OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 14 April 1994 *

Mr President,
Members of the Court,

1. The Bundesfinanzhof asks whether a retail product put up in a set of goods for determining the level of cholesterol in blood is to be classified under heading No 3822 or heading No 4823 90 90 or another heading of the 1991 Combined Nomenclature. More specifically the questions submitted are in the following terms:

'1. Is the Common Customs Tariff — Combined Nomenclature 1991 — to be interpreted as meaning that a retail product put up in a set, namely the "Chemcard Cholesteroltest", used for determining the cholesterol level of blood plasma — comprising a test card with a glued-on, reagent-impregnated, shaped paper cut-out (0.6 cm thick) covered by web-backed paper, a lancet, webbed wadding etc. (as more particularly described in the grounds of the order), is to be classified pursuant to General Rule No 3(b) as a "composite diagnostic reagent" under heading No 3822 on the ground that the component which gives that product its essential character is the test card?

2. If Question 1 is answered in the negative:

is the Common Customs Tariff to be interpreted as meaning that the component which constitutes the product's essential characteristic, namely the test card, is to be classified as "other" articles of paper under subheading No 4823 9090?

3. If Question 2 is answered in the negative: to which other heading is the set of goods including the test card which constitutes its essential characteristic to be assigned?'

2. The Combined Nomenclature for 1991 to which the Bundesfinanzhof refers [1] is

* Original language: Dutch.

1 — In its observations to the Court the Commission is basing itself on the combined nomenclature for 1993 as established by Commission Regulation (EEC) No 2505/92 of 14 July 1992 (OJ 1992 L 267, p. 1). The Commission also points out there have been no changes to the combined nomenclature of relevance to the questions submitted.

appended as Annex I to Commission Regulation (EEC) of 31 July 1990 [2] amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. [3] I mention below the chapters and headings discussed in the questions submitted, in the parties' observations to the Court and further on in this Opinion.

Chapter 38 comprises 'Miscellaneous chemical products'. According to the notes to the Chapter it does not include: 'separate chemically defined elements or compounds with the exception of the following'; the ensuing list is not relevant for these purposes.

Heading No 3822 covers 'composite diagnostic or laboratory reagents, other than those of heading No 3002 or 3006'.

Chapter 48 comprises 'Paper and paperboard; Articles of paper pulp, of paper or paperboard'. According to the notes that Chapter does not include 'paper ... impregnated ... or covered with soap or detergent ...'.

Heading No 4823 includes 'other paper, paperboard, cellulose wadding and webs of cellulose fibres, cut to size or shape, other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibres', together with various subheadings of which the last, subheading 4823 90 is entitled 'other'.

The last-mentioned heading No 4823 90 in its turn includes (headings 4823 90 10 to 4823 90 90) a number of subheadings of which the last, heading 4823 90 90 is the residual heading 'other' to which the second question refers. The other subheadings are not relevant for these purposes.

3. In accordance with the General rules for the interpretation of the Combined Nomenclature certain principles are stated as applying to the classification of goods.

Rule 3(a) provides that: 'the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, *those headings are to be regarded as equally specific in relation to those goods, even if one of*

2 — OJ 1990 L 247, p. 1.
3 — OJ 1987 L 256, p. 1.

them gives a more complete or precise description of the goods' (emphasis added).

Rule 3(b) states that: 'mixtures, composite goods consisting of different materials or made up of different compounds, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which *gives them their essential character in so far as this criterion is applicable*' (emphasis added).

As will be apparent, the parties, the Bundesfinanzhof and the Commission are in my view correct to take the view that General Rule 3(b) is applicable here. However, for the sake of completeness I shall also cite General Rule 3(c) which provides that: 'when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration'.

4. Techmeda Internationale Medizinisch-Technische Marketing-und Handels-GmbH&Co. KG ('Techmeda'), the applicant in the main proceedings, appealed to the Bundesfinanzhof against the ruling of 30 April 1991 by the Oberfinanzdirektion Köln, upheld by the decision of 20 May 1992 on the objection, in which the Oberfinanzdirektion issued to it a binding tariff classification ruling. That ruled that the set of goods used for determining the cholesterol level of blood plasma, known as the 'Chemcard Cholesteroltest' fell to be classified under heading No 4823 90 90 — 'other' articles of paper (autonomous rate of duty: 19%; conventional rate of duty: 11%).

