cost of which is such that the price of the basic agricultural raw materials becomes a completely marginal cost, are therefore excluded.

4. In the interests of legal certainty and the simplification of administrative procedures, it is the characteristics and the objective properties of products which, as a general rule, afford the decisive criterion for their classification in the Common Customs Tariff.

5. In the absence of Community explanatory notes in this field, the notes provided for by the Brussels Convention on Nomenclature for the classification of goods in the Customs Tariff afford an authoritative source for the interpretation of common headings.

6. Ethyl alcohol, under subheading No 22.09-A of the Common Customs Tariff, is distinguished from the products under subheading No 22.09-C-V by the presence in those products of flavouring substances or distinctive properties of taste.

In Case 185/73

Reference to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the action pending before that court between

HAUPTZOLLAMT BIELEFELD

and

OFFENE HANDELSGESELLSCHAFT IN FIRMA H. C. KÖNIG

on the validity of EEC-Regulation No 7a/59 of 18 December 1959 (OJ 1961, p. 71) and the interpretation of tariff headings Nos 22.09-A-II and 22.09-C-V-b of the Common Customs Tariff

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart (Rapporteur), Judges

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order for reference and the written observations submitted pursuant to Article 20 of the EEC Statute of the Court may be summarized as follows:

I — Facts

Tariff heading No 22.09 of the Common Customs Tarif is subdivided as follows:

'22.09

Spirits (other than those of heading No 22.08) [1]; liqueurs and another spirituous beverages; compound alcoholic preparations (known as 'concentrated extracts') for the manufacture of beverages:

A — Spirits (other than those of heading No 22.08)

B — Compound alcoholic preparations (known as 'concentrated extracts')

C — Spirituous beverages:

I — Rum, arrack and tafia

II — Gin

III — Whisky

IV — Vodka

V — Other'.

Article 38 of the Treaty provides:

'1. The common market shall extend to agriculture and trade in agricultural products. 'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.

2. Save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market shall apply to agricultural products.

3. The products subject to the provisions of Articles 39 to 46 are listed in Annex II do this Treaty. Within two years of the entry into force of this Treaty, however, the Council shall, acting by a qualified majority on a proposal from the Commission, decide what products are to be added to this list.

4. The operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States.'

1 January 1958 being the date of the entry into force of the EEC Treaty, the time limit of two years fixed by Article 38 (3) expired on 31 December 1959.

EEC Regulation No 7a/59 adding certain products to the list in Annex II, adopted pursuant to Article 38 (3), was published in the Official Journal on 30 January 1961 (OJ 1961, p. 71).

Article 1 of the Regulation purports to 'add to the list in Annex II to the Treaty' the following products, under Nos 22.08 and 22.09 in the Brussels Nomenclature:

Ethyl alcohol or neutral spirits, whether or not denatured, of any strength, obtained from agricultural products listed in Annex II to the Treaty, excluding liqueurs and other spirituous beverages and compound alcoholic preparations (known as 'concentrated extracts') for the manufacture of beverages.

1 — *Translator's Note:* This appears in the French version of the CCT as follows: 'Alcool éthylique non dénaturé de moins de 80°;' (ethyl alcohol, undenatured, of a strength of less than 80°).

According to Article 2 of the Regulation, the latter entered into force on 31 December 1959. It has as its closing formula: 'Done at Brussels, 18 December 1959'.

Article 191 of the EEC Treaty provides:

Regulations shall be published in the Official Journal of the Community. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication.

Directives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification.

In regard to products under heading No 22.09-A, which are thus agricultural products, derogations are permissible from certain rules providing for the establishment of the Common Market. On the other hand, in regard to products under subheading No 22.09-C, the rules of the Common Market and, in particular, of the Common Customs Tariff apply.

In accordance with the 'Acceleration Decision' of 26 July 1966, national customs duties were to be finally abolished as from 1 July 1968 and replaced, in respect of imports from third countries, by the Common Customs Tariff. Products listed in Annex II were excluded from the ambit of this decision and of EEC Regulation No 950/68 of the Council, concerning the Common Customs Tariff, by virtue of Article 2 of that Regulation.

