OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 18 FEBRUARY 1982 [1]

Mr President,
Members of the Court,

1. Introduction

In these cases, the Bundesfinanzhof [Federal Finance Court] has referred to the Court the following questions:

(1) How must tariff heading 13.03 (vegetable extracts) and tariff subheading 33.01 C (resinoids) be interpreted and delimited in relation to one another?

(2) (In Case 49/81:) Is a product described as extract of ginger containing, in addition to 25 % essential oils, all the soluble contents of the ginger root to be regarded as vegetable extract coming within tariff heading 13.03 or, having regard to the amounts of odoriferous substances or fragrant constituents, as resinoid falling within tariff subheading 33.01 C, even though as vegetable extract it contains all the typical contents and constituent substances of the ginger root? In addition to the essential oils, does for example "Gingerol" also belong to the odoriferous substances or fragrant constituents?"

(3) (In Case 50/81:) Is a product described as "Extract of black pepper decolorized" [sic] consisting of 16 or 20 % essential oils, 40 or 46 % piperine and 38 or 40 % other extracts to be regarded as vegetable extract coming within tariff heading 13.03 or, having regard to the amounts of odoriferous substances or fragrant constituents as resinoid falling within tariff subheading 33.01 C, even though as vegetable extract it contains all the typical contents and constituent substances of the fruit of the pepper plant? In addition to the essential oils, does for example piperine also belong to the odoriferous substances or fragrant constituents?

In relation to those questions referred to the Court, I would at once point out that the translation of the German text raises considerable problems. Those problems reflect the problems of interpretation which are connected with the text of the relevant tariff headings in the different Community languages. The wording of the questions submitted in German clearly seems to match the German version of tariff heading 33.04, the provisions of which have also played an important rôle in the proceedings before the Court. In particular the passage "Anteile an wohlriechenden Bestandteilen bzw. Aromastoffen" corresponds wholly with the German version of tariff heading 33.04, which provides as follows: "Mischungen von zwei oder mehreren natürlichen oder künstlichen *Riech- oder Aromastoffen* und Mischungen auf der Grundlage eines oder mehrerer dieser Stoffe (einschließlich alkoholischer Lösungen), die Rohstoffe für die Riechmittel-, Lebensmittel- oder andere Industrien sind". The description "Riech- oder Aromastoffen" does not appear in the versions in the other Community languages. The Danish version speaks merely of "lugtstoffer", the English version of "odoriferous substances", the French version of "substances odoriférantes", the Italian version of "sostanze oderifere" and the Dutch version of "reukstoffen". Thus the words

1 — Translated from the Dutch.

"Aroma" and "Aromastoffe", to which the Commission devoted so much attention in its written and oral observations, do not appear at all in the tariff heading 33.04 in the other Community languages.

Precisely because that point is of such importance for its argument, it is regrettable that the Commission did not devote any attention in its written and oral observations to the relevant texts in the other Community languages. Moreover, for that reason it is especially regrettable that, before making its observations on the questions posed, the Commission did not confer with the customs authorities of the other Member States and in particular with the two countries which are by far the most important importers of resinoids, namely France and the United Kingdom, each of which, as appears from the official statistics submitted by the plaintiff in the main proceedings, in 1979 imported about twice the quantity of resinoids as was imported into the Federal Republic of Germany, the third most important importing country. There may, amongst other things, be a connexion between the differently worded texts of the relevant tariff headings on the above-mentioned point and the fact that, as appears from the information which was obtained by the Commission only after the questions put to it by the Court, the British and French customs authorities in fact subscribe to an interpretation of those tariff headings which is different from that of the German customs authorities.

With regard to the questions submitted for a preliminary ruling, I would further point out that the importance of the first question in particular far exceeds the importance of the classification of the problems concerned. That question in fact relates to the interpretation of tariff heading 13.03 and subheading 33.01 C in general and is therefore of importance in relation to all resinoids. As appears from the statistics submitted, the total value of imports of resinoids in 1979 was over 73 million European Units of Account.

