OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 26 June 1990 *

Mr President,
Members of the Court,

1. In the present preliminary-ruling proceedings, the Finanzgericht München asks the Court to interpret certain headings of the Common Customs Tariff ('CCT') contained in Chapter 99 thereof, relating to works of art, collectors' pieces, and antiques.

2. The facts are as follows. Farfalla Flemming (the plaintiff in the main proceedings) asked the Hauptzollamt München-West (the 'Hauptzollamt') to release into free circulation, between 4 May 1981 and 30 April 1982, 13 postal consignments of what were described as 'paperweights' from the United States of America, declaring them as 'original sculptures in glass/any material' under Heading 99.03 of the CCT, which specifically covers 'original sculptures and statuary, in any material'.

According to the order for reference, the paperweights in question were made entirely by hand by recognized glassware artists. That applies both to the glass body and to the coloured representations of flowers or animals applied to or placed inside them. A distinction must be drawn between the two-dimensional and the three-dimensional pictorial representations.

The first are applied by the artist to the glass sphere whilst it is still extremely hot using coloured fluid glass and a spatula. A thin layer of glass surrounds the sphere and the pictures to protect them, and also to define the external form and create various effects.

In the second case, three-dimensional figures are incorporated in the glass sphere.

All the articles in question have a flat base of varying size.

As a result of the manufacturing process, which is essentially executed by hand, every individual article is different from the others; however, artists produce, sign and sell for unit prices of USD 35 to 300 — on which discounts are given — fairly large numbers of paperweights which are similar in size, decoration and execution.

It should also be noted that even though, according to the order for reference, the articles at issue in the main proceedings come within that price range, it became apparent at the hearing that works of that kind may attract even higher prices.

* Original language: Italian.

3. The Hauptzollamt, having conducted a tariff inspection of the articles described above, defined them as 'paperweights (ornaments) of glass, with inlaid work' or 'ornaments of common glass'.

Consequently, on the basis of Note 3 to Chapter 99, according to which 'Heading 99.03 is to be taken not to apply to mass-produced reproductions or works of conventional craftsmanship of a commercial character', the Hauptzollamt classified them as 'glassware for indoor decoration or for similar uses' under Heading 70.13 of the CCT which, unlike Heading 99.03, provides for customs duty to be levied.

4. Farfalla Flemming objected to that classification and, on dismissal of its objection, appealed to the Finanzgericht München, which decided to ask the Court of Justice for a preliminary ruling as to whether the articles in question, in which the representations are two-dimensional, are to be classified as paintings (Heading 99.01) or as sculptures (Heading 99.03), and whether those articles, and the similar ones containing three-dimensional representations, were of a commercial character within the meaning of Note 3 to Chapter 99 of the CCT.

In the event of the latter question being answered in the affirmative, the national court also asked the Court to specify the criteria for deciding whether or not the products in question should be regarded as commercial in character.

5. The wording of the first question, concerning the scope of Headings 99.01 and 99.03, appears to reflect the fact that Note 3 to Chapter 99 refers only to Heading 99.03.

However, it must be made clear that an exclusion of articles of a commercial character, of the kind mentioned in Note 3, also applies to works classified under Heading 99.01, since the very wording of the latter heading, which refers to paintings, drawings and pastels executed entirely by hand, expressly excludes 'hand-decorated manufactured articles', an expression which is substantially equivalent to the term 'works . . . of a commercial character' used in Note 3.

6. Therefore, I consider that in the present case the only choice to be made is between inclusion under Heading 99.03 and exclusion from Chapter 99, and that the possibility of inclusion under Heading 99.01 must be dismissed outright.

That is particularly clear in the case of the paperweights which have glass figures inside them, in view of the three-dimensional nature of the representation; but that statement applies also to paperweights on to which the representations are affixed by the application of fluid coloured glass whilst the sphere is still extremely hot.

It must be borne in mind in the first place that glass is not a material normally used in painting, but is typically intended for the creation of three-dimensional works of art, and in the second place that a paperweight, seen as a whole, is undeniably a three-dimensional article.

If a different criterion were to be used for classification purposes and the mass of glass were regarded simply as a medium (it being considered, for example, that the artistic value of the work lies exclusively in the colouring), the customs authorities would be exposed to a number of uncertainties since, in view of the fact that a sculpture may also be hand-coloured by an artist and that paperweights may take the most varied forms, the inspecting official would have from time to time to determine whether the essential artistic element of a hand-painted three-dimensional work was its form or the way in which it was coloured.

