OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 6 OCTOBER 1983 [1]

Mr President,
Members of the Court,

The Court has before it a request from the Bundesfinanzhof for a preliminary ruling, under the first and third paragraphs of Article 177 of the EEC Treaty, concerning:

(i) The interpretation and validity of Commission Regulation No 1074/80 of 29 April 1980 on the classification of goods under subheading 64.02 B of the Common Customs Tariff, and

(ii) the interpretation of subheading 64.02 of the Common Customs Tariff in conjunction with General Rule 3 for the Interpretation of the Nomenclature of the Common Customs Tariff.

Those questions are raised in proceedings between Gustav Schickedanz KG, a large mail-order firm in the Federal Republic of Germany, and the Oberfinanzdirektion Frankfurt am Main, in relation to the tariff classification of shoes imported in 1981 by Schickedanz from the People's Republic of China.

I — (1) At the time of importation Schickedanz asked the Oberfinanzdirektion Frankfurt am Main for a binding customs tariff notification. The Oberfinanzdirektion classified the shoes under subheading 64.02 B as "sports shoes (training shoes) with outer soles of rubber and *uppers of textile fabric*".

Schickedanz objected on the ground that the shoes in question came under subheading 64.02 A as "sports shoes with outer soles of rubber and *uppers of leather*".

Subheading 64.02 includes *inter alia* the following articles:

"Footwear . . . with outer soles of rubber or artificial plastic material:

A. Footwear with uppers of leather

B. Other."

The normal rate of customs duty on footwear with leather uppers is 8%. The rate applicable to footwear coming under subheading 64.02 B is 20%.

(2) When the Oberfinanzdirektion dismissed the objection Schickedanz brought an action before the Bundesfinanzhof, the Seventh Senate of which took the view that the outcome of the case depended on questions of Community law and accordingly complied with the obligation to bring the matter before this Court, as supreme courts are required to do by the third paragraph of Article 177 of the Treaty.

The Bundesfinanzhof asks first of all about the scope of Commission Regulation No 1074/80. Does it include "a sports shoe with a rubber outer sole, the upper of which consists entirely of textile fabric to which are stitched in the areas of the front part of the vamp, heel-piece, eyelets and outside and inside lateral sections and as decorative strips pieces of leather which cover about 70% of the textile fabric, account for more of the value of the upper than the textile fabric and also, on account of the protection and support which they provide and the special way in which the upper is bonded

1 — Translated from the French.

to the insole, are of essential importance for the use of the product as a sports shoe?"

In the event of an answer in the affirmative the Bundesfinanzhof asks whether the regulation is valid.

If either the first or second question is answered in the negative the Bundesfinanzhof asks whether the shoes described must be classified under subheading 64.02 B in view of General Rule No 3 for the Interpretation of the Nomenclature of the Common Customs Tariff.

I shall answer those various questions in the order in which they are raised.

II — The Bundesfinanzhof observes that Commission Regulation No 1074/80 applies to sports shoes with outer soles of rubber and uppers of textile fabric on which are sewn pieces of leather covering the surface to a greater or lesser extent but without other particulars. It therefore inquires whether the regulation also covers shoes in which the leather:

Is the predominant component in terms of quantity and value;

Solely or chiefly ensures that the shoes are fit for their intended use as sports shoes;

And is not stitched on to the textile fabric all the way round.

Schickedanz maintains that the shoes in question do not come within the scope of Regulation No 1074/80 for three reasons:

(i) The shoes do not have uppers of textile fabric but uppers composed both of textile fabric and of leather; only uppers of textile fabric are mentioned in Article 1 of the regulation.

The Commission rightly counters that, according to the very wording of Article 1 the shoes covered by Regulation No 1074/80 are those which have "uppers consisting of textile fabric on which strips or pieces of leather ... are sewn externally ... covering the surface to a greater or lesser extent".

It follows that shoes the uppers of which are made entirely of textile fabric to which pieces of leather have been attached so as to cover 70% of the surface are covered by the regulation.

(ii) The pieces and strips of leather are not sewn externally *(aufgenäht)* on the textile fabric. It is necessary to distinguish the expression "sewn externally" which appears only in Article 1 of Regulation No 1074/80 from "sewn together" *(angenäht)* and "sewn one upon the other" *(aufeinandergenäht).* That distinction is apparent from the drafts and other documents preparatory to Regulation No 1074/80 annexed by the Commission to its observations. In the present case, the pieces of leather which are the most important in giving the shoe its inherent function as a sports shoe [1] were attached to the textile fabric by stitches not extending all round their circumference, which corresponds to the definition of sewing one piece upon the other. So those pieces have not been sewn on all the way round the shoe, a finishing which corresponds to the use of the words "sewn externally", as the national court also points out.