For the various arguments which play a part in the proceedings, it is sufficient to refer to the two reports for the hearing, the grounds of the Bundesfinanzhof's two orders for reference, the answers to the written questions put by the Court and the transcript of the oral hearing. The answers to the questions put by the Court in particular introduced new factors into the debate after the written procedure was closed.

In the remainder of my opinion I shall primarily follow the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff from the Annex to the relevant regulation. I shall therefore first consider the terms of the headings and the section or chapter notes, as well as General Rules 2 to 5 inclusive. I shall make use only in so far as appears necessary or useful of the Explanatory Notes to the Customs Co-operation Council Nomenclature and those to the Common Customs Tariff of the European Communities, which according to the well-established case-law of the Court, unlike the above-mentioned General Rules, cannot have binding effect, but may serve as a valuable aid to interpretation. In its judgment in Case 11/79, (*Cleton v Inspecteur der Invoerrechten en Accijnzen* [1979] ECR 3069), *inter alia*, the Court recalled in paragraph 13 that the Explanatory Notes to the Customs Tariff of the European Communities are intended not to replace the Explanatory Notes to the Customs Cooperation Council

Nomenclature but only to supplement them. In connexion with the reference made in that case to an Explanatory Note of the Customs Cooperation Council of 4 April 1978, I concur with the view of Mr Advocate General Warner at p. 3087 of his Opinion in the *Cleton* case, that since the Explanatory Notes had no legal effect but were only an aid to interpretation, the Commission rightly took the view that reference might be made to them as such, regardless of the date (before or after the contested tariff classification) when they were issued. He expressed a similar view in his Opinion in Case 798/79 (*Hauptzollamt Köln-Rheinau* v *Chem-Tec*, [1980] ECR 2639 at pp. 2652 and 2653). I would reserve my opinion on that point with regard to such Explanatory Notes as are issued after questions of interpretation have been referred to the Court. That reservation is, however, of no importance in these cases.

2. The first question

2.1. *The wording of the relevant tariff headings and the notes thereon*

Turning now to the first question, I would first point out that the terms of the tariff headings in question are unclear.

Tariff heading 13.03 covers, so far as is relevant here, under A, "Vegetable fats and extracts", including VIII, "Other", (b), "Other".

Tariff subheading 33.01 C covers "resinoids".

Those terms leave open, on the one hand, the question of the difference between *other* vegetable extracts and resinoids and, on the other, the question what criteria for interpretation must be applied where a product contains both odoriferous substances obtained by solvents and other vegetable extracts. The Notes to Chapter 13 provide a little more clarity.

In those Notes, it is explained that tariff heading 13.03 is to be taken not to apply *inter alia* to: "(h) Essential oils, concretes, absolutes and resinoids ...". The specific type of vegetable extract called resinoid therefore appears to be excluded from the generic concept of vegetable extract. However, the question concerning the difference between vegetable extracts and resinoids remains open. Rule 1 of the General Rules throws just as little light on the rules of interpretation to be applied in the case of products of mixed composition such as those which are concerned in these cases. The plaintiff in the main proceedings refers to the title of Chapter 33, which mentions only perfumery, cosmetic or toilet preparations. Rule 1 of the General Rules for the Interpretation of the Nomenclature, however, shows that those titles are not binding for the purposes of interpretation. They are provided for "ease of reference" only. In my opinion, the Commission correctly stated in its written observations that it was clear from tariff heading 33.04 that raw materials for the foodstuffs industry could in principle also fall under that chapter.

2.2. *General Rule 2*

Rule 2 of the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff provides a little more clarification concerning

products of mixed composition such as are concerned here.

Rule 2(b) provides *inter alia* that "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." As appears from the second sentence of that sub-paragraph, the classification of such goods consisting of more than one material is to "be according to the principles of Rule 3."

2.3. *General Rule 3*

Rule 3 of the General Rules then provides, in so far as is relevant here, that mixtures of this kind must be classified as follows:

"(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

(b) Mixtures ... which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material ... which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs latest among those which equally merit consideration."