Accordingly, the German customs authorities continued to collect customs duties in respect of products under heading No 22.09-A (agricultural products) but not in respect of those under heading No 22.09-C (spirituous beverages).

The Company Offene Handelsgesellschaft in Firma H. C. König (hereinafter referred to as 'König') imported a product described as 'brandy for drinking, from molasses spirit, watered down to drinking strength'.

The Customs office at Bielefeld did not levy customs duty, since it considered that a spirituous beverage (No 22.09-C) was involved.

Having examined the product, the Customs office established that it was in fact a 'chemically pure and completely neutral ...' product which must fall under tariff sub-heading No 22.09-A. Forming the view that it was therefore an agricultural product and that the levying of customs duties was not prohibited, the office subjected the product to a customs duty of 110·35 DM per 100 litres.

The complaint by König to the Head Customs Office at Bielefeld (hereinafter referred to as 'HZA Bielefeld') against this rectification of duty having been unsuccessful, König instituted proceedings before the Finanzgericht Münster, which by Order of 20 November 1970 annulled the notice of rectification and the rejection of the complaint.

The Bundesfinanzhof, to which HZA Bielefeld appealed against the order on a point of law, decided by order of 16 October 1973 to stay the proceedings and to ask the Court for a preliminary ruling on the following questions:

1. Is EEC Regulation No 7a/59 of 18 December 1959 (OJ 1961, p. 71) valid, in spite of being issued only after the expiration of the power conferred in Article 38 of the Treaty establishing the European Community?

2. If Question 1 is answered in the affirmative: Was the Council of the European Economic Community permitted to add spirits to the list in Annex II to the Treaty establishing the European Economic Community without regard to its alcoholic strength?

3. If Questions 1 and 2 are answered in the affirmative: How are the products under tariff headings Nos 22.09-A-II and 22.09-C-V-b to be distinguished from one another?

II — Summary of the grounds of the order for reference

Concerning the first and second questions

The Bundesfinanzhof raises two objections to the validity of Regulation No 7a:

1. The time limit fixed in Article 38 (3) had already expired when EEC Regulation No 7a/59 was published on 30 January 1961. The fact that the Regulation was to take effect retroactively from 31 December 1959, a date when the Council was still competent to adopt the measure in question, is irrelevant.

The publication of a Regulation has a constitutive effect, since only after the prescribed publication can a Regulation enter into force. (Article 191, EEC Treaty).

2. Only those products corresponding with the definition of agricultural products given in Article 38 can be added to the list.

The tariff classification takes no account whatever of a minimum alcoholic strength. It is thus necessary to classify under this heading (No 22.09) alcohol intended for human consumption, so long as it does not contain special flavouring substances. Products of this kind cannot be considered as agricultural products of first-stage processing. They are in fact subjected after distillation to a further process, namely dilution with water.

Concerning the third question

The Common Customs Tariff came into force on 1 July 1968, pursuant to EEC Regulation No 950/68 of the Council (OJ L 172 of 22 July 1968, p. 1), and includes under heading No 22.09-C-V-b 'other spirituous beverages'. The imposition of an internal levy was thus prohibited in respect of products within that tariff heading.

Tariff heading No 22.09-A-II covers ethyl alcohol, whether or not denatured, of any strength, obtained from agricultural products.

Article 2 of EEC Regulation No 950/68 excludes from the ambit of the Common Customs Tariff the agricultural products listed in Annex II to the EEC Treaty. The rates of internal duty on imports from the other Member States are therefore still applicable.

The delimitation of tariff headings accordingly permits a distinction to be made between the field of application of the Common Customs Tariff and that of national tariff provisions still in force.

III — Procedure

The order for reference was filed with the Registry of the Court on 3 December 1973.