In the Commission's view, on the other hand, that distinction must be dismissed, for, as appears from its introductory note to the meeting of the Committee on Common Customs Tariff Nomenclature which approved its proposal for Regulation No 1074/80, the latter was to apply to a large number of sports shoes with uppers of textile fabric on which are sewn externally strips or pieces of leather, textile fabric covered with plastic

1 — Those sewn on the uppers, the vamp and the external and internal lateral sections.

material or both kinds of strips or pieces. Therefore the distinction between the various methods of attaching the pieces or strips to the textile fabric is irrelevant and the expressions "sewn together", "sewn one upon the other" and "sewn externally" are largely synonymous.

In this essentially technical discussion the documents before the Court seem to me to show only one certainty. It is clear from Point 14 of the note by which the Danish customs administration asked the Nomenclature Committee to give a ruling on the classifiction of the sports shoes in question that there are various techniques for sewing pieces or strips on the textile fabric of uppers of such shoes and that the differences in finishing may justify differences in tariff classification.

For the rest, however, the information available to the Court does not allow a clear decision in favour of one or other of the arguments put forward. I in no way dismiss the technical explanations of Schickedanz in relation to the various ways of making shoes. It seems to me however just as possible that the expression "sewn externally" used by the Commission in its regulation does not have the precise technical meaning attributed to it by Schickedanz or that it was chosen deliberately to include all the finishings in use and mentioned in the note from the Danish customs.

(iii) I shall refrain from attempting to resolve that issue, for the third argument of Schickedanz appears to me decisive; moreover, it largely coincides with the observations of the Bundesfinanzhof.

(a) It is apparent from the third and fourth recitals in the preamble that Regulation No 1074/80 applies to two types of sports shoes with uppers of textile fabric on which strips or pieces of leather are sewn:

Those where the strips or pieces are to be regarded merely as accessories or reinforcements (third recital);

Those where, given their importance, they can no longer be regarded as such, but as one of the constituent materials of the uppers (fourth recital).

In the first case I agree with the Commission in considering that the textile fabric gives the uppers of the shoes their essential character. Consequently, in my opinion Regulation No 1074/80 rightly classifies them in subheading 64.02 B. That classification follows from Rules 3 (b) and 5 for the Interpretation of the Nomenclature of the Common Customs Tariff. Rule 3 (b) provides "composite goods consisting of different materials ... shall be classified as if they consisted of the material or component which gives them their essential character ..." and Rule 5 makes the other rules applicable for the purpose of determining the appropriate subheading within a heading.

In the second case it is impossible under the regulation to decide, according to objective criteria, which material gives the uppers their essential character. Those shoes must therefore also be classified under subheading 64.02 B pursuant to Rules 3 (c) and 5. As the Court is aware, when goods cannot be classified by reference, *inter alia*, to Rule 3 (b), they are to be classified, pursuant to Rule 3 (c), "in the heading which occurs latest among those which equally merit consideration in determining their classification."

In my opinion, Schickedanz has sufficiently shown that there is no such impossibility as regards the shoes in issue and that, on the contrary, the application of simple criteria removes them from the scope of Regulation No 1074/80.

The combination of the following two objective criteria shows whether the leather gives the upper of that kind of shoe its essential character:

The proportion, on the visible surface of the upper, of leather in relation to fabric;

The positioning of the pieces of leather on the upper, which is decisive if the sports shoes are to be classified in accordance with their function.

(b) The first criterion is that contained in the new Note 4 (a) adopted provisionally by the Nomenclature Committee of the Customs Cooperation Council when considering the draft of Chapter 64 of the harmonized system (forty-first session):

"The material of the upper shall be taken to be the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments."

Paradoxically the Commission relies on that note for its view that the textile fabric gives the uppers of the shoes in issue their essential character because it covers the entire upper, unlike the leather, which covers part only. That interpretation makes sense only if account is taken not only of the visible part of the upper but also of the textile fabric hidden by the pieces of leather.

I think, on the contrary, that only the visible part should be taken into account. The exclusion of the invisible parts of the surface of a shoes is not only consistent with the general trend of the decisions of the Court; it also accords in particular with the judgment of 26 February 1980 in the *Hako-Schuh* case. For obvious reasons of legal certainty the Court favours the criteria of classification which are the easiest to use. [1] From that point of view it seems to me more convenient to disregard any reference to the invisible parts of the article to be classified. That is what the Court did in particular in the *Hako-Schuh* case, [2] which also concerned the tariff classification of shoes. In that judgment it was held that for the tariff classification of the espadrilles in issue the sole basis to be adopted was the extent of the rubber reinforcement covering the external rope sole, to the exclusion of the parts thereof covered by the reinforcement.

I think that criterion is satisfied as soon as the leather occupies more of the external surface of the upper than the fabric:

(c) That however does not seem to me to be sufficient reason to entail classification of sports shoes of the kind imported by Schickedanz as footwear with uppers of leather within the meaning of subheading 64.02 A. It seems to me also necessary to consider the place of the pieces of leather on the uppers of the shoes, for that is of vital importance if they are to merit the

1 — See in particular the summary of the case-law made by Mr Advocate General Mancini in his Opinion of 3 February 1983 in Case 175/82 *Dinter* v *Hauptzollamt Koln-Deutz* [1983] ECR 969.