Kurt Frey concludes in his article entitled "Zur Tarifierung von Waren nach ihrer stofflichen Beschaffenheit" (Zeitschrift für Zölle und Verbrauchssteuern 1979, pp. 102 to 107), in my opinion correctly, that where there is a choice between two or more tariff headings because the material falling under each of the possible headings does not indisputably predominate, Rule 3 (a), generally offers no solution. In my opinion, moreover, if there is a dispute as to the material which gives a mixture its essential character, such a solution cannot simply be based on General Rule 3 (b). In particular the meaning of "essential character" for these purposes is not inherently clear. Before I go on, if necessary, to the application of General Rule 3 (c), I shall therefore examine first how far the Explanatory Notes to the Customs Cooperation Council Nomenclature throw further light on the most important outstanding questions. As appears from what I have said earlier, those outstanding questions relate in particular to the concept of resinoids and to the interpretation of General Rule 3 (b).

2.4. *The Explanatory Notes to the Customs Cooperation Council Nomenclature*

(a) The concept of resinoids

In its Explanatory Notes on exception (h) under tariff heading 13.03, the Customs Cooperation Council states (at p. 81, (k)), that essential oils, concretes, absolutes and resinoids differ from vegetable extracts inasmuch as they are essentially composed of odoriferous substances. It is also noted that, according to whether the steam distillation or the solvent process is employed, certain plants can give either essential oils of heading 33.01 or vegetable extracts falling within heading 13.03.

Furthermore, it appears from the Explanatory Note on the concept of resinoids in tariff heading 33.01, that resinoids are obtained, usually by solvent action, from resins, amongst other things. The Explanatory Note on tariff heading 13.03 might, if considered purely in terms of its wording, give rise

to the mistaken view in this regard that it is precisely that tariff heading which is applicable. From a literal point of view, the characterization as vegetable extracts in the second half of the crucial sentence of the Explanatory Notes which I have cited corresponds with the criterion of the use of solvents in the first half of the sentence. [1]

From the Annex to the Explanatory Note on tariff heading 33.01, it is clear that essential oils and resinoids can be obtained *inter alia* from ginger and pepper and also from vanilla and a large number of other products, the extracts of which (particularly resinoids), obtained by solvent action and brought within heading 33.01 by virtue of the Annex, are certainly used in the food industry. The Commission gave numerous examples of those products during the oral proceedings. The argument of the plaintiff in the main proceedings to the effect that tariff heading 33.01 does not cover products for the food industry is also contradicted by tariff heading 33.04 which is contained in the same chapter and which I have already mentioned, as well as by the Explanatory Notes of the Customs Cooperation Council on the concept of essential oils, which immediately precede the Explanatory Notes on the concept of resinoids.

In its written observations, the Commission tried to prove, by physiological and linguistic arguments, that Chapter 33 applied to flavourings as well as to odoriferous substances. As I have demonstrated earlier, that interpretation was possible only on the basis of the German version of tariff heading 33.04, which refers to the words "Aromastoffe" and, as shown at the beginning of this sub-section of my Opinion, it is moreover incompatible with the Explanatory Notes to the Customs Cooperation Council Nomenclature. It presupposes in addition that the word "Aroma" in the German version of tariff heading 33.04 also covers flavouring. From an extensive examination of a dozen authoritative German, English, French and Dutch encyclopaedias, lexicons and dictionaries, however, I found that only two German sources supported that interpretation of the word "Aroma". The large Brockhaus and all the works examined in the other languages define "Aroma" as a pleasant smell or use similar expressions. Only if the taste of a product is in fact determined *exclusively* by the organs of smell, in accordance with the apple-onion test referred to by the Commission, would it therefore be possible to conclude on the basis of the physiological considerations put forward by the Commission, that the products concerned may also fall within tariff heading 33.01. Moreover, in my opinion, the Commission also commits an error of logic by inferring from the fact that flavour is sometimes determined by the organs of smell that flavourings *always* fall within the concept of "Aroma" which, as I have stated, it wrongly takes

1 — The relevant original text reads as follows:

"It should also be noted that, according to whether the steam distillation or the solvent process is employed, certain products, mainly ginger and pepper, may give either essential oils of heading No 33.01 or the extracts falling within heading No 13.03."

