OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 21 MARCH 1972[1]

Mr President,
Members of the Court,

The plaintiff in the main action, an undertaking established in Hamburg, imported a certain quantity of apricots in containers holding under 5 kg but over 4.5 kg, without spirit, from Spain into the Federal German Republic and on 21 July 1970 made an application for customs clearance for free circulation. In the clearance proceedings the competent customs authority carried out sample tests on the imported goods and found an average sugar content of 9.2% by weight. Consequently the customs authority put the goods under tariff heading 20.06 (Fruit otherwise prepared or preserved, whether or not containing added sugar or spirit) and sub-classified them under heading. 20.06 B II(a) 6(bb), that is to say, as apricots 'Containing added sugar, in immediate packings of a net capacity of 1 kg or less' and levied customs duty at the rate of 22.4%, in addition to the import turnover tax. This was done because Additional Note No 2 to Chapter 20 of the Common Customs Tariff provides: 'The products classified under heading 20.06 shall be considered as "containing added sugar" when the "sugar content" thereof exceeds by weight the percentages given hereunder, according to the kind of fruit concerned: pineapples and grapes, 13%, other fruits, including mixtures of fruit, 9%'.

The Interfood undertaking considers that this tariff classification is incorrect because the imported product contained only its own natural sugar as opposed to added sugar. In its view in such a case, even if the content in natural sugar exceeds 9%, classification under tariff heading 20.06 B II(c) 1(aa) must follow, that is to say, the relevant product must be considered as apricots 'Not containing added sugar, in immediate packings of a net capacity of 4.5 kg or more' and consequently duty should only be levied at the rate of 17%. Interfood lodged a claim on this ground for the partial return of the duty which it had paid. Nevertheless the application was dismissed by the Principal Customs Office on the basis of the second subparagraph of Article 2(3) of Regulation No 865/68 of the Council of 28 June 1968 (OJ L 153, p. 8, English Special Edition 1968 (I), p. 225) under which the added sugar content means the refractometer reading obtained, reduced by the figure appearing in column 2 of Annex I to the regulation (in the case of apricots, 9). The Principal Customs Office emphasized that this provision forms the basis for the aforementioned Additional Note No 2 to Chapter 20 of the Common Customs Tariff under which preserved apricots with a sugar content exceeding 9% by weight must be considered as 'fruit containing added sugar'. As a result of this the product in question must be treated as a product containing added sugar, on the basis of its sugar content even though no sugar has in fact been added.

Interfood has made an application against this decision to the Finanzgericht Hamburg. In essence it founds its application on the preliminary ruling delivered by the Court in Case 3/71 ([1971] ECR 577). In its view the decisive factor is that no sugar was added to the imported product; consequently it is also incorrect to classify it on the basis of the said Additional Note to tariff heading 20.06 B II(a) 6(bb). The Principal Customs Office, the defendant, opposes this view maintaining that the judgment in Case 3/71 is irrelevant because the present case does not relate to liability to the duty but to the tariff classification of a product. In addition it must be noted that in the said judgment the Court regarded the additional note as having legal effect within the sphere of customs law.

The question as it appears to the Finanzgericht is whether the Additional Note to Chapter 20 of the Common Customs Tariff

1 — Translated from the German.

contains a legal definition which cannot be challenged or whether it should only be accorded the status of an explanation or whether it is to be considered merely as a rebuttable presumption. Considering that the problem must be settled in accordance with Community law, the Finanzgericht by a decision of 15 October 1971 stayed the proceedings and referred the following questions for a preliminary ruling:

'*Question I*

Must subheading 20.06 B II(a) 6(bb) of the Common Customs Tariff read together with Additional Note No 2 to Chapter 20 be interpreted to mean that, when fruit (other than pineapples and grapes) referred to under heading 20.06 of the tariff has a sugar content which, determined in accordance with Additional Note No 1 to Chapter 20, exceeds 9% by weight but is less than 13%, it is liable to customs duties at the high rate prescribed for fruit containing added sugar (regardless of whether sugar has been added), despite the fact that fruit prepared without added sugar in packings of a net capacity of 4.5 kg or more is specifically referred to under subheading 20.06 B II(c) of the Common Customs Tariff which fixes the rate of duty for apricots at 17%?

