OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 23 FEBRUARY 1978 [1]

Mr President,
Members of the Court,

The recovery and reprocessing of used products, in particular of "scrap metal", are one of the consequences of the scarcity of certain raw materials. In particular, manufacture of aluminium from used goods and from waste or scrap accounts for a not inconsiderable part of the production of that metal, approximately a quarter of such production in West Germany in 1970, the year of the imports which are at the origin of this reference for a preliminary ruling from the Bundesfinanzhof concerning the interpretation of Chapter 76 of the Common Customs Tariff, and more particularly concerning the tariff classification of metallic products generally described as "aluminium pellets".

In August 1970 Oehlschläger imported into the territory of the Federal Republic of Germany two consignments of that product, under the description "aluminium milling waste and filings".

According to the facts which appear from the customs file, the *imported* product is obtained, from used aluminium cables and from remnants of cables, by processing in a shredder which first of all enables the material in question to be reduced to lengths of approximately five centimetres, after separation of the particles of iron by magnets. The sections of cable are comminuted into irregularly-shaped grains by rotating cutters, while the insulation material is separated from the aluminium wire and reduced to small pieces. The different components of the product thus processed are finally separated and isolated from one another by an air jet, according to their specific gravity.

The "pellets" obtained from this processing then take the form of light grey shining grains, having a high aluminium content, and containing only a very small proportion of other material.

These are the final findings of fact by the Bundesfinanzhof, and they are binding on this Court whatever other allegations may be made before it by the plaintiff in the main action.

The dispute started when the Hauptzollamt (Principal Customs Office) Emmerich, *having obtained the expert opinion of Zolltechnische Prüfungs- und Lehranstalt (Customs Technical Testing and Research Institute) Cologne,* classified that product under subheading 76.01 A, "unwrought aluminium", which is subject to an autonomous duty of 10%, whereas the importer considered that the goods should be classified under subheading 76.01 B II, "aluminium scrap", and as such free from duty.

The customs authorities refused to alter their decision, and Oehlschläger then brought an action before the Finanzgericht (Finance Court) Düsseldorf which that court dismissed on 3 September 1974. The plaintiff then appealed against that judgment to the Bundesfinanzhof (Federal Finance Court) which has referred the following questions to this Court for a preliminary ruling:

1. Must tariff subheading 76.01 B of the Common Customs Tariff be interpreted as including a product manufactured from cut-up aluminium wire of a light grey shining appearance which is the result of the reduction of used aluminium wire and the removal of most of the insulation material in so-called shredding apparatus?

1 — Translated from the French.

2. In the event of Question 1 being answered in the negative, does such a product come under tariff subheading 76.01 A?

In limiting the problem in this way, the Bundesfinanzhof carries out what in my opinion is a correct analysis of the general structure of Chapter 76 (Aluminium and Articles thereof), the provisions of which distinguish between three categories of products:

— first, the unwrought metal and aluminium waste and scrap: heading 76.01,

— secondly, semi-finished products such as wire, wrought bars, rods, angles, shapes and sections, wrought plates, sheets, strip and foil: headings 76.02 to 76.05,

— finally, finished products and other articles of aluminium: headings 76.06 to 76.16.

Unlike the Finanzgericht Düsseldorf, the federal court dismisses all possibility classifying the goods concerned under any of headings 76.02 to 76.16.

Like the Commission, I am of the opinion that that attitude is correct in law in so far as it sets aside any classification under the categories of half-finished or finished aluminium products, including those referred to in heading 76.16 under the description "other *articles* of aluminium", which in the context of Chapter 76 and according to its wording can concern only *manufactured* goods of aluminium, which implies that the aluminium which was the basic material has been processed or manufactured into a product which does not come under any other Common Customs Tariff heading. Furthermore, that interpretation is supported by the Explanatory Notes to the Nomenclature of the Customs Cooperation Council concerning the said heading 76.16, which state that classification under the aforesaid heading is subject to the unwrought aluminium having been processed, whatever the nature of such processing.

Therefore the real — and the only — question for the Court to decide is whether the products at issue, manufactured from used aluminium cable which beyond all question can be described only as scrap since it has ceased to fulfil its original purpose, can still be classified under subheading 76.01 B II after the reprocessing which they have undergone or whether that reprocessing gives them a greater affinity with unwrought aluminium.

In this connexion, a definition of the term *scrap* as used in the Common Customs Tariff must first be sought. On a general level, that term applies to waste metal with practically no value because it comes from defective, worn out or irreparable metal articles which can no longer be used for their original purpose. In so far as that scrap has retained any residual value, such value lies in the metallic material itself, provided that the metal in question can be "recovered" so as to be used afresh.

Moreover, Note 6 to Section XV of the Common Customs Tariff refers to that possibility of recovery, in the following terms:

"For the purposes of this Section, the expression 'waste and scrap' means waste and scrap metal fit only for the recovery of metal or for use in the manufacture of chemicals."

