OPINION OF ADVOCATE GENERAL COSMAS

delivered on 23 March 1995 *

I — The main proceedings — The questions referred for a preliminary ruling

1. In March 1987 Thyssen Haniel Logistic GmbH (hereinafter 'Thyssen') made a declaration in connection with the importation of certain goods from its bonded warehouse described as 'Amino Acid AA Mixture Peco' (powdered sterile mixture of various amino acids in measured doses for the manufacture of infusion solutions). The goods were declared by Thyssen as 'medicaments not put up in forms or in packings of a kind sold by retail' falling under Code No 3003 290 90 of the German Customs Tariff (subheading 30.03 A II (b) of the Common Customs Tariff). [1] The Hauptzollamt (Principal Customs Office) Hamburg-St Annen, however, classified the goods as 'other food preparations' under heading 21.07 of the Common Customs Tariff and fixed the duty payable on the basis of that classification. The Finanzgericht Hamburg upheld Thyssen's appeal, finding that the goods in question did fall under subheading 30.03 A II (b) of the Common Customs Tariff. Following the Hauptzollamt's appeal in cassation, the case was examined by the Bundesfinanzhof which, having doubts as to the interpretation of the relevant headings of the customs tariff, suspended its decision on the appeal and by order of 19 October 1993 referred the following questions to the Court for a preliminary ruling:

'1. Is the Common Customs Tariff (1987) to be interpreted to the effect that products such as powdered sterile mixtures of various amino acids in measured doses for the manufacture of infusion solutions fall as "medicaments" under tariff heading 30.03 (in this case tariff heading 30.03 A II (b))?

2. If not: Is the Common Customs Tariff (1987) to be interpreted to the effect that goods such as those described in question 1 fall as "other food preparations" under tariff heading 21.07?'

* Original language: Greek.

1 — The heading numbers refer to the version of the Common Customs Tariff in force at the time of the declaration. See the Annex to Council Regulation (EEC) No 3618/86 of 24 November 1986 amending Regulation (EEC) No 3331/85 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1986 L 345, p. 1).

II — The relevant headings of the Common Customs Tariff — Issues raised

2. Chapter 21 of the Common Customs Tariff is entitled 'Miscellaneous edible preparations' and includes headings 21.02 ('Extracts, essences or concentrates, of coffee, tea or maté and preparations with a basis of those extracts, essences or concentrates; roasted chicory and other roasted coffee substitutes and extracts, essences and concentrates thereof'), 21.03 ('Mustard flour and prepared mustard'), 21.04 ('Sauces; mixed condiments and mixed seasonings'), 21.05 ('Soups and broths, in liquid, solid or powder form; homogenised composite food preparations'), 21.06 ('Natural yeasts (active or inactive); prepared baking powders') and, lastly, heading 21.07 ('Food preparations not elsewhere specified or included'). According to the Notes to Chapter 21, the chapter does not cover *inter alia* 'yeast put up as a medicament and other products of heading No 30.03' (Note 1(d)).

3. Chapter 30 of the Common Customs Tariff is entitled 'Pharmaceutical products' and contains *inter alia* heading 30.03 which concerns, according to its wording, 'Medicaments (including veterinary medicaments)'. Subheading 30.03 A covers in particular medicaments 'Not put up in forms or in packings of a kind sold by retail: I. Containing iodine or iodine compounds, II. Other: (a) Containing penicillin, streptomycin or their derivatives, 1. Containing penicillin or its derivatives, 2. Other, (b) Other'. In accordance with the Notes to Chapter 30 (point 1), for the purposes of heading 30.03, 'medicaments' applies to goods which are either '(a) products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; or (b) unmixed products suitable for such uses put up in measured doses or in forms or in packings of a kind sold by retail for therapeutic or prophylactic purposes'. In the same Notes it is expressly stated that heading 30.03 does not cover 'foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages, spa water'.