7. That said, it is still necessary to establish whether the articles in question, which are theoretically classifiable under Heading 99.03, which is concerned with sculptures, should not on the other hand be placed, by virtue of their commercial character, in the chapter relating to the material of which they are made (as has been stated, that view would be valid if the Court were to consider that any of the articles in question might be classified under Heading 99.01, which is concerned with paintings and drawings).

In that connection, the plaintiff in the main proceedings draws particular attention to the fact that the description 'paperweight' may be misleading.

Collectors throughout the world regard that term as describing not an article with a useful function (that of a paperweight) but original works of art, not used to hold down papers but collected in the same way as pictures and other articles, being distinguished rather by their lack of functionality. In its view, paperweights are original works of art, designed, painted, shaped and signed individually by well-known artists, thus falling within Chapter 99 of the CCT.

8. Let me say straight away that Farfalla Flemming's arguments seem to me to be defective in a number of respects.

In the first place, manual manufacture is in itself common to both artistic works and works of craftsmanship of a commercial character; moreover, the real purpose of an article, in the absence of other points of reference, is a factor which falls outside the customs authorities' appraisal and in any case does not constitute an effective criterion for distinguishing a work of art from an ordinary ornamental article, the latter likewise having no specific use.

Finally, the fact that the article may be signed by a well-known artist (and often the work is merely initialled) cannot in itself constitute an essential factor in customs classification, since although most of the artists producing paperweights will probably be well known among *aficionados* of that kind of 'art', they may be wholly unknown to customs officials.

Nor is it acceptable to classify as a work of art any work of craftsmanship, which may perhaps be finely executed in the opinion of experts, merely because the articles in question have been signed or initialled, particularly in cases where they make up a large edition, are similar to each other and have been imported at prices which more or less correspond to those of similar commercial articles.

9. The Commission, for its part, observes that the reason for which the CCT allows certain articles to be imported free of duty lies in the fact that, being very personal creations produced by artists, such works do not compete with each other from a financial point of view.

The fact that the artistic value of an artistic work may greatly exceed its functional value is not therefore, in the Commission's view, a valid criterion for customs classification. The customs authorities are not in a position to assess the artistic value of an article and must rely exclusively on objective characteristics, which can easily be perceived and are apparent from the external aspect of the product.

It follows that, when an artist creates sculptures having the form of articles in common use, those articles will be classified according to the materials from which they are made — even if they are works of art — since they are commercial in character and are likely to be found on the market in competition with similar industrially manufactured products.

The fact that the articles may be unique hand-made pieces or may never in fact be used functionally is therefore wholly irrelevant in the Commission's view.

10. However, the view put forward by the Commission, which seems to accord more importance to legal certainty in the application of the CCT than to fairness, is also unsatisfactory from several points of view.

Whilst there may in fact be justification, in order to determine that the exemption under Chapter 99 is applicable, for verifying that the product in question is not, from the economic point of view, in competition with similar articles that may be produced on an industrial scale, it seems to me to be neither just nor logical to decide to what extent an article is competitive solely by reference to its external appearance.

If for example a famous artist decided to use as a medium for one of his paintings a plate or an ashtray, and made only one original, which was sold for a very high price in the art market, it could not reasonably be contended that, merely because its form was that of a plate or ashtray, it competed with similar industrially produced articles or works of craftsmanship and should therefore be subject to the rate of duty prescribed for those products.

As the Court has already had occasion to emphasize, if the rate of customs duty laid down for the material used were applied to a value for customs purposes fixed on the basis of the work's artistic nature, the duty payable would be out of all proportion to the cost of that material. [1]

Not only that, but the solution proposed by the Commission, besides being potentially unfair, is not capable of resolving all the problems concerning the customs classification of the paperweights at issue here.

Those articles may be of the most diverse dimensions and in certain cases — because

1 — Case 155/84 *Onnasch* v *Hauptzollamt Berlin-Packhof* [1985] ECR 1449, paragraph 11.

they are either too big or too small — obviously cannot be used as paperweights.

In those circumstances therefore, since the articles in question are not similar to ordinary paperweights, the classification rule suggested by the Commission would be of no help to the customs authorities; the latter, finding themselves confronted with an article which does not appear to have a specific use, ought in any event to have at their disposal some other criteria suitable for customs classification of the goods.

11. Whilst it is true that, as the Court has pointed out on several occasions, the artistic value, if any, of an article is determined by reference to subjective and indeterminate criteria, whereas the customs classification must be based on objective criteria adopted by the CCT for the purposes both of its effective operation and of legal certainty, [2] it is nevertheless true that the same decisions of the Court show that it is possible to furnish the customs authorities with certain precise points of reference which may assist them in determining, where it is necessary to do so, whether an article is artistic in character, to the exclusion of subjective criteria.