In conformity with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on behalf of the Council of the EEC by its Legal Adviser, Daniel Vignes, acting as agent; on behalf of the Commission of the EEC by its Legal Adviser, Peter Kalbe, acting as agent; on behalf of Ireland by the Chief State Solicitor, Liam J. Lysaght, acting as agent; and on behalf of the United Kingdom by the Treasury Solicitor, W. H. Godwin, acting as agent.

Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided not to undertake any preparatory inquiry.

Written observations submitted to the Court

A — Observations of the Commission of the EEC

As to the first question

On the basis that the time limit fixed by Article 38 (3) of the EEC Treaty

operates as a period of limitation, from the expiration of which the Council was no longer competent to add to the list of agricultural products, the Commission avers that Regulation No 7a, according to its Article 2, was to enter into force on 31 December 1959, that is, within the time limit. Since it was published in 1961, it is clearly a case of retroactivity which cannot have adverse effect, given that retroactive validity was not invoked in order to assert legal consequences.

Moreover, Article 38 (3) of the Treaty does not require that publication should take place during the course of the period of authorization. It is merely provided that the Council shall take a decision within that period. In the absence of any special provision the Council could have chosen a form which would not require publication in the Official Journal.

The Commission concludes that it is enough that a formal decision to adopt Regulation No 7a should have been taken within the time limit. The addition of new products to the list in Annex II to the Treaty has no direct effect on their legal position, but simply offers the possibility of including them subsequently in measures concerned with agricultural policy. No common organization of the market exists up to the present time in respect of the alcohol mentioned in Regulation No 7a.

As to the second question

The Commission is of the opinion that the first stage of the manufacturing process comprises all processes for the making and producing of ethyl alcohols of all strengths from agricultural products. The subsequent stage in processing comprises all operations which remove from this alcohol its original character and create new products having specific qualities.

Ethyl alcohol of a strength of less than 80° is nothing more than a neutral mixture of pure ethyl alcohol and water.

As to the third question

The distinction made in heading No 22.09 of the Brussels Nomenclature between

(i) ethyl alcohol, undenatured, of a strength of less than 80°

(ii) brandies, liqueurs and other beverages

(iii) compound alcoholic preparations for the manufacture of beverages

is reflected in the subheadings of heading No 22.09 of the Common Customs Tariff:

A — Ethyl alcohol, undenatured, of a strength of less than 80°

B — Compound alcoholic preparations

C — Spirituous beverages.

The term 'spirituous beverages' was preferred to the expression 'brandies, liqueurs and other beverages', which gives rise to difficult problems of translation.

A mixture of alcohol and water of a strength of less than 80° is covered by subheading No 22.09-A. Such a mixture of a strength of only 55° or less, which can thus be drunk directly, remains a mixture of alcohol and water, covered by subheading No 22.09-A.

Annex IV to the Common Customs Tariff in EEC Regulation No 950/68 speaks of tariff concessions provided under GATT. In the case of liqueurs and brandies, and of ethyl alcohol, undenatured, under heading No 22.09-A, the introduction of a strength of up to 46·2° clearly has the aim of limiting the agreed tariff concessions to beverages directly intended for human consumption. Accordingly, ethyl alcohol directly suitable for human consumption cannot be considered as a spirituous beverage within the meaning of subheading No 22.09-C.

The Explanatory Notes concerning subheading 22.09-A in the Brussels Nomenclature confirm these comments.

Products within subheading No 22.09-C are to be differentiated from those within subheading No 22.09-A by reason of the specific organoleptic properties of spirituous beverages. Very pure ethyl alcohol does not possess such properties and is not, for that reason, a spirituous beverage within the meaning of tariff subheading No 22.09-C, even though it is drinkable.

The Commission suggests the following answer to the third question:

Tariff subheading No 22.09-A (ethyl alcohol, undenatured, of a strength of less than 80°) covers mixtures of water and ethyl alcohol having, at a temperature of 15° C, a strength in ethyl alcohol less than 80° under the Gay-Lussac method, whatever may be their actual or potential use. It is apporpriate also to classify under this tariff subheading mixtures of water and ethyl alcohol capable of direct consumption, to the extent that they do not contain special flavouring substances.