4. As already stated, Thyssen described the goods in the customs declaration as a 'powdered sterile mixture of various amino acids in measured doses for the manufacture of infusion solutions'. It can be concluded from the terms of the order for reference and the written observations submitted by the parties in the course of these proceedings that the question which has arisen as regards the tariff classification of the above product turns on the point that while Thyssen considers the decisive criterion for that classification to be the fact that the mixture in question is intended to be used in the manufacture of infusion solutions used for artificial parenteral nutrition, the customs

authorities consider that since, at the time when the declaration was made, the mixture did not yet constitute a finished product used for artificial nutrition and could not be regarded as an unfinished product for that purpose (since it was possible, at least according to the customs authorities, that another type of processing could produce another product), in view of its composition the mixture should be regarded as a 'food preparation'. Thus emerged the central questions of the case before the Court: (1) for classification for customs purposes of the product in question should account be taken solely of its composition or also of the use for which it is intended? (2) if the intended use of the product constitutes a decisive criterion for its tariff classification, how cogent is the Hauptzollamt's argument that at the time of its classification more than one use was possible?

III — Reply to the questions referred for a preliminary ruling

5. According to the settled case-law of the Court, [2] in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is, in general, to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters. As is made clear from an examination of the case-law just cited, 'objective characteristics and properties' means first and foremost the characteristics and properties which go to make up the product, [3] to the element in other words which is especially the subject of inspection (or verification) during the customs clearance procedure. The Court's case-law recognizes, however, that when a certain heading of the Common Customs Tariff or the relevant Notes refer expressly to criteria other than those just mentioned they affect the classification for customs purposes of the product. Such criteria might be the method of manufacture [4] but also its intended use, [5] which in that case becomes an objective criterion for classification for customs purposes; [6] it suffices, as has been indirectly

2 — See, amongst many others, the judgments in Case C-395/93 *Neckermann Versand* [1994] ECR I-4027, at paragraph 5, Case C-338/90 *Hamlin Electronics* [1992] ECR I-2333, at paragraph 8, Case C-120/90 *Post* [1991] ECR I-2391, at paragraph 11, Case 40/88 *Weber* [1989] ECR 1395, at paragraph 13, and Case 175/82 *Dinter* [1983] ECR 969, at paragraph 10.

3 — See, for instance Case 40/88 *Weber* cited above, at paragraphs 19 and 20.

4 — See, for instance, the judgments in Case C-35/93 *Develop Dr Eisbein* [1994] ECR I-2655, at paragraph 18, and Case C-248/92 *Jepsen Stahl* [1993] ECR I-4721, at paragraphs 9 and 10.

5 — See the judgments in Case C-246/90 *Parma* [1992] ECR I-3467, at paragraph 20, Case C-219/89 *WeserGold* [1991] ECR I-1895, at paragraph 9, Case 38/76 *Industriemetall Luma* [1976] ECR 2027, at paragraph 7, and Case 38/72 *Van de Poll* [1972] ECR 1329, at paragraphs 4 and 5. See also the judgment cited above, Case C-395/93 *Neckermann Versand*, at paragraphs 7 to 9, and the judgments in Case C-108/92 *Astro-Med* [1993] ECR I-3797, at paragraph 8, Case C-218/89 *Shimadzu Europa* [1990] ECR I-4391, at paragraph 10 et seq. and Case 114/80 *Ritter* [1981] ECR 895, at paragraphs 7 to 9.

6 — See the judgments in Case C-256/93 *Emsland-Stärke* [1993] ECR I-1857, at paragraph 16, and Case 36/71 *Henck* [1972] ECR 187, at paragraph 4. See also the judgment in Case 183/73 *Osram* [1974] ECR 265, at paragraph 5.

held, [7] that it constitutes an inherent property of the goods.

