REPORT FOR THE HEARING
Case C-228/89 *

I — Facts and procedure

1. Between 4 May 1981 and 30 April 1982, farfalla Flemming und Partner, the plaintiff in the main proceedings ('farfalla Flemming'), presented a number of paperweights to the Hauptzollamt München-West, the defendant in the main proceedings (the 'Hauptzollamt'), for customs clearance. farfalla Flemming declared them under Heading 99.03 of the Common Customs Tariff ('CCT') ('Original sculptures and statuary, in any material'), which provides for an exemption from customs duties.

2. The Hauptzollamt carried out a tariff inspection and classified the goods under Heading 70.13 ('Glassware . . . for indoor decoration, or similar uses'), which provides for customs duty to be levied.

3. Following the dismissal of its objection against that classification decision, farfalla Flemming brought an action before the Finanzgericht München.

4. The paperweights in question are manufactured entirely by hand by recognized glassware artists — both the body of the weights and the coloured images applied to or incorporated in the glass, representing flowers or animals. The images are two-dimensional or three-dimensional. In the first case, the pictorial representations are applied with a spatula to a mass of molten, coloured glass, and then covered, for protection and in order to create various effects, with a thin layer of glass which is coloured, etched or otherwise treated. In the second case, three-dimensional representations, previously manufactured from glass, are incorporated within the glass body. Because of this manual production process, each paperweight is different; however, in each case, an artist produces and signs an edition (comprising paperweights of the same size, with the same pictorial representation and executed in the same manner). The unit sale price is between USD 35 and 300, on which quantity discounts are granted.

5 (a) In support of its action, farfalla Flemming maintained before the national court that, being works of art produced by famous glassware artists, the paperweights in question should be classified as original sculptures and statuary, under Heading 99.03 of the CCT. The paperweights in question have no functional value and cannot be regarded as decorative or as goods of a commercial character. Accordingly, they cannot be classified under Heading 70.13 of the CCT. On the contrary, they are works of art, produced to reflect the ideas of each artist, after much work, being collected for their artistic

* Language of the case: German.

value — which accounts for their high price — and displayed in art museums.

(b) In the alternative, farfalla Flemming claimed that the paperweights in question came within Heading 99.01 ('Paintings . . . executed entirely by hand'). Before the national court, Farfalla Flemming stated that the colours were applied to the glass body by means of a spatula in the same way as to a canvas and that only the background, being glass, distinguished them from traditional paintings on canvas.

6. The Hauptzollamt took the view that the paperweights in question were ordinary items with a specific purpose and were classifiable as works of craftsmanship, not of art. The functional value of the paperweights was not affected by the fact that in practice they were not used as utility articles. According to the Hauptzollamt, original sculptures and statuary, under Heading 99.03 of the CCT, were characterized by their non-functionality and non-utility, conditions which were not fulfilled in this case; moreover, classification of the articles in question under Heading 99.01 would disregard the fact that the paperweights were not hand-painted but were manufactured by the fusing of coloured glass.

7. In its order for reference, the national court states that it inclines towards the view that where the artists apply images to the surface of glass which is still molten, the paperweights are 'paintings' within the meaning of Heading 99.01 of the CCT. Thus, neither the constituent material (canvas, wood, metal, concrete, glass, etc.) nor the form (flat or curved) of the medium to which the image is applied is of any importance. What is important in deciding whether an article constitutes a painting within the meaning of Heading 99.01 and in defining the scope of that heading in relation to Heading 99.03 is the fact that, in the case of Heading 99.01, the images are two-dimensional. The fact that in this case the overlying glass gives the impression that the image is three-dimensional is irrelevant.

However, the national court expresses doubts as to whether the fact that a work of art is executed entirely by hand by a recognized artist and signed by him is, of itself, enough to preclude its being of a commercial character within the meaning of Note 3 to Chapter 99 of the CCT.

8. Accordingly, the Finanzgericht München, by order of 26 April 1989, stayed the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

'(1) Are glass spheres having a flat base and described as "paperweights", which are made entirely by hand by recognized glassware artists using a method whereby coloured glass in the form of pictorial representations is laid on the surface of the molten glass by the use of a spatula, to be regarded for the purposes of the Common Customs Tariff as paintings (Heading 99.01) or as works of conventional craftsmanship?