From Explanatory Note (A) of heading No 13.03, it moreover appears that vegetable extracts within the meaning of that tariff heading can also be obtained by solvents. The method of preparation alone therefore does not seem to provide an adequate starting point for tariff classification.

to be of central significance. It seems to me that that error of logic is also relevant in relation to the products in question.

(b) The interpretation of General Rule 3 (b)

The Explanatory Notes devoted by the Customs Cooperation Council to the concept of resinoids therefore appear in the last analysis to contain no adequate guidelines with regard to this problem of classification. In particular the question remains open whether the odoriferous substances concerned constitute the essence or the main element of the product in question. That essential element in accordance with the Explanatory Note on tariff heading 13.03 seems to be borrowed from the binding Rule 3 (b) of the General Rules for Interpretation, which I have considered earlier. Since in these proceedings, as appears from the questions submitted, there are two mixtures at issue, it is therefore necessary to determine on the basis of the above-mentioned rule for interpretation from which material the products in question derive "their essential character".

Some further clarification as to the way in which that question should be answered is provided by the second and final sentences of subparagraph (k) of the Explanatory Notes of the Customs Cooperation Council on tariff heading 13.03 (at p. 81). The second sentence states that the distinctive characteristic of resinoids is the fact that they are essentially composed of ("par leur composition essentiellement formée de") odoriferous substances. According to the final sentence of that Explanatory Note, an extract within the meaning of tariff heading 13.03 differs from the essential oils falling within heading 33.01, inasmuch as it contains, apart from the odoriferous constituents, a far higher proportion ("des quantités bien plus notables") of other plant substances (for example chlorophyll, tannins, bitter principles, carbohydrates and other extractive matter).

It therefore seems to me that, on the basis of General Rule 3 (b) and the Explanatory Note of the Customs Cooperation Council on products such as these, products which, apart from odoriferous substances obtained by solvents, contain a far higher proportion of other plant substances (such as chlorophyll, tannin, bitter principles, carbohydrates and other extractive matter) which help to determine the typical character of those products, fall as vegetable extracts under tariff heading 13.03 and not under tariff heading 33.01 C.

2.5. *The Explanatory Notes to the Customs Tariff of the European Communities*

As I have already observed, the Explanatory Notes to the Customs Tariff of the European Communities may, according to Mr Advocate General Warner's view, which I share, supplement the Explanatory Notes to the Customs Cooperation Council Nomenclature but may not alter them. The Court expressed the same view in paragraph 13 of its judgment, which I cited above, in the *Cleton* case (Case 11/79).

Again, in the Explanatory Notes to the Customs Tariff of the European Communities, the notes on headings 13.03 and 33.01 are of particular importance in so far as they relate to the concept of "resinoids".

In the first-mentioned Explanatory Notes, the word "oleoresins", which plays a part in these proceedings, is equated in a number of cases with the word "resinoids". The concept of oleoresins is not, however, more closely defined. As appears from the file, very different meanings are attributed to that concept in different countries. Moreover,

it is not clear from the Explanatory Notes in which cases resinoids are also called oleoresins. Finally, the concept of "oleoresins" does not appear in the Common Customs Tariff. For all those reasons I take the view that those Explanatory Notes do not provide any useful clarification in regard to the problem in this case.

The Explanatory Notes on tariff heading 33.01 C are more important. They state that "Resinoids are extracted from certain parts of plants or from certain animal substances by means of solvents. They are remarkable in that they reproduce the fragrance of the extracted substances more fully than does the essential oil alone which is generally present in the raw material". Here it is again added that resinoids (thus defined) intended for the food industry are also often called oleoresins.