6. Heading 21.07 of the Common Customs Tariff ('Food preparations not elsewhere specified or included') does not give a definition of 'food preparations'. Nor is any definition given in the Notes which head Chapter 21, [8] but at all events they rule out from the scope of application of Chapter 21 yeast put up as a medicament and other products of heading 30.03 (see Note 1(d) of the said Notes). However, according to the Explanatory Notes on the Nomenclature of the Customs Cooperation Council ('CCC') relating to heading 21.07, [9] provided that they are not covered by any other heading, the heading 'food preparations' covers on the one hand (paragraph A) preparations for use, either directly or after processing, for human consumption, and on the other hand (paragraph B) preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. As an example of the second category of preparations the Explanatory Notes refer to mixtures of chemicals (for example organic acids) with foodstuffs (for example, flour or sugar), for incorporation in food preparations either as ingredients or to improve some of their characteristics. Hence, according to the heading 21.07 of the Common Customs Tariff, interpreted in the light of the above Explanatory Notes, in order for a certain preparation to fall under the heading in question, it has at all events to consist wholly or partly of foodstuffs, but also to be intended for use in human nutrition either directly or after processing or, lastly, after its incorporation in another food preparation, as an ingredient of the latter or to improve some of its characteristics.

7. Heading 30.03 of the Common Customs Tariff does not include a definition of the term 'medicaments'. The use, however, of the preposition 'for' (in the Greek version) makes obvious, I consider, the fact that the composition of the product is not adopted as the primary criterion for classification under that heading in principle (but does regain,

7 — See the judgments in Case 222/85 *Kleiderwerke Hela Lampe* [1986] ECR 2449, at paragraph 15, and Case 90/85 *Mikx* [1986] ECR 1695, at paragraph 15. See also the judgment in Case C-228/89 *Farfalla Flemming* [1990] ECR I-3387, at paragraphs 20 and 22.

8 — On the significance of the notes which head the chapters of the Common Customs Tariff for the interpretation of the chapter headings see, amongst many others, the judgment in Case C-356/93 *Techmeda* [1994] ECR 2371, at paragraph 28, and Case C-11/93 *Siemens Nixdorf* [1994] ECR I-1945, at paragraph 12.

9 — According to settled case-law (see, for example the judgment already cited in Case C-11/93 *Siemens Nixdorf*, at paragraph 12, and the judgments in Case C-14/91 *SuCrest* [1992] ECR I-441, at paragraph 10, Case C-265/89, *Vismans Nederland* [1990] ECR I-3411, at paragraph 18, Case 167/84 *Drünert* [1985] ECR 2235, at paragraph 14, and Case 278/80 *Chem-Tec* [1982] ECR 439, at paragraph 14), the Explanatory Notes of the Customs Cooperation Council are an important means for ensuring the uniform application of the Common Customs Tariff. The Court states in clarification, however, that since those notes do not have legally binding force, where appropriate, it is necessary to consider whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions (see, in particular, the judgment in Case C-35/93 *Develop Dr Eisbein*, cited above, at paragraph 21, and the references given therein).

however, its significance for the purposes of classification under the subheadings) but rather its intended use. That is also confirmed in the Notes referred to above (see point 3) which head Chapter 30 of the Common Customs Tariff, according to which (see Note 1(a) and (b)) the term 'medicaments' in heading 30.03 is to be understood as referring to products which have been mixed or compounded *for* therapeutic or prophylactic uses (in the French version '*en vue* d'usages therapeutiques or prophylactiques') together with unmixed products suitable for such uses put up in measured doses or in forms or in packings of a kind sold by retail *for* therapeutic or prophylactic purposes. Lastly the CCC Explanatory Notes to heading 30.03, according to which 'medicaments' covers medicinal preparations *for use* in the internal or external treatment or prevention of human or animal ailments, are completely consistent with the wording of the heading in question of the Common Customs Tariff. [10]

8. In view of the foregoing, it is not possible to doubt that at all events preparations which are used for curing or preventing certain ailments should be regarded as 'medicaments' within the meaning of heading 30.03 of the Common Customs Tariff. It has, moreover, been held [11] that heading 30.04 of the Common Customs Tariff (in the version in force in 1990 which refers to 'medicaments (...) consisting of mixed or unmixed products prepared for therapeutic or prophylactic uses (...)') covers a preparation which has clearly defined and above all prophylactic therapeutic characteristics, the effect of which is concentrated on *precise functions* of the human organism. I consider, however, that preparations which, without having a therapeutic or prophylactic effect as such on a certain ailment, are used in medical science to treat a specific disturbance of the functioning of the organism which constitutes either one of the symptoms of a certain ailment, or arises as a result of the treatment followed to cure an ailment, should also be regarded as 'medicaments' falling under heading 30.03. That line of reasoning leads naturally to the conclusion that a preparation used for infusions as a means of artificial parenteral nutrition to treat the state produced when the functions of the organism have been disturbed in such a way that it is impossible to feed the patient by the normal route (i. e. by mouth), should be regarded as

