two questions on the interpretation of Commission Regulation (EEC) No 717/85 of 19 March 1985 on the classification of goods within subheading 17.04 D I of the Common Customs Tariff (OJ 1985 L 78, p. 13) and Chapter 30 of the Common Customs Tariff and the Combined Nomenclature as regards the classification of throat pastilles.

3 Those questions were raised in two sets of criminal proceedings brought by the French Administration des Douanes et Droits Indirects ('the Customs Authority') against two French manufacturers for allegedly obtaining, by means of false declarations or deceptive practices, refunds to which they were not entitled under the Community rules applicable to production refunds on certain sugar products used in the chemical industry.

4 Council Regulation (EEC) No 1010/86 of 25 March 1986 laying down general rules for the production refund on certain sugar products used in the chemical industry (OJ 1986 L 94, p. 9), as amended by Commission Regulation (EEC) No 1714/88 of 13 June 1988 (OJ 1988 L 152, p. 23), following the introduction of the combined nomenclature ('CN'), lays down rules for granting refunds to undertakings using sugar in the manufacture of certain chemical products.

5 With the object of developing the market in sugar and offsetting the difference in price between the Community price and the world price, Regulation No 1010/86 grants production refunds on the manufacture of products containing sucrose. In accordance with Articles 1 and 2(1), the refund is granted by the Member State in the territory of which processing of the 'basic products' into the 'chemical products' listed in the Annex to the regulation takes place. Pharmaceutical products in Chapter 30 of the CCT are included among those chemical products.

6 Between 1986 and 1989, Distrithera SARL, of which Mr Colin is the director, received under the said regulations FF 2 371 976.78 in refunds related to the use of sugar by declaring red and green Pulmoll pastilles, Sangart mixture and Quintonine as pharmaceutical products.

7 Between 1987 and 1990, through its chairman and managing director Mr Dupré, Laboratoires Valda SA received under the same regulations FF 1 728 760 in refunds for the use of sugar by declaring Valda pastilles, manufactured from a base of gelatine and gum arabic, as pharmaceutical products.

8 After analysing samples of those products, the Customs Authority challenged their classification as pharmaceutical products and found that the pastilles fell under CCT Chapter 17 ('Sugar and sugar confectionery') and the mixtures under CCT Chapter 22 ('Beverages, spirits and vinegar'), and demanded repayment of the refunds granted. At the same time it brought criminal proceedings against the directors of the two companies.

9 The national courts considered that the cases raised questions relating to the interpretation of the CCT and have therefore decided to stay proceedings until the Court of Justice has given a preliminary ruling on the following questions:

Questions referred by the Cour d'Appel, Bourges:

'1. Having regard to their composition, presentation and use, do red Pulmoll pastilles fall within the scope of Commission Regulation (EEC) No 717/85 of 19 March 1985 on the classification of goods within subheading 17.04 D I or

of Chapter 30 of the Common Customs Tariff, "Pharmaceutical products" — 30-4?

2. Having regard to their composition, presentation and use, do green Pulmoll pastilles fall within the scope of Commission Regulation (EEC) No 717/85 of 19 March 1985 on the classification of goods within subheading 17.04 D I or of Chapter 30 of the Common Customs Tariff, "Pharmaceutical products" — 30-4?

3. Having regard to its composition, presentation and use, does Sangart mixture fall within the scope of Chapter 30 of the Common Customs Tariff "Pharmaceutical products"?

4. Having regard to its composition, presentation and use, does Quintonine fall within the scope of Chapter 30 of the Common Customs Tariff "Pharmaceutical products"?'

Questions referred by the Tribunal de Grande Instance, Paris:

'1. May Commission Regulation (EEC) No 717/85 of 19 March 1985 on the classification of goods within subheading 17.04 D I of the Common Customs Tariff be interpreted as referring to goods whose composition (percentage by weight) is different from that indicated in Article 1 of that regulation?