Question II

If the answer to Question I is in the negative, is it necessary having regard to the wording of subheading 20.06 B II(c) of the Common Customs Tariff to interpret Additional Note No 2 to Chapter 20 to mean that (in accordance with the ruling of the Court of Justice regarding the levy fixed by Regulation (EEC) No 865/68) although the customs duties may only be levied at the high rate on products processed by an actual addition of sugar, the fact remains that if the sugar content of fruit coming under subheadings 20.06 B II(a) 6(bb) and 26.06 B II(c) 1(aa) of the Common Customs Tariff exceeds 9% by weight the burden of proving the natural sugar content is borne by the importer?'

We will now consider what answers are appropriate, the views of the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities having been given in writing and orally.

1. As we have heard it is first of all important to know whether tariff heading 20.06 B II(a) 6(bb) read together with Additional Note No 2 to Chapter 20 of the Common Customs Tariff must be interpreted as covering apricots with a sugar content exceeding 9% and less than 13% regardless of whether sugar was added. The question to be clarified is thus whether the additional note comprises a fiction, a legal definition, an irrebuttable presumption (as the Commission and the Federal Government both maintain) or whether, as the plaintiff thinks, it merely has the status of an explanation to facilitate tariff classification and does not exclude contrary evidence to show that no sugar has been added.

In order to answer this question it must be assumed that the additional note and the relevant tariff heading are to be considered as *an entity*. This may be asserted because it is evident that the additional note merely constitutes a definition valid for all the products to which it relates and is intended to simplify the presentation of the customs tariff. This does not provide any comment at all on the legal nature or legal content of the question put. The problem must be solved by other considerations.

In turning to these I must admit from the outset that the arguments set out by the Commission and the Federal Republic have made a considerable impression on me. Both of these parties to the proceedings made their deductions primarily on the basis of the acknowledged fact that, in order to cover all goods, customs law has to make generalizations and that such generalizations constitute an essential element in the development of the law in this field. On this ground and also because the interests of foreign trade frequently require specific criteria, customs law to a large extent operates in a sphere where words are not used in their ordinary sense. The Federal Government quotes as an example of this the distinction between

crude and refined animal oils in Chapter 15 which does not accord with scientific views. At page 11 of its observations the Commission has cited a series of similar examples (such as the definition of 'calves' in the Additional Note to Chapter 1 or 'ivory' in the additional notes to Chapter 5 of the Common Customs Tariff).

What these parties to the proceedings have brought out seems to me important, namely, that not only the customs legislation of the Member States but also the Common Customs Tariff contain frequently recurring fictions but appear to be devoid of rebuttable presumptions. This is frequently indicated by wording such as: the product 'shall be classified as' (ist zu tarifieren als), these products 'are covered by tariff heading X' (gehören zur Tarifstelle X), or again the recourse had to the word 'mean' (gelten). In particular this last-mentioned word occurs in 50 places in the notes to the Brussels Nomenclature and in 30 places in the additional notes inserted in the Customs Tariff by EEC regulations. It may be taken from this that the word is in fact to be understood as intending an obligatory tariff classification since it is frequently employed as an equivalent for other expressions, such as 'do not cover', 'cover only' or 'also constitute'. Accordingly expressions of this nature appear to have been frequently understood as constituting fictions both by the Customs Co-operation Council of Brussels and in the established practice of the Member States. In view of this it must indeed seem astonishing to consider similar expressions in the relevant Additional Note to Chapter 20 of the Common Customs Tariff as mere explanations, as equivalent to interpretative provisions and to regard them solely as rebuttable presumptions.

In any event support for this view is not to be found, as the plaintiff seeks to find it, in reliance on the fact that the Treaty makes provision for the objectives of Articles 39 and 110 to be taken into account. Arguments of this nature are much too vague to permit definite conclusions to be drawn in matters of customs tariff law in which, as both the Federal Government and the Commission emphasize, the legislature in principle enjoys wide freedom. Likewise there is simply no force in the plaintiff's reference to the principles of constitutional law regarding the admissibility of fictions as such and establishing limits to be observed in this respect in accordance with the principle of employing appropriate means to achieve the end in view. In particular it cannot be conceded that such principles are also valid in the sphere of customs law with its peculiar administrative and commercial problems and that they are moreover common to all Member States in this sphere.

