OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 10 July 1990 *

Mr President,
Members of the Court,

1. The Tariefcommissie, Amsterdam, has asked the Court to give a preliminary ruling on the interpretation and validity of Commission Regulation (EEC) No 1388/85 of 24 May 1985 classifying goods under subheading 12.04 A of the Common Customs Tariff. [1]

Background

2. The request for a ruling has been made in connection with a dispute between Gebr. Vismans Nederland BV (hereinafter referred to as 'Vismans'), and the Inspecteur der Invoerrechten en Accijnzen (Inspector of import duties and excises) concerning the classification under the Common Customs Tariff of goods imported from the United States which, in a declaration made on 27 April 1987, were described as 'beet pulp pellets'. In its order for reference the Tariefcommissie states that the goods have the following objective characteristics:

(i) they are derived from sliced sugar beet and they form the residue of a completed process of sugar extraction;

(ii) they contain 12% sucrose, calculated by reference to the dry matter, including the sucrose in the binder;

(iii) they have been pressed into pellets;

(iv) as the technology now stands, extraction of further sugar from them would be uneconomic.

3. According to Vismans, the imported goods should be classified under Chapter 23 of the Common Customs Tariff, [2] entitled 'Residues and waste from the food industries; prepared animal fodder', more specifically under subheading 23.01 B I:

'23.03 — Beet pulp, bagasse and other waste of sugar manufacture; brewing and distilling dregs and waste; residues of starch manufacture and similar residues:

A. . . .

B. Other:

* Original language: Dutch.

1 — OJ 1985 L 140, p. 7.

2 — The customs tariff applicable at the time of the facts is that contained in 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).

I. Beet pulp, bagasse and other waste of sugar manufacture

II. . . .'.

At the time when the goods were imported, goods classified under this tariff subheading were free of import duties and agricultural levies.

However, the Inspector classified the imported goods under Chapter 12 of the Common Customs Tariff, entitled 'Oilseeds and oleaginous fruits; miscellaneous grains, seeds and fruits; industrial and medical plants; straw and fodder', more specifically under subheading 12.04 A:

'12.04 — Sugar beet, whole or sliced, fresh, dried or powdered; sugar cane:

A. Sugar beet

B. . . .'

In accordance with that classification the Inspector demanded levies in respect of the imported goods amounting to HFL 412 024, which is a multiple of the declared customs value (HFL 174 875).

4. The Inspector's decision to classify the imported goods under tariff subheading 12.04 A is based on the aforesaid Regulation No 1388/85 in which the Commission, exercising the powers conferred upon it by Council Regulation (EEC) No 97/69,[3] set a limit for sucrose content as a criterion for distinguishing between sugar beet and beet pulp. Article 1 of Regulation No 1388/85 provides:

'Sliced sugar beet, partly de-sugared, whether or not pelletized either directly by compression or by the addition of a binder (up to 3% by weight), having a sucrose content (including any sucrose contained in the binder) exceeding 10% by weight by reference to the dry matter, shall be classified in the Common Customs Tariff under subheading:

12.04 — Sugar beet, whole or sliced, fresh, dried, or powdered; sugar cane:

A. Sugar beet'.

5. The Tariefcommissie considers that the imported goods should be classified as 'beet pulp' by reason of their objective characteristics. It points out however that such a classification seems to be contrary to the abovementioned provision of Regulation No 1388/85. In that connection it has referred the following two questions to the Court:

3 — Council Regulation (EEC) No 97/69 of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (OJ, English Special Edition 1969 (I), p. 12), as amended by Council Regulation (EEC) No 2055/84 of 16 July 1984 (OJ 1984 L 191, p. 1). Regulation No 97/69 has since been repealed by Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

'(1) Do the goods in issue, which contain 12% sucrose but must be regarded as pelletized "beet pulp" which has been de-sugared as far as economically feasible, nevertheless fall under the term "partly de-sugared sugar beet" in Article 1 of Commission Regulation (EEC) No 1388/85 of 24 May 1985?