2. If the reply to the first question is in the negative, must heading 30.04 of the Customs Nomenclature, which refers to medicaments, be interpreted as including a product which contains not only sugar but above all active flavouring agents having medicinal properties to an extent that it is used essentially for therapeutic and prophylactic purposes?'

10 By order of the President of the Fourth Chamber of 16 December 1994 the cases were joined for the purposes of the oral procedure and the judgment.

11 Both cases relate to a period which both preceded and followed the introduction of the harmonized system and the CN, which in 1988 replaced the Customs Cooperation Committee nomenclature. That change is not, however, of any material importance for the cases before the Court.

12 The first point which must be made is that it is the Court's task to interpret the CCT and the CN, not to give its opinion on the classification of particular products. In those circumstances, the questions referred by the Cour d'Appel, Bourges, must be understood as seeking to ascertain whether products such as those mentioned in the questions submitted to the Court fall under heading 30.03 of the CCT (heading 30.04 of the CN) or headings 17.04 and 22.09 of the CCT (heading 22.08 of the CN).

13 As regards the composition of the cough pastilles at issue in the main proceedings, it is apparent from the documents before the Court that a Valda pastille is essentially composed of sugar, gelatine or gum arabic, and to a lesser extent of ingredients such as menthol, eucalyptol, and also thymol, guaiacol and terpinol. According to the manufacturer, the pastilles are for coughs, have antiseptic properties and are intended to relieve the pain and discomfort caused by a sore throat.

14 Red Pulmoll pastilles consist essentially of sugar, terpene, menthol, amylocaine hydrochloride and glycirrhizin as well as a binding agent, flavouring and colouring. They are for coughs, sore throats and colds.

15 Green Pulmoll pastilles also consist essentially of sugar, menthol, peppermint essence and eucalyptus oil as well as a binding agent, flavouring and colouring. They are described as being for use against coughs and sore throats.

16 Quintonine mixture contains, besides water, alcohol and sugar, certain bitter and flavouring substances, *nux vomica* and calcium glycerophosphate. It is used for debility and anorexia and in convalescence.

17 It is apparent from the documents before the Court that each bottle of Sangart mixture contains distilled water, syrup and alcohol to which are added sodium arsenate, sodium nucleinate, *nux vomica*, calf-liver extract and various flavourings.

18 Heading 17.04 of the CCT covers sugar confectionery not containing cocoa. The CN expressly puts 'cough and throat-irritation pastilles' under the same heading.

19 Pharmaceutical products, however, come under Chapter 30 of the CCT (and CN). According to the notes at the beginning of the chapter, heading 30.03 (heading 30.04 in the CN) includes medicaments consisting of mixed or unmixed products for therapeutic or prophylactic use, put up in measured doses or in forms or packings for retail sale.

20 Chapter 22 of the CCT covers beverages, spirits and vinegar. Heading 22.09 of the CCT (heading 22.08 in the CN) covers 'undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol.; spirits, liqueurs and other spiritous

beverages; compound alcoholic preparations of a kind used for the manufacture of beverages'.

21 There are also explanatory notes drawn up by the Customs Cooperation Council ('CCC') (as regards the CCT) and by the Harmonized System Committee ('HSC') (as regards the CN) which, as the Court has already stated, may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see the judgments in Case 200/84 *Daiber* [1985] ECR 3363, and Case C-35/93 *Develop Dr Eisbein* [1994] ECR I-2655).

The questions referred by the Cour d'Appel, Bourges

22 It is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CCT and of the notes to the sections or chapters (see, in particular, the judgment in Case C-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381, paragraph 8).

Throat pastilles

23 According to the Explanatory Notes of the CCC and the HSC on heading 17.04 of the CCT, that heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate

consumption and collectively referred to as sweetmeats, confectionery or candies. Those products include preparations put up as throat pastilles or cough drops, consisting essentially of sugars and flavouring agents.