10 — The term 'medicaments' within the meaning of heading 30.03 of the Common Customs Tariff is not completely consistent with the term 'medicinal product' (translator's note: in Greek and other languages the same word is used) as found in Council Directive (EEC) No 65/65 of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965, p. 20). The divergence can be explained by the special purposes of the latter text. It has in fact been held (see *inter alia* the judgments in Case 227/82 *Van Bennekom* [1983] ECR 3883, at paragraphs 14 and 17, Case C-112/89 *Upjohn* [1991] ECR I-1703, at paragraph 16, and Case C-219/91 *Ter Voort* [1992] ECR I-5485, at paragraph 16) that Directive 65/65, with a view not only to the abolition of hindrances to trade in proprietary medicinal products but also to serving the fundamental purpose of protecting public health, gives (in Article 1(2) first and second subparagraphs) a definition of 'medicinal product' that covers not only products having a genuine therapeutic or prophylactic effect but also those which are not sufficiently effective or which do not have the effect which their presentation might lead consumers to expect. The directive thus seeks to preserve consumers not only from harmful or toxic medicinal products as such but also from a variety of products used instead of the proper remedies. Conversely, heading 30.03 of the Common Customs Tariff should be regarded as covering only products *actually intended* for therapeutic or prophylactic use (see, on this point, point 7 of Advocate General Gulmann's Opinion in Case C-177/91 *Bioforce* [1993] ECR I-45).

11 — See the judgment in Case C-177/91 *Bioforce* [1993] ECR I-45, in particular at paragraphs 10 and 12. See also points 4 and 5 of the Opinion of Advocate General Gulmann in that case.

a 'medicament' falling under heading 30.03 of the Common Customs Tariff even though that preparation, considered from the point of view of its composition alone, is made up exclusively of food substances. That conclusion is wholly consistent with both the CCC Explanatory Notes to heading 30.03, which on the one hand state that the heading does not apply to 'food preparations containing only nutritious substances', and on the other hand state (Note A(4)) that 'nutritional preparations for ingestion other than by mouth' are included. [12]

9. The conclusion from the foregoing as to the scope of application of the customs tariff heading in question may be summarized as follows: a preparation consisting wholly or partly of nutritious substances: (1) falls under heading 21.07 of the Common Customs Tariff provided it cannot fall under another heading in the Chapter and is intended to be used for human nutrition, either directly, or after processing or, lastly, incorporated in another food preparation; (2) falls under heading 30.03 if it is intended for use in infusions, as a means of artificial parenteral nutrition for treating certain disfunctions of the organism which prevent nutrition by the normal route.

10. The above conclusion does not suffice to answer the questions of the Bundesfinanzhof. In fact the declaration made by Thyssen did not, it will be recalled, relate to preparations used directly for infusion solutions for artificial nutrition but to a powdered sterile mixture of various amino acids in measured doses *for the manufacture* of infusion solutions. At the time when the customs declaration was made, the product in question could, according to the Hauptzollamt's assertions before the Bundesfinanzhof, have undergone further processing aimed at producing another product. How does that factor affect the classification for customs purposes of the product?