In my opinion, the second sentence of that Explanatory Note, in particular, may be considered as constituting a new element of some significance in regard to the concept of resinoids. However, for the linguistic reasons already given, I do not consider that the use of the word "fragrance" in that sentence can in any way alter the conclusion which I have drawn on the basis of the wording of the tariff headings and other means of interpretation with regard to that concept. The concept should in my opinion therefore be regarded as identical with the concept of "pleasant smell". Moreover, the Explanatory Notes as a whole seem to me to support my conclusions concerning mixtures, rather than those of the Commission. Those Explanatory Notes in fact speak exclusively of odoriferous substances which are extracted *inter alia* from part of plants by means of solvents. It can at most be asserted that the Explanatory Note leaves open the question concerning mixtures such as those at issue in this case. The final sentence adds to the Explanatory Notes on the concept of resinoids the fact that the product's label is of no relevance to its characterization, as laid down in the earlier sentences. Moreover, it supports the Commission's view, which I share, that resinoids may also be used for the food industry.

2.6. *Final remarks*

As the methods of interpretation used in the judgments of the Court in accordance with the General Rules ultimately seem to lead to a sufficiently clear conclusion, there is no need to apply General Rule 3 (c) in this case. Since the result is obtained largely on the basis of the Explanatory Notes to the Customs Cooperation Council Nomenclature and the Explanatory Notes to the Customs Tariff of the European Communities, I should not like to rule out entirely the possibility that subsequent Explanatory Notes might lead to a different conclusion. As the Commission's representative somewhat imprudently remarked during the oral procedure, legislation moreover falls behind practical developments and that in fact also seems to be the case as regards the tariff headings in question. In paragraph 12 of its judgment of 19 November 1981 in Case 122/80 (*Analog Devices v Hauptzollamt München*), the Court stated in relation to shortcomings in legislation that only the Community legislature may make amendments in that regard. In these cases it is particularly striking that Chapter 33 does in fact contain a tariff heading, 33.04, which relates to mixtures

of two or more types of odoriferous substances (natural or artificial) or mixtures with a basis of one or more of those substances, but contains no heading which relates to mixtures in which characteristic flavourings such as those concerned in this case play a major part. It does in fact seem to be a task for the legislature to fix the duties for those products which contain considerable quantities of various substances to which different customs duties apply. In spite of the part which tariff heading 33.04 has played in these proceedings, the court making the reference has moreover not asked this Court for a ruling on the interpretation of that tariff heading.

3. The second and third questions

The second and third questions, as formulated, relate to the assessment of the actual products concerned in the main proceedings. In the framework of proceedings under Article 177 of the EEC Treaty, the Court cannot of course reply to those questions as such. However, the questions contain factual information which provides useful clarification in regard to the concept of the "essential character" of mixtures, which I have dealt with earlier. Moreover, the answer to the first question must in my opinion be formulated in such a way as to enable the court making the reference to answer the second and third questions as well.

4. Conclusion

In conclusion, on the basis of the foregoing considerations, I propose that the questions referred to the Court should be answered as follows:

1. Tariff heading 13.03 (vegetable extracts) and tariff subheading 33.01 C (resinoids) must, having regard to the present state of the Explanatory Notes relating thereto and to the relevant binding provisions of Community law, be interpreted and distinguished as follows:

   (a) Resinoids may not be classified as vegetable extracts under tariff heading 13.03;

   (b) The concept of resinoids is determined first by the fact that they contain odoriferous substances which are obtained by means of solvents and which reproduce the fragrance more fully than does the essential oil which is generally present in the raw material;

   (c) It is not possible to consider as resinoids vegetable extracts which, apart from the odoriferous substances thus obtained, contain a far higher proportion of other plant substances, such as chlorophyll, tannins, bitter principles or other substances, perceptible mainly by the organs of taste, carbohydrates and other extractive matter, which help to determine the typical character of the product.

(d) Such a proportion, co-determining the typical character of the product, of other plant substances such as those mentioned under (c), exists in particular where those other plant substances also influence the smell or to a substantial extent add to it other features such as taste or other qualities essential to the consumer;

(e) The fact that a product is intended for use in the food industry cannot detract from the conclusions drawn from the criteria set out above.

2. Questions 2 and 3 must be answered in the light of the answer to the first question. "Gingerol" and "piperine" are not among the odoriferous substances which determine the concept of resinoids, if their characteristic qualities are determined predominantly by the organs of taste and not by the organs of smell.