24 According to the Explanatory Notes, preparations put up as throat pastilles or cough drops which fall under heading 17.04 share the common feature of consisting of sugar to which have been added small proportions of various substances such as menthol, eucalyptol and tolu. The fact that those flavouring agents possess secondary medicinal properties is not enough to cast doubt on their classification under heading 17.04.

25 That interpretation is consistent with the provisions of headings 17.04 and 30.03 of the CCT (30.04 of the CN). Sugar confectionery not containing cocoa comes under the first heading. Mixed or unmixed products for therapeutic or prophylactic use, put up in measured doses or in forms or packings for retail sale, however, come under the second heading and are therefore to be considered to be medicaments.

26 According to the Explanatory Notes of both the CCC and the HSC, heading 30.03 (30.04 of the CN) includes pastilles, tablets and drops of a kind suitable only for medicinal purposes. However, according to the Explanatory Notes, preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances such as benzyl alcohol, menthol, eucalyptol and tolu balsam), fall under heading 17.04 in so far as, where a flavouring agent may also have medicinal properties, the proportion which it forms of each pastille or drop is such that it does not enable the preparation to be given therapeutic or prophylactic uses.

27 The interpretation afforded by the Explanatory Notes concerning heading 30.03 of the CCT (30.04 of the CN) is also consistent with the provisions of the CCT and CN. Sugar confectionery not containing cocoa comes under heading 17.04, except for preparations containing a certain proportion of flavouring agents which have sufficient medicinal properties to make the preparation fall under heading 30.03 of the CCT (30.04 of the CN).

28 It follows that it is not enough that a product's flavouring agents should have a therapeutic or prophylactic effect. In order for the product to be classified under heading 30.03 of the CCT, the effect must be due to the flavouring agents' medicinal properties present in proportions sufficient for the product to be used only for therapeutic or prophylactic purposes. Although the ingredients of the products in question may have a soothing effect, in particular where they ease the pain of a sore throat, it would seem that this effect may be caused by the non-medicinal ingredients.

29 It is to be noted that it is apparent from the documents before the Court that the therapeutic effect of the products at issue has not been shown to be caused by the flavouring agents with medicinal properties. Furthermore, it has not been established that those flavouring agents were present in such proportion as to enable the preparation to be used for therapeutic or prophylactic purposes.

30 It follows that the products in question must be classified in heading 17.04.

Tonic beverages

31 As stated above, heading 30.03 of the CCT must be regarded as applying both to products which have been mixed with a view to therapeutic or prophylactic uses and to unmixed products for the same uses, put up in measured doses or in forms or packings for retail sale for the same uses. The notes at the beginning of the

chapter exclude from heading 30.03 of the CCT foodstuffs and beverages such as dietetic, diabetic and fortified foods, tonic beverages and mineral waters.

32 As stated in the Explanatory Notes on Chapter 22 of both the CCC and the HSC, spiritous beverages designed to maintain general health fall within heading 22.09 of the CCT (22.08 of the CN). It is apparent from the documents before the Court that given their ingredients, and also their alcoholic strength and use, Quintonine and Sangart mixture correspond to that objective. Tonic beverages of that kind are specifically excluded from Chapter 30 of the CCT. The Explanatory Notes confirm that they are excluded even if medicinal substances have been added once the latter have been added solely to ensure a better dietetic balance, to increase the energy-giving or nutritional value of the product or to improve its flavour and do not remove its character of a foodstuff.

33 It has not been demonstrated that the medicinal substances contained in the tonic beverages are present in such proportions that they enable those beverages to be used for therapeutic or prophylactic purposes. Consequently, since the tonic beverages do not fall under heading 30.03 of the CCT (heading 30.04 of the CN), it follows that they must be classified under heading 22.09 of the CCT (heading 22.08 of the CN).

34 The answers to be given to the questions referred to the Court by the Cour d'Appel, Bourges, must therefore be:

1. Having regard to their composition, presentation and purpose, pastilles such as red Pulmoll pastilles fall under heading 17.04 of the CCT.

