Heading No 30.04 of the Common Customs Tariff must be interpreted as meaning that the expression "put up in retail packings for medical or surgical purposes" implies that a product, in order to be classified under that heading, must not exceed the dimensions which enable it to be sold by retail to any user, including individual persons. That heading therefore excludes a product which is packed in such a way that it can be sold, without re-packing, only to hospitals or other large-scale users.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 6 October 1983.

For the Registrar

H. A. Rühl

Principal Administrator

P. Pescatore

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 14 JULY 1983 [1]

Mr President,
Members of the Court,

1. The questions referred to the Court for a preliminary ruling in this case concern the classification for customs purposes of a product described as "absorbent gauze". The Bundesfinanzhof [Federal Finance Court] seeks a definition of the scope of heading No 30.04 of the Common Customs Tariff, *inter alia* in relation to Commission Regulation (EEC) No 2282/79 of 17 October 1979, in order to enable it to resolve a dispute between the Oberfinanzdirektion [Principal Revenue Office] Frankfurt am Main, and Lohmann GmbH & Co. KG, Neuwied (hereinafter referred to as "Lohmann").

Lohmann imports from Yugoslavia bleached, permeable plain-weave fabric woven wholly out of cotton, which is concertina-folded and not impregnated

1 — Translated from the Italian.

or coated with pharmaceutical substances. It is put up in packages containing five pieces of gauze laid one on top of the other and each measuring 40 metres by 80 centimetres. Each package bears a lable affixed by the Yugoslav producer in consultation with Lohmann. The label indicates the type, the dimensions and the composition of the gauze and gives the name and address of the importing company. Lohmann sells the product, which is used "for medical treatment", only in the Federal Republic of Germany, without altering the packing or dimensions in any way. 91.6% of the gauze goes to hospitals and clinics, 4.3% to chemists and the remaining 4.1% to first-aid centres in large industrial undertakings. The purchasers cut and, where necessary, sterilize the gauze in accordance with their different requirements.

On 14 April 1981 Lohmann, which until that date had imported gauze under heading No 30.04 of Chapter 3 (Pharmaceutical products) of the Common Customs Tariff, applied to the Oberfinanzdirektion Cologne for a binding customs tariff ruling. This was issued on 19 May 1981, but by the Oberfinanzdirektion Frankfurt am Main which classified the product under subheading 55.09 A I of Chapter 55 (Cotton) of the Common Customs Tariff. That subheading applies to "other woven fabrics of cotton, containing 85% or more by weight of cotton, of a width of less than 85 cm". At the time, the products classified thereunder were subject to autonomous duty of 17% and conventional duty of 13%.

On 5 June 1981 Lohmann lodged and objection against that classification and submitted an expert report drawn up by the Bundesvereinigung Verbandsstoffe und medizinische Hilfsmittel eV [Federal association for dressings and medical appliances], according to which the gauze was "put up in retail packings for medical or surgical purposes" and was therefore to be classified under heading No 30.04 of the Common Customs Tariff. That heading includes "wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in retail packings for medical or surgical purposes, other than goods specified in Note 3 to this Chapter". At the material time an autonomous duty of 17% and a conventional duty of 10.1% were levied on those products. Lohmann also pointed out that the imported gauze appeared to be packed in conformity with Standard DIN 61630 formulated by the Hospital Committee of the German Standards Association and that the trade description of the product in question corresponded to a heading in the Pharmacopoeia Europaea.

By decision of 10 August 1981, the Oberfinanzdirektion Frankfurt am Main rejected Lohmann's objection on the ground that, although the product in question was individually packaged and labelled, it could not, on account of its dimensions, be regarded as "put up in retail packings for medical or surgical purposes". In support of that view, it relied upon Commission Regulation (EEC) No 2282/79 of 17 October 1979 on the classification of goods under subheading 55.09 A I of the Common Customs Tariff (Official Journal 1979, L 262, p. 23).

Lohmann appealed against the Oberfinanzdirektion's decision to the Seventh

Senate of the Bundesfinanzhof which, by order of 12 October 1982 which was received at the Court Registry on 3 November 1982, stayed the proceedings and requested the Court to give a preliminary ruling on two questions.

2. In its first question, the Bundesfinanzhof asks whether "heading No 30.04 of the Common Customs Tariff [is] to be interpreted as meaning that the phrase 'put up in retail packings for medical or surgical purposes' requires conformity with specific maximum dimensions". I have already quoted the text of the tariff heading in question. Subject to further qualification let me say at the outset that the classification of the goods does not depend on their dimensions. The Bundesfinanzhof also takes that view. In its question, therefore, it seeks to ascertain whether the classification of the product is affected by Regulation No 2282/79 which prescribes that absorbent gauze of certain specified dimensions is to be classified under subheading 55.09 A I.