(2) If so, is the regulation referred to in Question 1 valid?'

The scope of Regulation No 1388/85

6. The Tariefcommissie's first question is designed to establish whether goods having the characteristics which it describes fall within the scope of Regulation No 1388/85.

Vismans claims that the regulation covers only sugar beet which has not undergone a completed process of sugar extraction. In support of that view it refers to the Customs Cooperation Council's Explanatory Notes concerning Heading 23.03 of the Customs Cooperation Council nomenclature, which describe 'beet pulp' as the residue which remains after the sugar has been extracted from the root of the sugar beet. Goods from which all the sugar has been extracted in so far as is economically feasible cannot therefore, in Vismans' view, be described as 'partly de-sugared sugar beet' for the purposes of Regulation No 1388/85 even where the remaining sugar content exceeds 10%.

7. In my view, that interpretation is not consistent with the purpose or wording of the regulation. It is apparent from the preamble that the Commission wished to lay down a specific criterion for determining whether the residue which remains after the sugar has been extracted from sugar beet should be classified as 'sugar beet' or as 'beet pulp'. The Commission opted for a single criterion, namely the remaining sugar content. Where the residue contains more than 10% sugar by weight, including the sugar contained in the binder, it is regarded as 'sugar beet'. Other criteria, such as the fact — referred to by Vismans — that it is not economically feasible to extract further sugar from the residue, are disregarded. It follows that the goods fall within the scope of Regulation No 1388/85 solely because of the finding that their sugar content exceeds 10%.

The validity of Regulation No 1388/85

8. I therefore turn to the second question: given that the goods fall within the scope of Regulation No 1388/85, is that regulation valid?

I should point out first of all that Commission Regulation No 1388/85, adopted on the basis of Council Regulation No 97/69, *may clarify* the scope of tariff Headings 12.04 ('sugar beet') and 23.04 ('beet pulp') but *may not amend* it. If that were not so, the Community would not comply with its obligations under the Treaty of 15 December 1950 on Nomenclature for

the Classification of Goods in Customs Tariffs.[4] That restriction on the Commission's powers is moreover expressly stated in the second recital of Regulation No 97/69[5] and it is also referred to in the Court's case-law concerning the interpretation of that regulation.[6]

9. In those cases the Court stated that the Commission, acting in close cooperation with the customs experts of the Member States, had a wide power of discretion in clarifying the subject-matter of headings of the Common Customs Tariff. However, that discretion, wide though it may be, may not be exercised arbitrarily and may not, in the guise of clarification, consist in amendment of the Tariff nomenclature.

As the Court has consistently held, the Commission must also take account of the fact that:

'in the interests of legal certainty and ease of verification, goods must be classified on the basis of the objective characteristics and properties of products which can be ascertained when customs clearance is obtained'.[7]

In the regulation in question the Commission undoubtedly used a criterion which was objective and easy to verify in order to distinguish sugar beet more clearly from beet pulp, namely the remaining sucrose content. The question remains whether the Commission, by setting the sucrose content at a maximum of 10% by weight, did not arbitrarily — without applying an appropriate distinguishing criterion, that is to say one related to the determinant characteristics of the product (see paragraph 10 below) — classify as sugar beet a group of products which in reality constitute beet pulp and hence attribute to the terms 'beet pulp' and 'sugar beet' used in the Common Customs Tariff meanings which resulted in those products being classified, contrary to their nature, in a heading of the Common Customs Tariff that was not intended for them. Specifying tariff headings in such a manner so as to take no account of the essential characteristics of the products concerned amounts in substance to an amendment of the Common Customs Tariff, something which does not fall within the powers of the Commission.[8]

In answering this question it should be remembered that de-sugared sliced sugar beet generally has a sugar content of 6 to 7%, but that the sugar extraction process can in some cases, depending *inter alia* on climatic conditions (for example where the sugar beet is frozen), result in a product with more than 10% sucrose content.

4 — For the Community's obligations in this matter see the judgment in Case 38/75 *Nederlandse Spoorwegen* v *Inspecteur der invoerrechten en accijnzen* [1975] ECR 1439.