2. Having regard to their composition, presentation and purpose, pastilles such as green Pulmoll pastilles fall under heading 17.04 of the CCT.

3. Having regard to their composition, presentation and purpose, beverages such as Sangart mixture fall under heading 22.09 of the CCT.

4. Having regard to their composition, presentation and purpose, beverages such as Quintonine fall under heading 22.09 of the CCT.

The questions referred by the Tribunal de Grande Instance, Paris

35 By its first question, the Tribunal de Grande Instance, Paris, asks whether Regulation No 717/85 may be interpreted as referring to goods whose composition (percentage by weight) is different from that indicated in Article 1 of that regulation.

36 Regulation No 717/85 provides that certain cough and throat-irritation pastilles containing defined substances capable in certain doses of having a particular medical effect are to be classified under heading 17.04 D I.

37 However, while the composition of the pastilles at issue in the main proceedings is similar to that referred to in the regulation, it is not identical. Since Regulation No 717/85 cannot have a wider scope than that conferred by its own terms, it cannot be interpreted as applying to the products under consideration in this case.

38 The answer to the question referred by the national court must therefore be that Regulation No 717/85 may not be interpreted as referring to goods whose composition (percentage by weight) is different from that indicated in Article 1.

39 By its second question, the national court is asking in substance whether heading 30.03 of the CCT must be interpreted as including a product consisting of sugar, but above all of active flavouring agents having medicinal properties to an extent that it is essentially used for therapeutic and prophylactic purposes.

40 It follows from the answers to the questions referred by the Cour d'Appel, Bourges, that if the active flavouring agents with medicinal properties form part of the ingredients of a product in such a proportion that it is used only for therapeutic and prophylactic purposes, that product falls in Chapter 30 of the CCT. In the absence of such ingredients in such proportions, it cannot be regarded as a pharmaceutical product falling within that Chapter.

41 The answer to be given to the second question must therefore be that heading 30.03 of the CCT, which covers medicaments, is to be interpreted as including a product consisting of sugar, but above all of active flavouring agents with medicinal properties in such a proportion that it is used only for therapeutic and prophylactic purposes. Where the proportion of flavouring agents in the composition of each product does not enable the product to be used only for therapeutic or prophylactic purposes, it cannot be regarded as a pharmaceutical product falling under that heading.

Costs

42 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT (Fourth Chamber)

in answer to the questions referred to it by the Cour d'Appel, Bourges, by judgment of 3 February 1994, and by the Tribunal de Grande Instance, Paris, by interlocutory judgment of 2 March 1994, hereby rules:

1. **Having regard to their composition, presentation and purpose, pastilles such as red Pulmoll pastilles fall under heading 17.04 of the Common Customs Tariff.**

2. **Having regard to their composition, presentation and purpose, pastilles such as green Pulmoll pastilles fall under heading 17.04 of the Common Customs Tariff.**

3. **Having regard to their composition, presentation and purpose, beverages such as Sangart mixture fall under heading 22.09 of the Common Customs Tariff.**

4. **Having regard to their composition, presentation and purpose, beverages such as Quintonine fall under heading 22.09 of the Common Customs Tariff.**

5. **Commission Regulation (EEC) No 717/85 of 19 March 1985 on the classification of goods within subheading 17.04 D I of the Common Customs Tariff**

may not be interpreted as referring to goods whose composition (percentage by weight) is different from that indicated in Article 1 of that regulation.

6. Heading 30.03 of the CCT, which covers medicaments, is to be interpreted as including a product consisting of sugar, but above all of active flavouring agents with medicinal properties in such a proportion that it is used only for therapeutic and prophylactic purposes. Nevertheless, where the proportion of flavouring agents in the composition of each product does not enable the product to be used only for therapeutic or prophylactic purposes, it cannot be regarded as a pharmaceutical product falling under that heading.

Kakouris Kapteyn Murray

Delivered in open court in Luxembourg on 14 December 1995.

R. Grass

Registrar

C. N. Kakouris

President of the Fourth Chamber