OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 17 July 1997 *

I — Introduction

1. The Court has been called on in the present case to interpret the Common Customs Tariff for the purpose of determining whether peppers cut into pieces measuring between 4 and 8 mm in length can or cannot be classified as crushed or ground peppers.

II — The Community legislation

2. Set out below are the provisions of subheading 0904 20 of the Common Customs Tariff, in the version resulting from Commission Regulation (EEC) No 3174/88 of 21 September 1988 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff and from Commission Regulation (EEC) No 2886/89 of 2 August 1989 amending Annex I to Regulation No 2658/87 [1] (hereinafter 'the Combined Nomenclature'):

'0904 20	— Fruits of the genus Capsicum or of the genus Pimenta, dried or crushed or ground:
	— — Neither crushed nor ground:
0904 20 10	— — — Sweet peppers
	— — — Other:
...	
0904 20 90	— — Crushed or ground'.

III — The facts of the case

3. Leonhard Knubben Speditions GmbH purchased over the period from June 1989 to November 1990 a number of consignments

* Original language: Italian.

1 — OJ 1989 L 282, p. 1.

of dried peppers from non-member countries. The peppers in question, measuring between 4 and 8 mm, were declared as 'crushed or ground' within the meaning of subheading 0904 20 90 of the Combined Nomenclature.

However, following inquiries as to the nature of the goods, the Hauptzollamt (Principal Customs Office) Mannheim, the defendant in the present proceedings, discounted the possibility that the goods could be 'crushed or ground' peppers within the meaning of the above customs subheading. It ruled that they therefore fell to be classified with those coming under subheading 0904 20 10 of the Customs Tariff. The Hauptzollamt accordingly proceeded to post-clearance recovery of the customs duty.

The applicant appealed against that decision to the Finanzgericht (Finance Court), which confirmed the decision of the Hauptzollamt. The applicant then appealed on a point of law against the first-instance decision to the Bundesfinanzhof (Federal Finance Court). That court has considered it necessary, in order properly to resolve the dispute, to refer the following question to the Court for a preliminary ruling:

'How is subheading 0904 20 of the Common Customs Tariff — Combined Nomenclature 1989 and 1990 — to be interpreted? Does the term "sonst zerkleinert" ("otherwise crushed") used therein signify merely a fineness similar to the ground product, or does it also cover a product cut into pieces, such as a product cut into pieces measuring between 4 and 8 mm?'

IV — Analysis of the dispute

4. The dispute here under consideration turns essentially on a question of terminology. What the Court is being specifically called on to do is to determine the exact meaning of the expression 'sonst zerkleinert' ('otherwise crushed') contained in subheading 0904 20 90 of the German version of the Customs Tariff ('the CT'). In particular, the issue centres on the dimensions of peppers such as may allow them to be classified under the tariff subheading in question. The CT does not, however, specify the dimensions which apply for that purpose or provide an appropriate classification for cut peppers: the choice is thus between classifying the product at issue among peppers, without additional or specific qualifications, and bringing it within the category of 'crushed or ground' peppers.

5. The applicant submits in this regard that the expression 'sonst zerkleinert' used by the CT does not lay down any particular dimensions for classifying the product under subheading 20 90. It argues that the CT draws a distinction between whole peppers and those cut into pieces, irrespective of the dimensions of the pieces thus obtained. Otherwise, the applicant continues, there would be no appropriate customs heading for peppers which are not whole but which are also not crushed.

6. In contrast, the defendant, as the Bundesfinanzhof points out, argues that 'sonst zerkleinert', so far as the dimensions of the product are concerned, is, as an expression,

equivalent to the other expression used, 'gemahlen' ('ground'). Consequently, it is contended, only those peppers cut into pieces which attain a degree of fineness comparable to that of ground peppers can be treated as coming under subheading 0904 20 90. The English and French versions of the CT, the defendant argues, support this interpretation. On that basis, the expression 'sonst zerkleinert' therefore indicates only a different mechanical process for reaching a state of product fineness equivalent to that of the ground product.

7. For its part, the Commission supports substantially the views of the defendant, using the different language versions of the CT and thereby coming to the conclusion that the expression 'sonst zerkleinert' in the German version of the CT indicates exclusively the difference in processing by which a reduced product in the form of powder or flour is obtained. According to the Commission, therefore, the fact that the peppers are cut into pieces and that those pieces may also have very small dimensions is not such as to lead in any event to classification of the product in question under subheading 20 90.

8. In my opinion, however, the interpretation of the relevant subheading of the CT must satisfy criteria of reasonableness and consistency with the overall system of rules to which that provision belongs. For that reason I take the view that a mere lexical comparison between the German version and the French and English versions (as well as the other language versions) of the CT does not in itself enable the person interpreting the provision to identify with sufficient precision the *ratio* underlying the Community legislature's choice.

The matter at issue in the present case is to classify a product which it is clearly not appropriate to classify immediately as either whole peppers or as pepper powder or flour. The argument put forward by the Commission and the defendant, to the effect that the expression 'sonst zerkleinert' indicates a result similar to that obtained from grinding, albeit achieved through a different process, strikes me as unconvincing. It is an inflexible solution and does not make it possible to provide appropriate tariff treatment for a product which, in all probability, does not correspond, in its characteristics and functions, to that to which, according to this view, it is to be treated as analogous. Furthermore, the view taken by the defendant and the Commission would lead to the conclusion that the Community legislature has in fact used a meaningless pleonasm in drawing up the heading in question. If the product had to be in the form of powder or flour in order to be classified under subheading 20 90, the positioning of the expression 'sonst zerkleinert' alongside the term 'gemahlen' would be entirely superfluous.

9. In my view, it is necessary to identify the subheading that is closest to the organoleptic characteristics of the product in question and to its current market use. Such an investigation is, by its nature, one which falls within the competence of the national court. It is, however, for the Court of Justice to point out the factors which may assist the national

court in correctly classifying the product in question. In the present case, reference may be made to the characteristics inherent to the product and to its potential commercial use. This interpretative technique, based on the principle of analogy, is, moreover, provided for in Rule 4 of the General Rules for the interpretation of the Combined Nomenclature. [2]

10. A different interpretation of the CT, based on a simple textual analysis and on a comparison with the other language versions, could have the result that goods which are similar according to composition and functions may in fact be treated differently for tariff classification purposes, even though there are no other overriding reasons to justify such difference in treatment. Consequently, the breach of the principle of equality to which I have previously referred might also, on such a construction, lead the Court to declare invalid that part of the CT the provisions of which unjustifiably treat similar products differently.

11. Mention ought, however, to be made of yet another interpretative key, namely that set out in General Rule A.3.(c) of the Combined Nomenclature, which provides that, where it is not possible otherwise to classify it, the product should be classified under the heading which occurs last among those which equally merit consideration. [3] In the present case, the heading relating to products which are 'crushed or ground' turns out in fact to be the last of these possibilities. This too, therefore, has the result that the product in question is classified under subheading 20 90.

Conclusion

12. In the light of the foregoing considerations, I propose that the Court reply as follows to the question submitted by the Bundesfinanzhof:

The expression 'sonst zerkleinert' contained in the German version of subheading 0904 20 90 of the CCT covers peppers cut into pieces measuring between 4 and 8 mm where that product has organoleptic characteristics similar or equivalent to those of ground peppers and in normal commercial usage has functions that are equivalent to those of such products.

2 — 'Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.'

3 — This rule was set out, for example, by the Commission in Case C-67/95 *Rank Xerox*. See in this regard my Opinion in that case, delivered on 12 December 1996 (points 17 and 18).