(2) Can articles as described above, made and signed by recognized artists, or similar objects in which the coloured motifs (instead of lying as a two-dimensional image on the surface)

are incorporated within the sphere as a three-dimensional shape, be works of a commercial character within the meaning of Note 3 to Chapter 99?

(3) If Question 2 is answered in the affirmative: are the goods to be regarded as being of a commercial character if they

(a) are produced by the artists using the same conventional craft techniques as similar glass products which are mass-produced in glassworks by glassblowers according to artists' designs,

(b) are produced individually by the artists but in small, limited editions of uniform size, decoration and execution,

(c) are decorative in character by reason of the motifs selected for the pictorial and colour representations, and

(d) are offered and sold at a standard unit price for each series, which ranges between USD 35 and 300, and on which discounts are given?

What, otherwise, are the determining criteria for designating works of conventional craftsmanship as being of a commercial character?'

9. The order from the Finanzgericht München was received at the Court Registry on 18 July 1989.

10. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 31 October 1989 by farfalla Flemming, represented by its partners Monika Flemming and Peter Pommerencke, and by the Commission of the European Communities, represented by its Legal Adviser Jörn Sack.

11. 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.

12. By decision of 14 March 1990, pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court assigned the case to the Second Chamber.

II — Written observations submitted to the Court

1. *Farfalla Flemming* claims that the paperweights in question, which are original works of art designed, painted, modelled and signed by hand by American artists, are 'paintings' falling under Heading 99.01 of the CCT. Even if the material used (glass) and the external form (hemispherical, spherical or ovoid) of the work are more reminiscent of a sculpture, more importance should be attached to the artistic representation on and in the glass, which is the fruit of work just as detailed and time-consuming as that of painters; the only difference is that the latter artists apply colours to customary media such as canvas, board or wood, whereas, for the articles in question, the artists apply the paint to glass at high temperature, and that difference is of no consequence.

In support of that view, farfalla Flemming states first that nowadays the domain of original painting covers a wide spectrum by reason of the great variety of techniques and materials used and that the authors of the explanatory notes to Chapter 99 of the CCT did not intend to limit the work of contemporary artists. Secondly, as the Court has held (Case 155/84 *Onnasch* [1985] ECR 1449), the headings in Chapter 99 of the CCT must be liberally interpreted so as to embrace modern artistic techniques, in so far as original artistic productions are concerned. Moreover, the Court's finding in that case, to the effect that if the rate of customs duty prescribed for the material used were applied to a value for customs purposes fixed on the basis of the work's artistic nature, the duty payable would be out of all proportion to the cost of the material, is also relevant to the present case.

Farfalla Flemming goes on to say that the description 'paperweight' (in English) is misleading since in German that word never describes a functional object. On the contrary, the technical term 'paperweight', which cannot be translated into any other language, is used throughout the world by specialists and collectors to describe special artistic works of the kind at issue in this case. Those original works of art, which are never used to immobilize paper and are collected in the same way as paintings, are characterized by their non-functionality and non-utility. The artist paints and fashions them solely to express his creativity and the collector buys them for their artistic value, solely in order to look at and display them. Paperweights are exhibited in famous museums, such as the Chicago Art Institute, they command high prices at auctions, organized in particular by Sotheby's and Christie's, and numerous specialized works are devoted to that art form. Finally, it cannot be inferred from the fact that every paperweight has a flat base that it can be used to hold down papers. The base, which is needed to enable the artist to hold the piece when modelling and painting it, has the same 'practical utility' as the base of any original work of statuary or sculpture.

Farfalla Flemming also states that the paperweights in question cannot be regarded as articles of a commercial character. They are original works of art, individually modelled and painted by hand by artists in the United States of America and, to date, there are only 23 artists who are skilled in and practise that art. Paperweights of the kind at issue here should not be confused with similar objects, intended to have a practical use as such, manufactured in their thousands on the basis of models and drawings in plants such as Baccarat and St Louis which, if imported, would be treated by the customs authorities as ornamental or utility articles and would therefore be subject to customs duties. Farfalla Flemming adds that the fact that discounts are granted on the purchase of paperweights is of no relevance. It states that it is customary for artists to give art dealers a discount on works of art, provided that several original works are purchased at the same time for cash.