In that regard it is appropriate to point out that, as the Court has already made clear, in the event of its being necessary to interpret a heading allowing duty-free importation, account must be taken of the purpose of the exemption. [3]

The exemptions provided for in Chapter 99 of the CCT are, as we know, intended to promote trade in cultural and educational objects between peoples and that purpose, as the Court has had occasion to emphasize, is decisive for the interpretation of the heading in question. [4]

12. It must then be borne in mind that the Court has consistently held that, for the purpose of interpreting the CCT, both the notes at the beginning of each chapter of it and the explanatory notes to the Customs Cooperation Council nomenclature ('the CCC nomenclature') provide important means of ensuring uniform application of the tariff and as such may be regarded as useful aids for interpretation.

In interpreting the headings in question, account must therefore be taken not only of the wording and the scheme of the CCT but also of the explanatory notes.

From the CCC nomenclature explanatory notes to Chapter 99 it appears that 'most articles falling in the present chapter are either unique, or at least exist in such very small numbers that they may not be freely available for purchase'.

Moreover, according to those notes, most of the articles covered by Chapter 99 'are not dealt with in ordinary commercial transactions; some are, however, handled by a

2 — Case C-1/89 *Raab* [1989] ECR 4423, paragraph 25, and Case 23/77 *Westfälischer Kunstverein* v *Hauptzollamt Münster* [1977] ECR 1985, paragraph 3.

3 — Case 200/84 *Daiber* v *Hauptzollamt Reutlingen* [1985] ECR 3363, paragraph 15, and Case 252/84 *Collector Guns* v *Hauptzollamt Koblenz* [1985] ECR 3387, paragraph 12.

4 — *Daiber* and *Collector Guns*, *supra*.

specialized trade (postage stamps, antiques, etc.). They are very often of great value, out of all proportion to the value of their constituent materials'.

Consequently, 'a further characteristic of the articles in question, linked to the previous one, is that they are not traded on the ordinary market and may fetch a high price'. [5]

13. Applying those principles, the Court, in relation to two disputes concerning the importation of a motor car of some age and antique pistols and holsters, emphasized in particular that, whilst it is true that collectors' pieces are not normally used for their original purpose, it cannot be ruled out that their functional capacity may remain intact; and it also stated that collectors' pieces, within the meaning of Heading 99.05 of the CCT (which are also exempted from duty), are relatively rare articles which are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value. [6]

14. The line of reasoning followed by the Court in the judgments cited seems to me to be the one most likely to lead to a solution which fulfils the requirements both of legal certainty and of fairness.

That applies also in a case such as this one where there can be no question of recourse to Heading 99.05 — collectors' pieces — which was not envisaged in the questions submitted by the national court and in any event is not feasible since the pre-conditions for classification under that heading (in particular 'historical interest') are lacking. [7]

In this case too it is necessary to identify a series of criteria which, taken together, may enable the customs authorities to determine objectively whether specified goods are works of art.

For that purpose, I consider that the fact that a particular article is executed by hand, is signed by the author of the work and is produced in extremely limited numbers is certainly an important factor such as to distinguish it from similar articles of a commercial character.

The high price, which in any event bears no relation to the intrinsic value of the constituent elements of the sculpture or statuary, and a finding that the work in question is the subject of transactions outside the usual market for similar articles, may therefore provide further confirmation of the fact that the article in question is not in a position to compete with similar works, and although it may be similar in form to articles in common use, it is not in fact intended to be used for its ostensible purpose.

5 — *Daiber*, *supra*, paragraph 20, and *Collector Guns*, *supra*, paragraph 17

6 — Ibid.

7 — *Daiber*, paragraphs 22 to 24 and *Collectors Guns*, paragraphs 19 to 21, *supra*.

In other words, it seems to me that where an article executed entirely by hand, signed by an artist and produced in an extremely limited edition, the individual items of which are not identical but merely similar, is sold at a high price which, however, bears no relation to the intrinsic value of its constituent elements and is the subject of transactions within the art market, it may be assumed that the article in question, even if similar in form to articles in common use, is not normally used for its apparent purpose and in fact constitutes a work of art within the meaning of the CCT.

15. In the light of the foregoing considerations, I propose that the court reply as follows to the questions submitted by the Finanzgericht München:

'Glass spheres having a flat base and described as "paperweights", which are made entirely by hand by recognized glassware artists, in limited numbers, decorated with two- or three-dimensional representations, are to be regarded as original works of sculpture (Heading 99.03) only where they are pieces which are the subject of special transactions outside the normal trade in similar utility articles, are of a high value that bears no relation to the intrinsic value of the constituent elements and therefore do not appear intended for use according to their normal purpose.'