11. The Common Customs Tariff classifies amino acids in principle as 'Organic chemical products' under Chapter 29 (subheading 29.23 D). However, it can be indirectly concluded from the order for reference that the amino acids making up the mixture imported by Thyssen are substances with a nutritive

12 — In the light of that Explanatory Note it is in any case precluded that preparations used for artificial nutrition of the organism should fall under heading 30.05 ('Other pharmaceutical goods') of the Common Customs Tariff. Moreover, according to the notes which head Chapter 30, heading 30.05 is to be taken to apply and to apply *only* to products listed in Note 3 (a) to (g) and according to the CCC Explanatory Notes to heading No 30.05 that list is strictly exhaustive.

value. [13] [14] That view is also supported by the Commission in its written observations to the Court (see p. 10 of the French translation), in which it points out, *inter alia*, that (1) according to the information given in the order for reference amino acids constitute the basic ingredient of the protein mixture and (2) according to the CCC Explanatory Notes to heading 30.03 proteins are among the major nutritional substances in food. In that light if the intended use of that mixture, inherent to its particular characteristics, was for normal human nutrition, directly or following certain processing, or for incorporation in another food preparation, it should, in accordance with the foregoing, be regarded as falling under heading 21.07 of the Common Customs Tariff [15], the mere possibility of other uses of the product being irrelevant. In that case, the further classification of the mixture under one of the subheadings of heading 21.07 should take place on the basis of the criteria used in the above subheadings and the specific facts in point, which it is of course for the national court to ascertain.

12. Neither the Hauptzollamt, however, in its observations to the Court, nor the documents in the case, indicate that the mixture imported by Thyssen is intended in fact to be used directly or following processing in normal human nutrition or that it is intended

13 — In the judgment referred to above in Case C-14/91 *SuCrest* [1992] ECR I-441, at paragraph 10, it was held (in interpreting, it is true, headings of the Combined Nomenclature which was introduced from 1 January 1988 by Council Regulation (EEC) No 2658/87 of 23 July 1987 (OJ 1987 L 256, p. 1)) that the expression 'substances with nutritive value' could apply to chemicals. I would point out that in the Explanatory Notes of the Customs Cooperation Council to Chapter 38 ('Miscellaneous chemical products') of the Harmonized Commodity Description and Coding System (which formed the basis for the combined nomenclature introduced on 1 January 1988) it is explicitly stated that the expression 'foodstuffs or other substances with nutritive value' also includes 'essential amino acids'. Moreover, the Bundesfinanzhof appears, in the penultimate paragraph of the order for reference, to refer to those Explanatory Notes (see also Commission Regulation (EEC) No 2061/89 of 7 July 1989 concerning the classification of certain goods in the combined nomenclature (OJ 1989 L 196, p. 5), the annex to which treats various preparations in the form of tablets, including *inter alia* amino acids, for countering deficiency from food lacking in proteins as food supplements and consequently classifies them in the corresponding positions of the Combined Nomenclature).

14 — The Hauptzollamt states in its observations to the Court that, in describing the mixture in question, the Bundesfinanzhof uses the term 'doses' ('powdered sterile mixture of various amino acids in measured doses') which appertains solely and exclusively to medicaments, thus anticipating the reply to the questions which it referred for a preliminary ruling. That submission by the Hauptzollamt is unfounded. It should first of all be pointed out that, according to the Notes which head Chapter 30 of the Common Customs Tariff (see Note 1 (a) and (b)), the question whether a certain product is presented in a the form of doses (that is, according to CCC Explanatory Note B (a), put up in measured doses ready for taking as single doses) only affects classification under heading 30.03 if the products are *unmixed*, whereas the product in question is a mixture of amino acids, that is, a product which, within the meaning of the above Notes, is 'mixed or compounded'. Note 1(A)(2) which heads Chapter 30, according to which all goods *inter alia* falling under Chapter 29 (under which in principle amino acids also fall) are to be treated as 'unmixed products', can be regarded only as referring to the pure products mentioned in Chapter 29 taken separately and to the products treated as such, in accordance with the definitions in the Notes heading that Chapter, and not to *mixtures* of those products (see Note 1 to Chapter 29 and the heading 'General' in the CCC Note). Moreover, quite independently of the above, from the order for reference taken as a whole, I consider that in using the term 'doses' the Bundesfinanzhof does not mean that the mixture to be classified is presented in measured doses in the quantities in which they are subsequently to be used in the manufacture of infusion solutions, but simply that the amino acids which make up the mixture appear in certain specific proportions (see the Commission's comments on this point at p. 14 of the French translation of its observations).