On the other hand at least two and indeed possibly three serious arguments may be advanced in support of the view of the Commission and of the Federal Republic that the Additional Note to Chapter 20 contains an irrebuttable presumption.

The first important factor here is the negotiations in the Dillon Round, within the framework of GATT, which in 1962 resulted in an agreement on customs concessions and the consolidation of reduced customs rates. These negotiations were conducted on the basis of the Common Customs Tariff, in the version of the Decision of the Council of 13 February 1960, that is to say of a text Chapter 20 of which already contained additional notes whose content corresponds to that in force today. In this connexion it is important that with regard to tariff heading 20.06 the members of the Community who were parties to the agreement, clearly and directly accepted the percentages for the sugar content suggested by the Community and thus accepted fixed rates regarding the natural sugar content. Indeed had they not intended that these rates should be absolute the Community States would certainly not have omitted a clear reference to this effect, as the Commission convincingly emphasizes. An even more significant point is that the parties to the Treaty furthermore accepted a reservation in favour of the Community whereby with regard to certain headings the Community is entitled to levy an additional charge over and above the consolidated rates when specific sugar contents are exceeded. Even at this point it was thus not certain whether *added* sugar was meant. If this

were disregarded by an interpretation of the Common Customs Tariff through a literal construction of the word 'addition' this would in fact amount to saying that the Community had *independently* made further concessions. There is however no support whatsoever for a view of this nature.

A second but less important argument arises from the origins of the Common Customs Tariff. In this respect the Commission considers that it is in a position to show evidence of a decisive influence coming from the French customs tariff of 1957. In this tariff, so far as it is relevant now, a distinction was drawn between preserved fruit 'sans sucre ni sirop' (without sugar or syrup), and preserved fruit 'dans un liquide sucré' (in a sugar solution), which was liable to a higher rate of customs duty. With this must be read Note V to Chapter 20 containing a specific limit for the sugar content and the statement 'sans qu'il y ait lieu de *rechercher l'origine* du sucre' (no investigation into the source of the sugar being necessary). From the documents produced it must be assumed that the Common Customs Tariff was drawn up accordingly and in particular that the figures relating to the natural sugar content, established carefully by experts, were to be understood in absolute terms. Nevertheless when reference is made in the Common Customs Tariff to *added* sugar this probably follows the example of tariff heading 20.06 of the Brussels Nomenclature (where reference is made to fruit with or without added sugar) and furthermore because it might appear paradoxical to talk of 'fruit without sugar' as does the French tariff.

The third argument which can be put forward in favour of the view of the Commission and of the Federal Government is certainly weightier and probably the most telling. This is in essence that if the Additional Note to Chapter 20 of the Common Customs Tariff merely contains a rebuttable presumption against which evidence is admissible that sugar has not been added to a product numerous and serious problems must in practice follow. In this connexion the following must be stated: according to what we have heard in the proceedings it certainly appears possible through chemical analysis to produce evidence of added sugar in cases where it has been added to fruit which in its natural state has no sugar or only small quantities or contains additives (such as, for example, glucose syrup). It must however be borne in mind that such additions seldom occur and are clearly of no practical importance. On the contrary the ordinary sugar which is usually added (sucrose which is a combination of dextrose and fructose) cannot be found by the chemical analysis of preserved fruit. According to the expert opinions which have been produced the sugar decomposes, partly through heating during the preserving process and through the effects of the fruit acid mixing with the natural fruit sugar, so that it is no longer possible to distinguish it in the varying proportions of fruit sugar present. Thus the only form of proof which could be adduced here regarding the addition of sugar would be that the total sugar content of a preserved fruit should be compared to the sugar content normally encountered in the relevant fruit. This would however necessarily entail difficult investigations regarding the natural sugar content which appears to vary considerably according to the type of fruit, the year of harvesting, the region of cultivation, the time of harvesting and the type of preparation (preservation by adding water or by dehydration). Furthermore only sugar above an *upper* limit, fixed empirically, could be considered as added sugar. This would thus pave the way for manipulation and in many cases the added sugar could not be determined. If in the view of these problems it were desired to change to other methods of proof, the so-called administrative proof, the difficulties would generally be even greater. In this connexion the plaintiff points to the fact that in this case the imported product came from Spain and that the imported apricot pulp was packed in containers holding more than 4.5 kg. From this it may be ascertained with certainty that it was a typical semi-finished product without added sugar. It is not for the Court to make decisions of this nature within the framework of a preliminary question (when they are