I shall, however, proceed in the proper order. As I recalled in my Opinion in Case 175/82 *Dinter* [1983] ECR 978, the Court has repeatedly held in order to ensure legal certainty that the classification of goods for customs purposes must be based on the objective characteristics and properties of the goods when they are presented for customs clearance. In the present case, the objective characteristic to be verified is whether the product is "put up in retail packings" for medical or surgical purposes. The meaning of those words is also apparent from the case-law of the Court. Under the Common Customs Tariff — the Court has held — goods are generally regarded as "prepared" or "put up in retail packings" if "the product is objectively suitable, given the form in which it is presented, for sale by retail, without further packaging" (judgment of 11 February 1982 in Case 278/80 *Chem-Tec* v *Hauptzollamt Koblenz* [1982] ECR 439, paragraph 12 of the decision), in other words, where the product is sold directly to the final consumer.

The next step is, therefore, to consider the nature of the purchasers. The question arises whether the concept of retail sale encompasses Lohmann's disposal of the gauze, over 90% of which, as the Court is aware, is sold by Lohmann to hospitals and clinics. The answer can only be in the affirmative, as is expressly confirmed by the Explanatory Notes to heading No 30.04 of the Customs Cooperation Council Nomenclature; the purpose of those notes is to define the scope of the various headings and, as the Court itself has held in its judgment of 8 December 1970 in Case 14/70 *Deutsche Bakels* v *Oberfinanzdirektion München* [1970] ECR 1001, they constitute, in the absence of Community explanatory notes, an authoritative source for the interpretation of the Common Customs Tariff.

The Explanatory Note to heading No 30.04 includes the following passage: "Wadding and gauze for dressings (usually of absorbent cotton) and bandages, etc., not impregnated or coated with pharmaceutical substances, are also classified in this heading, provided they are exclusively intended (e.g. because of the labels affixed or special folding) for sale directly without re-packing, to users (private persons, *hospitals,* etc.) for use *for medical or surgical purposes"* (Note to heading No 30.04, Ref. EN/AS 28 — June 1978, p. 459, emphasis added).

Faced with such a clear text, the Commission cannot but acknowledge that the sale of gauze to hospitals or to

similar institutions also qualifies as sale by retail. However, it disputes that the disposal of the gauze by Lohmann qualifies as sale by retail relying on arguments which are not related to the nature of the purchasers. The gauze, the Commission observes, may be used for other purposes, for example for wrapping certain types of cheese, as filter cloths for milk and also in the manufacture of thermal insulation, bookbindings and sanitary towels. It also cannot be classified under heading No 30.04 by virtue of its dimensions which, in the first place, differ from those of gauze generally sold by retail (for example, in chemists' shops) and, secondly, are such that the product cannot correspond to a "direct requirement" on the part of purchasers. In order to use the gauze, hospitals and clinics are obliged to "re-package" it, having sterilized it and cut it to size.

I am not swayed by those arguments. It is quite true that the gauze in question is also used for the purposes referred to by the Commission. However, it is also true that, in such cases, it is classified under different headings of the Common Customs Tariff. Thus, sanitary towels and tampons are classified under heading No 48.21, cotton gauze fabric under heading No 56.07 and so on. I intend to consider the dimensions of the gauze in greater detail in conjunction with Regulation No 2282/79, but, even at this stage, the incongruity of the Commission's argument cannot be overlooked. It is impossible to maintain that the sale of gauze to hospitals and clinics constitutes retail sale and, at the same time, to rely on the dimensions of the product available from chemists' shops. After all, individual needs and the requirements of a hospital establishment are quite different and, indeed, are not even capable of comparison.

The Commission is no more persuasive when it contends, again in reliance on the dimensions of the gauze, that the gauze is not "put up in retail packings" since hospitals are obliged to cut it and to sterilize it. In that regard, it may be pointed out that sterilization is not a necessary prerequisite for all the products covered by heading No 30.04 and, in particular, not for those which are neither impregnated nor coated with pharmaceutical substances. Furthermore, the process of cutting the gauze is tantamount to re-packaging only where it is carried out with a view to reselling the product to a third person. In any event, it seems incontestable to me that the packaging of the gauze varies according to the type of purchaser (a private individual or a hospital) and according to the use to which it is put by the purchaser.