15 — See also the CCC Explanatory Notes to heading 21.07 (Note B (10)), according to which 'protein hydrolysates consisting mainly of a mixture of *amino-acids* and sodium chloride, used in food preparations (e. g. for flavouring)' are included in the heading.

for incorporation in a food preparation. [16] On the contrary, according to the order for reference, '[t] he composition of the products is such that they are more likely to be used exclusively for medical purposes'. That statement in the order for reference is consistent with the report dated 22 March 1991 by the Institut Fresenius — Chemische und biologische Laboratorien GmbH, upon which Thyssen relies in its observations to the Court, explaining that it was also relied upon in the procedure before the national courts. According to that report, to which the Commission also refers, the use in human nutrition of a mixture of amino acids with characteristics such as those of the mixture at issue is, although possible in principle, nevertheless 'extremely unlikely', from an economic point of view, given that 'the high level of microbiological and chemical purity of the mixture which is obtained at a high financial price and the fact that it is pyrogen-free precludes its use in that area'.

13. That last fact is, in my opinion, of great significance in the resolution of the questions referred by the Bundesfinanzhof, for if: (1) the use in normal human nutrition of a mixture with characteristics such as those of the mixture in question amounts merely to a theoretical possibility and (2) the mixture in question is used in the manufacture of infusion solutions for artificial parenteral nutrition (a fact which no one appears to have disputed) it only remains to answer the question whether those two factors, taken together, can constitute a criterion for classification of the above mixture under heading 30.03 which, as already stated, must be regarded as covering preparations used for artificial nutrition of the organism.

14. I propose that that question should be answered in the affirmative. I recalled at an earlier point in this Opinion (see point 5 above), that the case-law of the Court indicates indirectly that the intended use of goods may constitute an objective criterion for their classification for customs purposes where it constitutes an inherent property of those goods. As the abovementioned report by the Institut Fresenius explains, in practice, the use in normal human nutrition of a mixture with characteristics similar to those of the mixture in question is precluded owing to its inherent properties (high level of microbiological and chemical purity, pyrogen-free). It can justifiably be concluded, I believe, that it is those specifically inherent properties which determine that in fact the mixture will be used exclusively for medical purposes for the manufacture of infusion solutions. That position seems, moreover, to be accepted by the Bundesfinanzhof when, as noted above, it states that

16 — The fact relied on by the Hauptzollamt before the Bundesfinanzhof, that in the light of its composition the mixture is a preparation which *can* be taken by mouth does not suffice for classification under heading 21.07. In accordance with the foregoing account, in order for a product to fall under that heading it does not suffice that is made up of nutritive substances, but must further be intended in fact for normal human nutrition. From the order for reference it appears that on the question of the intended use of the mixture at issue the Hauptzollamt confined itself to alleging, without further elucidating the point, that 'another type of processing was possible'.

'*the composition of the products is such* [17] that they are more likely to be used exclusively for medical purposes'. That intended use, inherent to the properties of the mixture, may accordingly be regarded as an objective criterion for its classification under heading 30.03 of the Common Customs Tariff [18] and in particular (in the light of the fact that it is in the form of a powder and is not put up in forms or in packings of a kind sold by retail) under subheading 30.03 A II b.

15. To summarize, the questions referred to the Court by the Bundesfinanzhof should, in my opinion, be answered as follows: the Common Customs Tariff, as amended by the Annex to Council Regulation (EEC) No 3618/86, should be interpreted as meaning that products such as powdered sterile mixtures of amino acids, not put up in forms or in packings of a kind sold by retail, and in measured doses (a) should be regarded as falling under tariff heading 30.03 (subheading 30.03 A II (b)) if in fact their sole intended use inherent to their particular characteristics, is the manufacture of infusion solutions; (b) should be regarded as falling under heading 21.07 if their intended use, inherent to their particular characteristics, is for normal human nutrition, directly or after certain processing, or for incorporation in food preparations. In the latter case the mere possibility of other uses of the said products (for example in the manufacture of infusion solutions) is irrelevant, and their further classification in subheadings thereunder will take place on the basis of the criteria used in those subheadings and the specific facts of the case in point, which it is for the national bodies to ascertain.