relevant such questions must be dealt with in the main action). However it must be noted that there scarcely appears sufficient proof for the plaintiff's assertion that this is a typical semi-finished product to which it would be uneconomic to add sugar. The position could be different where the plaintiff's reference to a relevant export regulation from the Spanish Ministry of Commerce is concerned; this apparently prescribes certain minimal requirements to be observed regarding the natural sugar content of apricot pulp and of preserved fruit and makes provision for checking on exportation. Nevertheless it would certainly be wrong to seek the solution to the problem of principle which has arisen by having regard only to the peculiarities of the case at issue in the main action. The additional notes now under consideration apply not merely to the goods imported by the plaintiff and to the exporting country in this particular case. If, as appears necessary, the scope of the consideration is broadened, the problem of the admissibility of the administrative proof is thrown into relief (quite apart from the fact that this represents an alien element in customs proceedings, which require quick settlement). In principle the choice is between a strict or liberal assessment of the evidence in the proceedings. If the strict interpretation is preferred, as the term 'proof' suggests, this would in many cases undoubtedly result in considerable impairment of trade. On the other hand if a liberal attitude were adopted to the interpretation of the evidence this would involve a risk of failing to implement the intention of the legislature, namely that fruit containing added sugar should always be subject to a higher customs duty. This would especially be so if, as the plaintiff advocates and as is prescribed in an order of the Federal Ministry of Finance of 8 July 1971, account were taken solely of the declarations of importers or of the export certificates from the exporting country. It is plain that extensive opportunities for abuse would be afforded through the multiplicity of countries involved, with their diverse administrative structures and unevenly developed means of control as well as the large number of firms in the trade. Finally it should not be forgotten that a procedure of this nature with regard to evidence could lead to considerable differences in its evaluation from country to country, a situation which would undoubtedly be at odds with the principle of the unity of the Common Market.

Viewed in this light it is indeed impossible to dismiss out of hand the conclusion that the legislature could scarcely have intended to confer on the words 'shall be considered as' contained in Additional Note No 2 to Chapter 20 of the Common Customs Tariff a meaning other than that which they bear in other sections of the customs tariff and to read into them a mere rebuttable presumption.

Before this can be accepted as a definite fact one of the arguments to the contrary put forward by the plaintiff indeed remains to be considered, one which it regards as by no means the least important. This relates to Regulation No 865/68 of the Council under which a levy is to be made on processed products containing added sugar and to the findings made in this respect in the judgment in Case 3/71. As the Court is aware it was stated in this judgment that Article 2 of Regulation No 865, which corresponds to the Additional Note to Chapter 20 of the Common Customs Tariff, only contains a rebuttable presumption; it therefore allows the importer to adduce evidence that sugar has not been added to the imported product. The applicant considers that if this is correct there can be no other logical interpretation of the Additional Note to Chapter 20.

In this connexion it must admittedly only be regarded as unfortunate and a disservice to legal certainty if essentially similar provisions of Community law receive different interpretations. Accordingly, the Commission too considers that as a matter of principle the Court should reconsider the said decision.

Nevertheless this solution which in itself appears the neatest, even if the foregoing is regarded as well founded, is not inevitable. Indeed the view may be maintained that the problems in the present