Although that note puts the accent exclusively on the use for which the goods are intended and does not refer to the objective, qualitative characteristics which emerge from the actual words of the provision, it should none the less be remembered that, according to the case-law of this Court, whilst the Common Customs Tariff does indeed in certain cases contain references to manufacturing processes and to the use for which goods are intended, "it is generally preferred, in the interests of

legal certainty and ease of verification, to employ criteria for classification based on the objective characteristics and properties of products which can be ascertained when customs clearance is obtained" (judgment of 16 December 1976, Case 38/76, *Industriemetall Luma* [1976] ECR 2027).

For that reason it seems to me, as it does to the Commission, that the definition of waste and scrap metal as "fit only for the recovery of metal" cannot be taken to provide the only criterion of the use intended for the scrap.

That criterion cannot stand alone; it is a mere indication. In order to be classified under the heading pertaining to waste and scrap, goods must also exhibit the objective, external characteristics of "waste" or "scrap".

Consequently, even without any need to refer to the Explanatory Notes to the Brussels Nomenclature on heading 73.03 (unusable, worn-out and broken articles of iron or steel), it is clear that old aluminium cables or remnants of such cables must be classified as scrap.

On the other hand, it is just as clear that when customs clearance is obtained for them, the imported goods resulting from prior complex processing designed to recover aluminium and eliminate other matter such as iron or insulating material, cannot be treated in the same way, because it is then a fresh product, which is different from the worn-out cables and which no longer corresponds to the objective characteristics of "scrap".

Therefore that product can no longer be classified under subheading 76.01 B II. Thus the first question from the Bundesfinanzhof should be answered in the negative.

Is classification under subheading 76.01 A (unwrought aluminium) therefore the appropriate one?

We have seen that, in the general structure of Chapter 76 of the Common Customs Tariff, the scheme of which is identical to that of the other chapters in Section XV (metals and metal products), the expression "unwrought aluminium" designates the metal as such, as yet unprocessed, that is to say the basic raw material, the products manufactured from which are classified under different tariff headings or subheadings.

However, the Common Customs Tariff does not define the physical and chemical composition of unwrought aluminium.

Therefore reference must be made to technical and scientific terminology, which distinguishes four sorts of aluminium according to their degree of purity:

— Al 99.

— Al 99.6

— Al 99.8 and

— Al 99.9

Therefore the question is whether, in fact, the degree of purity of the grains of aluminium obtained from worn-out cables by means of the processing which I have described is comparable to that of one of the sorts of aluminium mentioned above.

According to the judgment of the Finanzgericht Düsseldorf, the chemical composition of those grains "corresponds approximately to the least pure sort of aluminium, Al 99 H", that is to say 99% pure cast aluminium obtained from bauxite by casting from electrolysis baths.

In the absence of any further indication from the wording of subheading 76.01 A, account should be taken of general Rule No 2 (b) for the interpretation of the nomenclature of the Common Customs Tariff:

"Any reference in a heading to a material or substance shall be taken to

include a reference to mixtures or combinations of that material or substance with other materials or substances."

In accordance with this rule, since aluminium, being 99% of the mixture, is the distinctive component of the product at issue, in the absence of any other specific provision that product can be classified only as unwrought aluminium under subheading 76.01 A.

Therefore it is immaterial that, as the plaintiff in the main action claims, the imported goods have to be further reprocessed before being used as recovered aluminium.

Furthermore, the Explanatory Notes on heading 76.01 of the Customs Co-operation Council Nomenclature state that the heading "unwrought aluminium" also includes "aluminium pellets", which as I have said is the form taken by the goods at issue. The technical process to which the used aluminium cables have been subjected has no relevance to that statement which describes the granular form of the product obtained after the process of shredding and crushing, and there is no need to take into consideration that processing itself.

Finally, this interpretation has been confirmed by a classification slip of the Committee on Common Customs Tariff Nomenclature dated 18 May 1972.

Although that classification slip is not directly applicable to the events at issue in this case as it was published after they had occurred, in my opinion it gives a correct interpretation of subheading 76.01 A of the Common Customs Tariff in that the Committee itself accepted that a fresh product, comparable to unwrought aluminium in its granular form and in the use for which it was intended, resulted from the processing to which the used aluminium was subjected.

I am of the opinion that the Court should rule that:

1. Tariff subheading 76.01 B of the Common Customs Tariff cannot be interpreted as including goods consisting of chopped aluminium wire of a light grey shining appearance and produced in a so-called shredder by the comminution of used aluminium cables and the substantial removal of the insulation.

2. By reason both of their chemical composition and their granular form and the use for which they are intended, such goods must come under tariff subheading 76.01 A, as being comparable to unwrought aluminium.