B — Observations of the Council

As to the first question

The Council submits to the Court a minute of its 26th session, of 18 December 1959, to show that the decision to add the products in question to Annex II to the Treaty was in fact made on 18 December 1959.

Since Article 38 (3) of the EEC Treaty does not specify the legal form of the act required for additions to the Treaty, there is a choice between a regulation and a decision *sui generis*. The problem of legislative technique was one of the numerous problems concerned with the form acts should take which were due to be resolved at that time, and was not resolved until a year after the decision of the Council.

The Council maintains that the rules of Article 38 (3) providing for a proposal by the Commission and adoption by the Council were complied with. Having taken its decision as to the content in due form, the publicity required to be given thereto had only a declaratory character, rendering the measure applicable to individuals.

Having ascertained that most of the Member States make a distinction between the promulgation of a law and its publication, this last being only a matter of declaration, concerned with applicability, the Council concludes that this distinction is made in the EEC Treaty in Article 189 (promulgation) and Article 191 (publication). The requirement of publication in the Official Journal for entry into force does not affect validity, but concerns applicability and the taking of effect.

Whilst conceding that the Regulation in question could not become directly applicable until after publication, the Council rejects the objection as to retroactivity. It adds that the application as from 1 July 1968 of EEC Regulation No 950/68 of the Council concerning the Common Customs Tariff, Article 2 of which allows of non-application of the tariff to agricultural products, is the first consequence for the product in question of its addition to Annex II of the Treaty.

As to the second question

The Council considers that the concept of first-stage processing cannot be interpreted too rigorously. The products which appear in the original Annex II have the character of agricultural products by reason of their inclusion in the Treaty. Several of these products are not not processed products as strictly interpreted. The Council considers that it is justified in applying the same interpretation of Article 38 (1) as did the authors of the Treaty. Moreover, it is open to question whether the addition of water to reduce the alcoholic strength of a distilled agricultural product is a process distinct from that of distillation.

As to the third question

In the view of the Council, unrefined products defined exclusively according to their basic chemical composition come under subheading No 22.09-A, whereas products which are more specific, prepared in accordance with well-defined rules, particularly those of local tradition, and made to original or special recipes come under subheading No 22.09-C. These products may answer to generic definitions recalling the basic products entering into their composition. Moreover, they are beverages suitable for consumption.

C — Observations of the United Kingdom

As to the second question

According to the United Kingdom, the power given to the Council by Article 38 (3) to add products to the list in Annex II, does not extend to those products falling outside the meaning of the expression 'agricultural products' as defined in Article 38 (1).

The Treaty itself provides that products in the list as it was framed originally are governed by Articles 38 to 46 of the Treaty. In drawing up the list, the authors of the Treaty exercised a particular power, in the same way as when they gave a definition of 'agricultural products' in Article 38 (1). In so doing they created the 'Grundnorm' of the Community.

The Council, however, when exercising the power to add products to the list was not in the situation of the authors of the Treaty and could not add to that 'Grundnorm'.

In the view of the United Kingdom, alcohol to which water is added is a product which has progressed beyond first-stage processing. The production of ethyl alcohol, covered by tariff headings Nos 22.08 and 22.09, whatever its alcoholic strength, is the result of a series of processes. Although fermentation may possibly amount to first-stage processing, the production of ethyl alcohol of any kind requires a second process, namely, distillation.

From that it follows that products under tariff headings Nos 22.08 and 22.09, being neither products of the soil, of stockfarming nor of fisheries, nor products of first-stage processing directly related to such products, are not agricultural products within the meaning of Article 38 (1) of the Treaty and cannot therefore be added to the list in Annex II to the Treaty.

D — Observations of Ireland

As to the second question

The manufacture of ethyl alcohol from products of the soil involves more than one processing stage. To produce ethyl alcohol from cereals there are four stages, namely: milling, brewing, fermentation and, lastly, distillation.