3. I have already observed that in its first question the Bundesfinanzhof seeks to ascertain whether, and to what extent, the contested classification is affected by Commission Regulation No 2282/79. That measure is based on Regulation (EEC) No 97/69 of the Council of 16 January 1969 (Official Journal, English Special Edition 1969 (I), p. 12) which is aimed at achieving a uniform application of the Common Customs Tariff Nomenclature in the various Member States and, with that end in view, authorizes the adoption of measures to "specify the content of the headings or subheadings of the Common Customs Tariff without, however, amending the text thereof" (second recital in the preamble to the regulation). During the oral procedure the Commission's representative informed the Court that Regulation No 2282/79 was adopted as a result of initiatives taken by the French delegation

on the Committee on Common Customs Tariff Nomenclature in order to resolve certain very specific questions (including the classification of a brand of absorbent gauze sold in France). That factor alone, in my view, deprives the source in question of part of the significance which the Commission seeks to attach to it as a key to the interpretation of the (far wider) tariff heading concerned.

In any event, I shall examine the provisions of that regulation. Article 1 provides that "lengths of absorbent cotton fabric (known as 'gauze'), not impregnated or coated with pharmaceutical substances, 100 m long and 0.65 m wide, concertina-folded, individually wrapped and labelled, shall be classified" under subheading 55.09 A I. The reasons for the choice of those dimensions are given in the fourth and fifth recitals in the preamble which contain the following passages: "in view of their dimensions, these articles, even if they are individually wrapped and labelled, cannot be considered at the time of importation as being put up in retail packings for medical or surgical purposes"; "having regard to their nature and dimensions" those articles cannot be classified under heading No 30.04. Accordingly, it is more appropriate to classify them under subheading 55.09 A I.

What is to be said of those provisions? The Bundesfinanzhof, it seems to me, is right to question whether, in adopting that regulation, the Commission "exceeded the limits of the powers conferred upon it by Regulation No 97/69". Regulation No 2282/79 amends the wording of the headings in question which, as I have already said, is expressly prohibited by the second recital in the preamble to the basic regulation. That is not all. The provisions of Regulation No 2282/79 are in breach not only of Regulation No 97/69 but also of one of the General Rules for the Interpretation of the Common Customs Tariff Nomenclature which states that where goods are "classifiable under two or more headings, ... the heading which provides the most specific description shall be preferred to headings providing a more general description" (Rule 3 (a), Official Journal 1981, L 335, p. 11). Finally — and this strikes me as the decisive argument — the Commission's representative himself acknowledged during the oral procedure that, even if it were considered valid, Regulation No 2282/79 could not apply to the absorbent gauze imported by Lohmann since its dimensions (40 metres by 80 centimetres) are different from those specified by the contested regulation.

4. In other words, the dimensions of the gauze in question are not relevant for the purposes of its classification under heading No 30.04. The second question, in which the Bundesfinanzhof asks whether "conformity with specific maximum dimensions" is required, is by implication therefore devoid of purpose. Nevertheless, I wish to make some observations regarding that question and the inferences which may be drawn from it in support of the above argument.

As Lohmann demonstrated in the proceedings before the national courts, the size of the gauze depends on the use to which it is put. That in turn varies according to whether the user is a private individual or a hospital and, in the case of a hospital, according to the treatment provided there. The only unchanging factor is the requirement prescribed by heading No 30.04 namely — I repeat — that the gauze must be put up in retail packings for medical or surgical purposes. Apart from that, it seems to me that the criterion contained in the Common Customs Tariff reflects a valid

requirement of social policy. It is only fair that gauze for medical or surgical purposes which is used in a hospital should not be subject to a higher rate of duty than levied on the same product put up in different packages and intended for private individuals.

I should like to make a final observation regarding the reply proposed by Lohmann to the Bundesfinanzhof's second question. In order to answer that question, Lohmann claims, the maximum dimensions prescribed by Standard DIN 61630 must be taken into account. However, as I have already said, that standard was laid down by a German private institution and in Germany it has the force of commercial usage. Where a heading of the Common Customs Tariff falls to be interpreted, reference to national practices or usage, whether they stem from the private or public sector, is certainly not permissible. Moreover, reliance upon such factors would be contrary to the very purpose of the Common Customs Tariff which is of course uniformity of treatment within the common market.

5. In conclusion, I propose that the Court should answer the question referred to it under Article 177 of the EEC Treaty by the Seventh Senate of the Bundesfinanzhof by order of 12 October 1982 in the following manner:

Conformity with specific dimensions is of no relevance for the interpretation of the phrase "put up in retail packings for medical or surgical purposes" in heading No 30.04 of the Common Customs Tariff.