Techmeda appealed against that ruling on the ground that in its view the test card ought to have been classified under heading No 3822 covering 'composite diagnostic or laboratory reagents' (autonomous rate of duty: 18%; conventional rate of duty: 7.6%).

5. According to the national court, the set of goods comprise paperboard packaging with a test card, a lancet and webbed paper. Since the product is intended for retail sale, it also includes an information leaflet with instructions for use. According to the product description contained in the tariff classification ruling mentioned at paragraph 4 above the test card (ca. 4.8 x 8.6 cm) is a reagent-impregnated paper cut-out (ca. 0.6 cm thick) covered by self-adhesive, perforated, web-backed paper. Essentially the web-backed paper acts as a filter and is located between the self-adhesive paper in which a round opening is made and the impregnated paper

cut-out. Drops of blood deposited on to the web-backed paper penetrate through the web to the paper cut-out beneath. Since that paper is impregnated with reagents, the blood causes a chemical reaction which is recorded on the paper cut-out by a colour change indicating the cholesterol level in the blood.

Essentially, the web-backed paper operates in such a way that the red globules (cellular components) are absorbed but the plasma is allowed to go through. It is the plasma which brings about a chemical reaction indicated by a colour change on the paper cut-out impregnated with three enzymes and a chromogen (tetramethylbenzidine). The coloration is only possible because the red globules are first filtered out. The filtering process through the web-backed paper is therefore in itself a purely physical process.

6. In Techmeda's appeal submissions, as reproduced in the order for reference (Techmeda submitted no observations to the Court), the test was said to consist essentially of two chemical reactions: separation of the blood constituents (plasma and cellular components) by means of chemical reagents penetrating the semi-permeable membrane (web) and the effect of the other constituents on the reactive area of the test card. In its view, therefore the most important element of the product is the web covering the test area. The paper cut-out constituting the test area is in its view not the essential component of the product since it is merely a throw-away item which serves only as a medium for displaying the result of the reaction induced. For that reason the product consisting mainly of plastic is correctly classified in the United kingdom as a composite diagnostic or laboratory reagent under heading No 3822.

As far as the last assertion is concerned, however, the United Kingdom in its observations to the Court stated that its customs authorities have in the meantime formed a different view and are now in agreement with classification under heading No 4823 as proposed by the Oberfinanzdirektion (see below).

7. The Oberfinanzdirektion is in fact of the opinion, again according to the order for reference, that the merely physical separation of plasma and cellular components by the web, which contains no chemical reagents, plays only a secondary role. The aim of the test is achieved by reading off the result of the measurement on the reactive area (the paper cut-out) whereby the paper itself has no influence on the chemical process on which the result of the test depends; the only reagents are the chemical substances located on the reactive area. The Oberfinanzdirektion therefore considers that when paper and chemical substances are used at the same

time, and also as in this case when composite reagents are used, the items in question must be classified under heading No 4823. Although it, too, is of the opinion that it would be more equitable for these items to be classified under heading No 3822, pending an official alteration of the Combined Nomenclature, they must be classified under heading No 4823.

8. In its order for reference the Bundesfinanzhof states that it is inclined to favour the view advanced by Techmeda concerning tariff classification but on different grounds. For the Bundesfinanzhof is of the view that the test card consisting of a reagent-impregnated paper cut-out is the essential component of the test as defined by General Rule 3(b) (cited in paragraph 3 above). Going by its characteristics and use, it considers that the test card (or paper cut-out) can be regarded as a composite reagent, other than those mentioned in headings 3002 or 3006, [4] within the meaning of heading 3822. The reactive area of the card, however, contains various 'chemical substances' so that a composite product may be assumed to be involved. [5] The substances contained in the test area react with the blood constituents in a chemical reaction which causes a result to be displayed. 'Therefore', says the Bundesfinanzhof, 'the conditions for classification under heading No 3822 appear to be met.'

As the Bundesfinanzhof goes on to point out, by reference to the Court's judgment in *Analog Devices*, [6] notwithstanding the fact that the test card is a new development that does not preclude it from being assigned without much difficulty to heading No 3822.

Since, however, classification of the test card under heading No 3822 is not entirely beyond doubt, as the test card could also be regarded as impregnated paper within the meaning of Chapter 48 and then would fall to be classified under heading No 4823, [7] it preferred to refer the case to the Court for a preliminary ruling.