Ireland is of the view that by reason of the various processing stages required for the production of ethyl alcohol from agricultural products, this type of alcohol does not constitute, whatever its strength, an agricultural product within the meaning of Article 38 of the Treaty and cannot, accordingly, validly be included in the list in Annex II to the Treaty of Rome.

Oral procedure

During the oral procedure on 28 March 1974, the Council, represented by M. Vignes, developed a new line of argument, to which the Governments of the United Kingdom, represented by Mr Hall Brown, and of Ireland, represented by Mr Cooke, replied.

This argument may be summarized as follows:

According to the Council the Court no longer has jurisdiction to give a preliminary ruling on the validity of Regulation No 7a. Although the Regulation was in origin an act adopted

by an institution of the Community, the effect of that act was to add products to the list in Annex II of the Treaty itself. As from the entry into force of the Treaty of Accession on 1 January 1973, the Regulation acquired the same legal status as any other provision in the Treaty.

The Act of Accession annexed to the said Treaty is, according to its Protocol No 19, explicitly based on the existence at law of Regulation No 7a, since the Protocol speaks of the regulation to be adopted on the common organization of the market in alcohol. If Regulation No 7a were to be declared invalid this Protocol would no longer be applicable.

Neither Article 7 of the Act of Accession, which is concerned with acts adopted by the institutions to which the transitional provisions laid down in that Act relate, nor Article 8, which is concerned with repeals of or amendments to acts adopted by the institutions, is relevant in the present connexion.

The Government of the United Kingdom takes the view that Protocol No 19 is concerned with the power conferred on the Council in 1972, whereas what is in question here is a decision taken in 1959. If the argument of the Council is correct, no act adopted before the Act of Accession could be open to doubt as to its validity. However in the case of a defective Regulation it would be vitiated *ab initio* and incapable of incidental validation by the Treaty of Accession.

The Government of Ireland considers that Article 8 of the Act of Accession maintains the status in law of a Regulation which has been amended by the Act of Accession. If this is true for Regulations which have been amended by the Act of Accession, it is true *a fortiori* for Regulations which were adopted without amendment. Protocol No 19, in that it speaks of spirituous beverages and in particular of whisky, clearly indicates that it is not concerned with Regulation No 7a, which speaks of ethyl alcohol and expressly excludes spirituous beverages.

The *Commission of the EEC* was represented by its Legal Adviser, P. Kalbe, as agent.

The Advocate-General delivered his opinion at the hearing on 30 April 1974.

Law

1 By Order of 16 October 1973 of the Bundesfinanzhof, filed at the Registry on 3 December 1973, a preliminary ruling was requested of the Court as to the validity and interpretation of EEC Regulation No 7a/59 of the Council, bearing the date 18 December 1959 (OJ 1961, p. 71), as well as to the interpretation of tariff subheadings Nos 22.09-A-II and 22.09-C-V-b of the Common Customs Tariff.

2 During the oral procedure the Council adduced arguments from the Acts relating to the accession to the Communities of the Kingdom of Denmark, of Ireland and of the United Kingdom, in order to challenge the jurisdiction of the Court to pronounce upon the validity of Regulation No 7a.

According to such argument, as an addition to the EEC Treaty, the Regulation in question was, in any event, validated by Article 1 of the Treaty of Accession, which provides that the States acceding become Parties to the Treaty establishing the Communities 'as amended or supplemented'.

Moreover, Protocol No 19, annexed to the Act of Accession, concerning spirituous beverages obtained from cereals would have no meaning without the support of a valid organization of the market in alcohol, which, in its turn, necessarily presupposes the validity of the provisions made by Regulation No 7a.

3 The Acts relating to the Accession of the new Member States have as their essential purpose the extension to those States of the entirety of Community law in force at the time of accession.

Although certain clauses in these Acts, such as Article 3 of the Treaty of Accession, may be considered as a recognition, by all the parties, of the binding character of decisions taken or agreements reached within the general system of Community law, no provision in the Treaty of Accession or in the Acts accompanying it can be construed as validating measures, whatever their form, which are incompatible with the Treaties establishing the Communities.