2 — Case 54/79 *Hako-Schuh* v *Hauptzollamt Frankfurt am Main-Ost* [1980] ECR 311, in particular paragraph 6 at p. 319.

description "sports shoes" given to them by the importer for the purposes of customs clearance. The strips or pieces of leather fulfil their protective and reinforcing function and their stabilizing function, which alone make them appropriate for the practice of certain relatively violent sports (long jump, high jump, throwing the discus, etc., running and football), only if they are placed on the upper, the vamp, the eyelets and on the external and internal lateral sections.

If such a condition is not imposed it might be feared, as the Commission rightly emphasizes, that certain traders might cover their shoes with pieces of leather, without regard to the position thereof, with the sole aim of paying lower customs duties. That kind of customs fraud must be made impossible.

III — The second question from the Bundesfinanzhof relating to the validity of Regulation No 1074/80 is asked only in the event of an affirmative answer to the first question. In taking the view that the sports shoes described there do not come under Regulation No 1074/80 I have answered the question in the negative. I shall therefore deal with the second question only in the alternative.

In my opinion, if the regulation is construed as applying to the kind of shoes in issue, it is invalid for breach of superior rules of Community law.

Commission Regulation No 1074/80 was adopted pursuant to Regulation No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the Nomenclature of the Common Customs Tariff. Admittedly, it cannot be denied that the procedural rules contained in Articles 2 and 3 of Regulation No 97/69 were observed in the present case. The Commission duly submitted to the Nomenclature Committee set up by that regulation the draft of what was to become Regulation No 1074/80. It took that initiative at the request of the Danish customs authority, which had doubts about the classification of the shoes which were to be covered by the regulation. [1] By a qualified majority [2] the Committee gave an opinion in favour of the proposal for the Commission regulation.

On the other hand, as far as the substance is concerned, I consider that Regulation No 1074/80 is incompatible both with Rule 3 (b) of the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff and with Regulation No 97/69. In so far as the Commission regulation covers shoes for which it is possible to determine on the basis of the criteria to which I have just referred in answer to the first question that the leather is the material which gives the uppers their essential character, the regulation is contrary to Rule 3 (b), which constitutes a superior rule because it is included in Council Regulation No 950/68 on the Common Customs Tariff and the amending regulations.

In considering that it was impossible, save in marginal cases where the leather covered at least 90% of the surface, to determine which material, the leather or

1 — Article 2 and the first two sentences of Article 3 (2).

2 — Last sentence of Article 3 (2).

the textile fabric, gave the uppers of the shoes their essential character within the meaning of Rule 3 (b), the Commission seems to me not to have been content with interpreting subheadings 64.02 A and B but to have altered their meaning and scope.

In doing so it also exceeded its powers under Regulation No 97/69, which, as appears expressly from the second recital in the preamble, allows the Commission to "specify the content of the headings or subheadings of the Common Customs Tariff *without, however, amending the text thereof*".[1] Commission Regulation No 1074/80 thus presents the same defect as Regulation No 2282/79, which is the subject of Case 289/82 *(Lohmann)*. That case was also referred to the Court by the Seventh Senate of the Bundesfinanzhof and Mr Advocate General Mancini delivered his opinion on 14 July 1983.[2]

IV — If, as I do, the Court considers that the shoes described in the first question cannot be covered by Regulation No 1074/80 or if it declares that regulation invalid, the classification of the shoes must be made on the basis of the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff.

Thus the Bundesfinanzhof asks the Court whether, in view of Rule 3, the shoes must be classified under subheading 64.02 B of the Common Customs Tariff.

The answer to that question obviously follows from that which I have given to the first two questions of the Bundesfinanzhof. Sports shoes such as described in the first question cannot be classified under subheading 64.02 B of the Common Customs Tariff as footwear with uppers of some material other than leather. On the contrary, on the basis of Rule 3 (b) they come under subheading 64.02 A: footwear with uppers of leather.

In conclusion I invite the Court to answer the questions put by the Bundesfinanzhof as follows:

1. Commission Regulation No 1074/80 of 29 April 1980 must be interpreted as not covering sports shoes with rubber outer soles, the upper of which consists entirely of textile fabric to which are stitched in the areas of the front part of the vamp, heel piece, eyelets and outside and inside lateral sections pieces of leather which constitute a larger part of the surface of the upper than the textile fabric and, on account of the protection, support and stabilization they provide, are of essential importance for the use of the product as a sports shoe.

2. On the basis of Rule 3 (b) for the Interpretation of the Nomenclature of the Common Customs Tariff, subheading 64.02 A must be interpreted as applying to sports shoes such as described in paragraph 1 above.

1 — Emphasis added.

2 — See in particular point 3 of his opinion in relation to Regulation No 2282/79.