5 — According to the second recital, second sentence, of Regulation No 97/69 the provisions should 'specify the content of the headings or subheading of the Common Customs Tariff without, however, amending the text thereof'

6 — See the judgments in Case 37/75 *Bagusat* [1975] ECR 1339, Case 158/78 *Biegi* [1979] ECR 1103, Joined Cases 87, 112 and 113/89 *Bagusat* [1980] ECR 1159 and Case 141/86 *Imperial Tobacco* [1988] ECR 57

7 — See, *inter alia*, the judgment in Case C-233/88 *Gijs van de Kolk* v *Inspecteur der invoerrechten en accijnzen* [1990] ECR I-265, paragraph 12, in which the Court referred to its judgment in Case 38/76 *Luma* v *Hauptzollamt Duisburg* [1976] ECR 2027, paragraph 7

8 — Let us take a caricatural example: The Commission may not, by way of clarification of the Common Customs Tariff, classify a bicycle as a 'motor vehicle' on the basis of the criterion — which is certainly objective and easy to verify — that a bicycle, like a motor vehicle, has wheels. That criterion does not take account of the essential characteristic adopted by the Common Customs Tariff, namely that it is driven not by a motor but by pedals (see the Explanatory Notes of the Customs Cooperation Council to Heading 87.12 of the Customs Cooperation Council nomenclature)

10. According to the Common Customs Tariff, the essential characteristic of beet pulp is that it is a waste product of the sugar industry. That is apparent from the heading to Chapter 23 and from the wording of subheading 23.03 B I. Beet pulp appears in Chapter 23 entitled 'Residues and waste from the food industries' and is classified under subheading 23.03 B I with 'other waste of sugar manufacture'. It is also apparent from the Explanatory Notes of the Customs Cooperation Council, in which, as I have already pointed out, beet pulp is described as the residue which remains after the sugar has been extracted from the root of the sugar beet. Finally, it is in accordance with the ordinary meaning attributed to the term. [9]

The terms 'residue' and 'waste' used in Chapter 23 are not equivalent terms, as is apparent from the Court's case-law concerning the classification of goods, in particular soya pulp under Heading 23.04 of the Common Customs Tariff. In its judgments in *Fancon* [10] and in *Cargill*, [11] the Court stated that the term 'residue' was not to be confused with that of 'waste'. According to the Court, 'waste' is a virtually worthless substance which is already to be found in the basic products and does not undergo any change in the course of the extraction process. A 'residue' is, on the other hand, a product which is the direct result of the extraction process. In classifying beet pulp, Heading 23.03 uses the term 'waste' rather than 'residues'. I do not attach too much importance to the use of that term. Indeed in the Explanatory Notes of the Customs Cooperation Council concerning Heading 23.03 of the Common Customs Council Nomenclature, beet pulp is described as a 'residue'. In my view, what is important is that the Court's case-law states that the goods in question, whether they are to be regarded as 'waste' or 'residues', are always the end result of an industrial extraction process.

The *Fancon* judgment is also interesting in another respect. In that case the Court stated that the fact that all the oil has not been removed from flour extracted from soya does not preclude classification of the goods as 'residue'. The Court stated that the de-fatting process was taken as far as technology made possible and that the presence of quantities of residual oil did not prevent the goods from being classified under the Common Customs Tariff on the basis of their 'main property' (or, as I have referred to it, their 'essential characteristic' for the purposes of classification in the Common Customs Tariff).

11. It therefore appears that beet pulp must be regarded as a final product derived from sugar beet, more specifically a waste product, which after undergoing an extraction process, in this case a sugar extraction process, can no longer be used by

9 — In *Van Dale, Groot woordenboek der Nederlandse taal*, (revised 11th Edition) the word 'pulp' is defined, as in the Explanatory Notes of the Customs Cooperation Council, as 'the product which remains after extraction of the sugar and surplus water from sliced sugar beet'. In *Le Petit Robert, dictionnaire alphabétique et analogique de la langue française*, 1986 Edition, the term 'pulp' is defined as 'the paste-like residue from the processing of certain vegetables in the sugar and distilling industries'.