4 Accordingly, it would appear that the preliminary objection of the Council must be rejected.

As to the first question

5 The first question asks whether Regulation No 7a of the Council, adding certain products to the list in Annex II to the Treaty, is valid, although not adopted until after the expiry of the period of validity of the power conferred by Article 38 of the Treaty establishing the EEC.

The national court points out in this connexion that Regulation No 7a, although bearing the date of 18 December 1959, was not published in the Official Journal until over a year after the expiry of the time limit set by Article 38.

The fact that that Regulation was to have taken effect as from 31 December 1959, the last day of the said time limit, does not alter the legal position, since the publication of a regulation has a constitutive effect.

6 According to the wording of the second sentence of Article 38 (3), 'within two years of the entry into force of this Treaty, however, the Council shall, acting by a qualified majority on a proposal from the Commission, decide what products are to be added' to the list in Annex II to the Treaty.

This provision, by giving the Council power to decide the products to be added to the list, could not, after 31 December 1959, provide a legal basis for a decision of the Council supplementing that list.

In any case, it has been shown that within the time limit set by Articles 38 (3) the Council had in fact decided, on a proposal from the Commission, to insert in Annex II the products with which Regulation No 7a is concerned, as is shown in the text of the Regulation — dated 18 December 1959 — as published in the Official Journal.

The validity of this Regulation is not affected by the fact that this publication, on 30 January 1961, did not take place until after the expiry of the time limit, since this belatedness has no significance save as to the date from which the Regulation could be applied and take effect.

7 For present purposes, the Court is not called upon to examine the compatibility with general principles of law of the provision in Article 2 (1) of the Regulation, under which the Regulation was to 'enter into force' on a date prior to its publication, this question not having been raised by the national court.

8 Accordingly, examination of the first question does not reveal any elements such as to affect the validity of Regulation No 7a of the Council.

As to the second question

9 The second question asks whether the Council was permitted to add ethyl alcohol to the said list without regard to its alcoholic strength.

10 The national court, forming the view that only those products could be added to the list which complied with the definition of agricultural products given in the first paragraph of Article 38, expresses doubt as to whether ethyl alcohol can come within this definition, by reason of the fact that alcohols of a strength of less than 80° would, in practice, be subjected after their distillation to an additional process, that is, dilution with water.

11 The intervening governments deny that the Council had, in any circumstances, acting within the scope of Article 38 (3), the option of adding alcohol to the list in question.

They submit that the competence of the Council was limited by the definition of agricultural products given in the first paragraph of Article 38, so that it was not permitted, in interpreting the concept of 'products of first-stage processing' contained therein, to rely on the list of products given in Annex II by the authors of the Treaty.

They suggest that the concept of first-stage processing should be interpreted as being restricted to a single operation on the raw material.

12 According to the definition in Article 38 (1), agricultural products are 'the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products'.

Paragraph (3) of that Article provides that the products subject to the provisions of Articles 39 to 46 are listed in Annex II to the Treaty.

In this list appear, not only the principal agricultural products, but also a certain number of foodstuffs, the remoteness of which in industrial terms from the basic agricultural product goes beyond the point of first-stage processing as understood in a restricted sense.

The element common to these products resides in the close economic interdependence between them and the basic products, so that it would not be justifiable to apply the agricultural system to the basic products, while applying to the processed products the general rules of the Treaty.

13 The definition of agricultural products, placed at the head of the Title devoted to agriculture, would be devoid of practical meaning if it were not to be interpreted, as regards the power of the Council to fill the gaps with which Article 38 (3) is concerned, in the light of the aims of the common agricultural policy and with reference to the products with which the authors of the Treaty considered that policy to be concerned.

The concept of 'products of first-stage processing directly related' to basic products must, accordingly, be interpreted as implying a clear economic interdependence between basic products and products resulting from a productive process, irrespective of the number of operations involved therein.