16. For the sake of completeness, however and to further clarify the conclusion I have reached, the following additional points should be made: the Commission submits in its observations to the Court, following an analysis which is similar on many points to my own, that the Common Customs Tariff should be interpreted to the effect that products such as that imported by Thyssen should be regarded as falling under heading 30.03. It adds (at p. 18 *in fine et seq.* of the French translation) that the same solution may be reached on the basis of one of the general rules for the interpretation of the nomenclature of the Common Customs Tariff which are included in the first part, Section I A., of the annex to Regulation No 3618/86 applicable to this case. The Commission relies, in particular, on the first sentence of General Rule 2(a) (according to which '[a] ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as imported, the incomplete or unfinished article has the essential character of the complete or finished article') and maintains that if the 'complete or finished article' in question is taken to be the infusion solution which results from water being added to the mixture at issue, that mixture

17 — Emphasis added.

18 — See also the CCC Explanatory Notes to heading 30.03 (B(a)), according to which *inter alia* 're-distilled water' put up in measured doses and 'for use either for the direct treatment of certain diseases (...) or as a solvent for the *preparation of injectable medicinal solutions*' also falls under that heading.

may be regarded as the 'incomplete or unfinished article' which has the essential character of the 'complete or finished article' and thus should fall under the same tariff heading.

17. That construction cannot, I believe, be accepted, on the following two grounds. (1) According to point III of the CCC notes relating to the general rule upon which the Commission relies, in view of the scope of the headings of Sections I to VI, that is to say, Chapters 1 to 38, of the Common Customs Tariff, Rule 2(a) 'does not normally' apply to goods of those Sections. Although it is true that, as the Commission rightly points out, the Court has held [19] that the words 'not normally' mean that it cannot altogether be ruled out that that rule of interpretation might exceptionally apply to a heading in Chapters 1 to 38 of the Common Customs Tariff, nevertheless in my view it is not apparent from the documents before the Court, nor is it maintained by the Commission, that the facts of the case constitute an exceptional circumstance warranting application of Rule 2(a) for classification under the Common Customs Tariff heading in question. (2) As an independent point, I do not see how it could be accepted that a *powdered product for the manufacture of infusion solutions* could be considered to have the essential character of an infusion *solution* since at all events it is lacking possibly the most basic characteristic of that solution, which is the possibility of being used directly for infusion. In my opinion the product to which the Bundesfinanzhof's questions relate should fall as a 'medicament' under heading 30.03 of the Common Customs Tariff not because it is an 'unfinished article' which has the essential character of a 'finished article' (the infusion solution) but because, insofar as its use in the manufacture of infusion solutions is the intended use inherent to its particular characteristics, it constitutes *per se* a preparation used medically for artificial nutrition.

IV — Conclusion

In view of the foregoing, I propose that the Court should reply to the questions referred to it as follows:

The Common Customs Tariff, as amended by the Annex to Council Regulation (EEC) No 3618/86, should be interpreted as meaning that products such as pow-

19 — See the judgment in Case C-318/90 *Boehringer Mannheim* [1992] ECR I-3495, at paragraphs 17 and 18. See also the judgment in Case 295/81 *IFF* [1982] ECR 3239.

dered sterile mixtures of amino acids, not put up in forms or in packings of a kind sold by retail, and in measured doses (a) should be regarded as falling under tariff heading 30.03 (subheading 30.03 A II (b)) if in fact their sole intended use inherent to their particular characteristics, is the manufacture of infusion solutions; (b) should be regarded as falling under heading 21.07 if their intended use, inherent to their particular characteristics, is for normal human nutrition, directly or after certain processing, or for incorporation in food preparations. In the latter case the mere possibility of other uses of the said products (for example in the manufacture of infusion solutions) is irrelevant, and their further classification in subheadings thereunder will take place on the basis of the criteria used in those subheadings and the specific facts of the case in point, which it is for the national bodies to ascertain.