9. The Commission is not in agreement as the legislation stands (though it shares the aspiration for a legislative amendment) with the preference expressed by the Bundesfinanzhof for heading No 3822. In its observations to the Court it considers that the test card which it, too, considers to be the essential component of the test set within the meaning of General Rule 3(b) was correctly classified by the Oberfinanzdirektion under heading No 4823 90 90 as 'other' paper articles. Nevertheless, it too is of the opinion that it would be more normal to classify the test card under heading No 3822: the test card is, after all, 'impregnated' with the three enzymes in combination with the chromogen in order to indicate the cholesterol

4 — Headings 3002 and 3006 concern *inter alia* reagents for determining blood groups or blood factors.

5 — The Commission, too, in its written observations to the Court, expressed the view that it is a composite product and not a 'separate chemically defined element' which, in accordance with note 1(a) to Chapter 38, would fall outside that chapter (quoted in paragraph 2 above).

6 — Case 122/80 *Analog Devices* v *Hauptzollamt München-Mitte and Hauptzollamt München-West* [1981] ECR 2781, paragraph 12, see also the judgment in Case 234/87 *Casio Computers* [1989] ECR 63, paragraph 12.

7 — And not under heading 4811 having regard to Note 7(a) to Chapter 48, the Bundesfinanzhof rightly adds (as does the Commission in its written observations in reply to the second question).

level and must therefore be classified as a composite diagnostic reagent. [8]

But the Commission takes the view that it is not the reagent but the reactive paper which is the product to be classified. In that connection it relies on Note 1(d) to Chapter 48 of the Combined Nomenclature according to which certain kinds of impregnated paper do *not* come within that Chapter. [9] The Commission infers therefrom that all other kinds of impregnated paper come under Chapter 48. As a legislative aspiration, however, the Commission considers that classification under heading No 3822 would be appropriate. In June 1991 it submitted a proposal to that effect to the Customs Cooperation Council in Brussels. And, after long debates, the Council is said to support the Commission's interpretation.

10. Following this detailed description of the various viewpoints, I can be quite brief in the statement of my viewpoint. I am at one with the Oberfinanzdirektion, the Bundesfinanzhof and the Commission that the web-backed paper which contains no chemical reagents but merely serves as a filter cannot be regarded as the component which gives the test kit its essential character within the meaning of General Rule 3(b) for the interpretation of the Combined Nomenclature (see paragraph 3 above); on the contrary the essential component of the kit is indeed the reagent-impregnated card.

Accordingly, I am at one with the abovementioned institutions that the reagent-impregnated paper cut-out must in principle be regarded as a composite reagent. The Commission, too, comes to that conclusion in its reply to the first question submitted. [10]

The actual dispute turns on whether the paper cut-out in which the chemical substances are located and the chemical reaction occurs must be regarded, as the Commission and the Oberfinanzdirektion propose, as (reactive) paper rather than, as the Bundesfinanzhof is inclined to think, as a composite reagent, although the paper acts as the medium.

11. Like the Bundesfinanzhof I have a preference for the second solution. I rely in that connection on the abovementioned General Rule 3(b) pursuant to which for the classification of composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, regard must be had to the material or component which gives them their essential

8 — See also above, footnote 5.

9 — See above, paragraph 2. In addition to paper impregnated with soap or detergent mentioned by the Commission, paper impregnated with cosmetics is also mentioned there, under (C).

10 — See Page 9, at (aa) of its written observations.

character. This rule does not merely permit, as indicated above, the paper cut-out as opposed to the web-backed paper to be regarded as determining the classification of the test set: it also permits the reagents (enzymes and chromogen) to be deemed to be part of the paper cut-out from which the cut-out and therefore the whole test set derives its essential character. That decision is moreover in conformity with the feelings of the parties and institutions that the test set ought as a result of a legislative amendment be regarded as a composite reagent within the meaning of heading No 3822. As indicated above, that decision can already be reached by applying General Rule 3(b).

The *Analog Devices* judgment [11] cannot be availed of against that solution: there the competent authorities were held to be entitled to make changes to the Common Customs Tariff when technical developments necessitate a fresh tariff classification. That judgment and the later *Casio Computers* judgment, cited above, [12] involved actual technical developments in the field of electronics. In the present case it was purely and simply a question of making the diagnostic test more readily accessible by the application of reagents to the paper cut-out whereby the test set also became available for the retail trade. I do not see that as a technical development.

12. On the basis of the foregoing I therefore propose that the Court should reply to the first question that the test set described therein must be classified under heading No 3822 of the Combined Nomenclature. The second and third questions do not then call for any reply.

11 — Cited in footnote 6 above.

12 — See footnote 6.