2. The *Commission* observes in the first place that it is unnecessary to answer the first question, concerning the scope of tariff

Headings 99.01 and 99.03. Whilst there is no doubt that that question was asked because of the restriction imposed by Note 3 to Chapter 99 of the CCT, which relates only to Heading 99.03 ('sculptures') and which excludes from that heading sculptures of a commercial character, that limitation is not material to the present case since a similar provision is contained in the very wording of Heading 99.01 concerning 'paintings' ('other than hand-painted . . . manufactured articles').

If, however, the Court should consider it necessary to answer that question, the Commission is of the opinion that all the paperweights could be classified under Heading 99.03 of the CCT. That heading, which is the obvious one for paperweights with glass figures incorporated in their bodies because of the three-dimensional nature of the motif, is also the appropriate one for pieces of glass on to which a pictorial representation has been applied: even if the motif were two-dimensional, the fact that a three-dimensional object has been executed entirely by hand (in this case, the piece of glass with the motif) is decisive for its classification, as is the fact that the representation is made out of glass; glass is a material which is not normally used in painting but, typically, is used for the creation of three-dimensional works of art such as sculptures.

However, the Commission takes the view that before the paperweights are definitively classified in Chapter 99, it must be decided whether some other chapter of the CCT might not be appropriate in the present case. It is apparent from Note 3 to Chapter 99 that certain articles, which it is certainly appropriate to regard as artistic statuary, do not, because of their commercial character, fall within Chapter 99 but must be classified in the chapter covering the constituent material of the article in question. A similar restriction derives from the wording of tariff Heading 99.01 with respect to paintings.

The Commission infers from this that Chapter 99 of the CCT does not include all types of works of art and that the fact that the paperweights in question are to be regarded as works of art is not in itself decisive for their classification in that chapter. In the Commission's view, it is necessary to consider whether the paperweights at issue are of a commercial character within the meaning of Note 3 to Chapter 99 of the CCT.

According to the Commission, the essential reason for which the CCT grants an exemption from duty for certain works of art is that they are entirely personal creations, executed by artists who are not, from the economic standpoint, in competition with each other.

On the other hand, that does not apply either to works of art which can be reproduced at will and which are produced not only by the artist but also by a whole sector of industry (for example, books, gramophone records, films, photographs) or to works of craftsmanship, where the works are not purely artistic but also have a practical function and therefore are genuinely in a situation of economic competition.

The Commission emphasizes that the fact that the artistic value of a decorative article may vastly exceed its purely utilitarian value does not constitute a valid distinguishing criterion for tariff classification. The customs authorities cannot assess the artistic value of an object and therefore only objective criteria may be adopted, which are easily identifiable and relate to external characteristics of the goods. Accordingly, the price of an article likewise cannot be an appropriate basis for tariff classification.

According to the Commission, it is apparent from the wording both of Note 3 to Chapter 99 and of Heading 99.01 that the paperweights in question cannot be classified among the works of art covered by Chapter 99 of the CCT. Just as not all functional articles, even those painted by hand by well-known artists, do not fall within Heading 99.01, the paperweights in question are of a commercial character within the meaning of Note 3 because they are functional articles. The fact that the articles in question are unique items executed by hand is not relevant to their tariff classification any more than the fact that they are never, in practice, used as functional objects. On the one hand, the customs authorities cannot verify the use to which goods are put and, on the other, such use varies according to the personal circumstances of the owner.

In the Commission's view, it follows that where an artist produces works of statuary having the form of normal or functional objects, the items in question may well be works of art but, for the purposes of tariff classification, they do not fall within Chapter 99 and they should be classified by reference to their constituent material, since they are of a commercial character and are in a market where they compete with industrially-produced articles. That applies particularly where the articles are produced in series and sold under normal market conditions, in so far as quantity discounts are granted.

In short, the Commission proposes the following answer to the questions submitted by the national court:

'Glass spheres with a flat base, which are described as "paperweights", are made entirely by hand by recognized glassware artists, in limited editions, and are decorated with two-dimensional or three-dimensional motifs, must be regarded as sculptures of a commercial character and consequently be classified, pursuant to Note 3 to Chapter 99 of the Common Customs Tariff, not as original sculptures or statuary (Heading 99.03) but by reference to their constituent material.

If the Court should consider the articles in question to be "paintings", the same decision should be taken with respect to Heading 99.01.'

F. A. Schockweiler
Judge-Rapporteur