case (tariff classification) can be logically distinguished from those in Case 3/71 (imposing a charge), that the judgment in Case 3/71 does not necessarily constitute *res judicata* with regard to the present case and consequently a judgment at variance with it would by no means constitute an insupportable contradiction. In this connexion it must first of all be borne in mind that the said additional note was not inserted in the customs tariff by Regulation No 865; rather was it already contained in the customs tariff. It must further be clearly established that the judgment in Case 3/71 was delivered on the *wording* of Article 2 of Regulation No 865, the *express recitals* in its preamble and the *unequivocal objective* of the trading system that only added sugar and not natural sugar contained in the fruit should be subject to a levy. On the other hand the same definitiveness clearly does not prevail in customs law; in this sphere the legislature enjoys significantly greater freedom, as I have already said. Thus there is in fact no obstacle to the view, put forward by the Commission as an alternative, that the provisions on the organization of the market are independent of tariff legislation and of the problems of tariff classification. This can indeed be supported by reference to the findings of the judgment in Case 3/71 which mention that 'this provision [additional Note No 2 to Chapter 20 of the Common Customs Tariff], incorporated in a regulation concerning customs duties, cannot alter the basis of charge of an agricultural levy especially since it is referred to by Article 9(2) of Regulation No 865/68 only for the purposes of "tariff classification" of the products to which the regulation relates'.

The particular significance of this is that in the matter of tariff classification the appearance of the letter L (= levy) opposite a heading or subheading does not necessarily mean that the levy must be imposed. Properly understood the letter L is merely in the nature of a reference to B.5 of the General Rules on the Common Customs Tariff. Finally it must be deduced from the relevant provisions on the organization of the market whether the conditions for imposing a levy (which is of course dependent on the price situation) are present.

When the problems related to the judgment in Case 3/71 have been thus overcome there is in fact no obstacle to the view that Additional Note No 2 to Chapter 20 of the Common Custom Tariff contains a legal definition or a fiction against which contrary evidence may not be brought. Consequently this should be the reply to the first question of the Finanzgericht Hamburg.

2. Since the second question was only put in case the first question should be answered in the negative it does not require to be considered, in view of what I have already said. Nevertheless, in case the Court does not share the opinion which I have expressed on the first question, I should like to set out a few alternative remarks on the second question. As the Court is aware, the Finanzgericht asks in the second question whether the much discussed additional note must be taken to mean as regards tariff heading 20.06 B II(c) that the higher duty is payable only when sugar has actually been added but that as regards fruit coming under tariff headings 20.06 B II(a) 6(bb) and 20.06 B II(c) 1(aa) of the Common Customs Tariff having a sugar content exceeding 9% by weight the importer must prove the content in natural sugar. My observations on this are as follows:

First the fundamental point is the proof that the product in question contains *only natural sugar*. In this connexion I can refer to what was stated in the judgment in Case 3/71. Thus in my opinion there can be no doubt that if it is supposed that the additional note merely contains a presumption as to tariff classification, it is for the importer to adduce the necessary *proof to the contrary*. Here I cannot agree with the plaintiff's assertion that, because the burden of proof for a tariff classification which has been applied falls in principle on the customs administration, recourse to the presumption is only to be had under specific conditions and in exceptional circumstances but not when there is an absence of real doubt as to the natural sugar content (as in the case of the

importation of apricot pulp from Spain). The additional note must rather be understood, at least with regard to the customs administration, as signifying that it is sufficient to establish the sugar content and that as soon as the levels mentioned in the additional note are exceeded evidence to the contrary is required. It is not possible to set out in detail what evidence is relevant if this interpretation of the additional note is adopted. Basically I can only agree with the Commission that such evidence must constitute *genuine* proof of such a nature as to exclude reasonable doubt, that is to say, concrete evidence is required and not a mere probability. It appears that this is the only means of ensuring that the Community provisions are correctly applied and that essential interests, including the interests of the organization of the market, are not jeopardized.

This, then, is how the second question put should be settled if consideration of it should be found necessary after examination of the first question.

3. Finally I should like to summarize my opinion as follows:

(a) Tariff heading 20.06 B II(a) 6(bb) of the Common Customs Tariff read together with Additional Note No 2 to Chapter 20 must be interpreted to mean that, when fruit other than pineapples and grapes referred to under tariff heading 20.06 has a sugar content, ascertained in accordance with Additional Note No 1 to Chapter 20, exceeding 9% by weight but less than 13% it is liable to customs duty at the higher rate applied to fruit with added sugar, regardless of whether sugar has in fact been added to it.

(b) If the said additional note is merely considered as a rebuttable presumption it follows that, where the percentage stated in the note has been exceeded, the importer must adduce clear evidence to show that the imported product contains only natural sugar.