Processed products which have undergone a productive process, the cost of which is such that the price of the basic agricultural raw materials becomes a completely marginal cost, are therefore excluded.

14 There is no reason to consider that ethyl alcohol falls within this category.

Since the number of operations necessary to obtain a processed product is not the criterion for determining its classification as a product of first-stage processing, the dilution of ethyl alcohol with water after distillation does not affect its classification.

15 Accordingly, the fact that the Council added ethyl alcohol to the list in Annex II, without regard to its alcoholic strength, does not affect the validity of Regulation No 7a.

As to the third question

16 The third question asks how the products listed under tariff subheadings Nos 22.09-A-II and 22.09-C-V-b are to be distinguished from one another.

17 Heading No 22.09 in the Brussels Nomenclature covers both undenatured ethyl alcohols of a strength of less than 80°, and brandies, liqueurs and other spirituous beverages whatever their degree of alcoholic strength.

In the Common Customs Tariff, this heading is subdivided into No 22.09-A, ethyl alcohol, undenatured, of a strength of less than 80°, and No 22.09-C-I to V, spirituous beverages.

18 In the interests of legal certainty and the simplification of administrative procedures, it is the characteristics and objective properties of products which, as a general rule, afford the decisive criterion for their classification in the Common Customs Tariff.

In the absence, at the material time, of Community explanatory notes in this field, the Notes provided for by the Brussels Convention on Nomenclature for the classification of goods in the Customs Tariff afford an authoritative source for the interpretation of common headings;

In these notes it is specified that heading No 22.09 includes 'ethyl alcohol, undenatured, whether rectified or not, of a strength of less than 80° ... whether intended for human consumption or for industrial uses ... ' which is 'distinguished from "spirituous beverages" by the fact that it is devoid of all flavouring substances'.

Subheadings Nos 22.09-C-I to V of the Common Customs Tariff are subdivided according to the types of beverage known to the trade, subheading No 22.09-C-V being a residual subheading.

19 Accordingly, ethyl alcohol, under subheading No 22.09-A, is distinguished from the products under subheading No 22.09-C-V by the presence in those products of flavouring substances or distinctive properties of taste.

Costs

20 The expenses incurred by the Government of Ireland and the Government of the United Kingdom, by the Council and by the Commission of the EEC, which have submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Bundesfinanzhof by order of 16 October 1973, hereby rules:

1. **Examination of the questions referred does not reveal any elements such as to affect the validity of Regulation No 7a of the Council.**

2. Ethyl alcohol, under subheading No 22.09-A-II of the Common Customs Tariff, is distinguished from the products under subheading No 22.09-C-V-b by the presence in those products of flavouring substances or distinctive properties of taste.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 29 May 1974.

A Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 30 APRIL 1974 [1]

Mr President,
Members of the Court,

1. The present proceedings arise from a dispute over the classification for customs purposes of a consignment of an alcoholic product imported into the Federal Republic of Germany from Belgium in September 1968. It concerns rough brandy distilled from molasses spirit, the analysis of which showed it to be completely neutral and chemically pure, and which was therefore classified under tariff heading 22.09-A-II as ethyl alcohol or neutral spirits, undenatured, of a strength of less than 80°. Prior to the analysis, the product had been classified under tariff heading 22.09-C-V-b comprising spirituous beverages. Once classified under heading 22.09-A-II, the product was subject to a customs duty, whereas it would have been exempt if its classification under heading 22.09-C-V-b had been maintained.

The interpretation of these tariff headings has caused grave and more complex preliminary questions to be raised concerning Article 38 (1) and (3) of the EEC Treaty and the validity of a regulation of the Council adopted on the basis of Article 38 (3). We are concerned here with Regulation No 7a, dated 18 December 1959 but published in the Official Journal of 30 January 1961, by which the Council, acting precisely by virtue of the powers conferred by the said paragraph (3), added to the list of agricultural products contained in Annex II to the Treaty three groups of

1 — Translated from the Italian.