10 — Case 129/81 *Fancon* v *SIAT* [1982] ECR 967, paragraph 14).

11 — Case 268/87 *Cargill* v *Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 5151, paragraph 11).

the sugar industry as a raw material. If the Commission wishes to clarify the term in a regulation by establishing a limit for sucrose content, then that limit must be based — even by the use of suitable margins — on whether or not it is possible for the sugar industry to extract further sugar from the goods concerned. If that limit does not take account of that essential characteristic of beet pulp, then the Commission regulation will have the result that the imported goods, which are in reality beet pulp and not sugar beet, are subject to the higher levy for sugar beet that was introduced in order to prevent the disruption of the Community sugar market, even though the goods cannot be used as a raw material by the sugar industry. For the most part this in practice has the effect of denying such products access to the Community for reasons which are unrelated to the common organization of the market. [12]

12. In the fourth recital in the preamble to Regulation No 1388/85 it is stated that it is 'appropriate' to set the limit for sucrose content at 10%, but no justification is given for that statement. From the explanations given by the Commission at the hearing it appears that that percentage was in fact the result of discussions between experts from the Member States who based themselves on the sucrose content which usually remained in practice following extraction of the sugar and not the sucrose content which would allow further economic extraction of sugar. The result of those discussions was initially set out in an explanatory note to the Customs Tariff of the European Communities. In that Note, goods with more than 8% sucrose by weight, excluding the sucrose in the binder, were regarded as sugar beet. The percentage specified in that Note was adopted in Regulation No 1388/85, except that the sucrose content in the binder was now included and the total sucrose content rounded up to 10% by weight. From the background to the regulation it cannot be concluded that the limit adopted to distinguish sugar beet from beet pulp was fixed in a relevant and hence not an arbitrary manner, with reference to a criterion which takes account of what the Common Customs Tariff regards as the essential characteristic of beet pulp, namely that the goods can no longer be used as raw material by the sugar industry.

13. In its order for reference the Tariefcommissie finds as a matter of fact that the imported goods containing 12% sucrose have undergone a completed process of sugar extraction and that it is not economically feasible to extract further sugar from them. The Commission did not dispute that finding. However, it states that Community rules cannot be based exclusively on the circumstances existing at the time of their adoption. They must also

12 — In this case the Inspector demanded levies amounting to several times the value of the imported beet pulp pellets (see paragraph 3).

contemplate circumstances which may occur in the future, for example if prices on the sugar market — a traditionally unstable market — increased significantly.

The Commission is undoubtedly correct in stating that Community rules must contemplate future circumstances; however, its provisions must also be based on eventualities which may reasonably occur. On that point the Commission did not refute Vismans' arguments to the effect that it cannot reasonably be anticipated that market prices will ever fluctuate to such an extent that it becomes economically feasible for the sugar industry, having regard to the high costs associated therewith, to extract further sugar from beet pulp with a sucrose content of 12%. On the contrary, at the hearing it became apparent that the Commission was unaware of any case in which the sugar industry had in the past extracted sugar from sugar beet which had already undergone a process of sugar extraction.

14. For the foregoing reasons my conclusion is that the Commission has done more than merely clarify the tariff headings concerned. It has on the contrary redefined them by setting, for the purpose of distinguishing between sugar beet and beet pulp, a sucrose content so low that goods which by reason of what the Common Customs Tariff regards as their essential (or principal) characteristic [13] constitute beet pulp may no longer be classified under subheading 23.03 B 1.

Conclusion

15. In conclusion I propose that the Court should reply as follows to the questions submitted:

'(1) A product with a sucrose content of 12% by weight, including the sucrose contained in the binder, which is the residue of a completed process of sugar extraction from sugar beet falls within the scope of Commission Regulation (EEC) No 1388/85 of 24 May 1985.

(2) That regulation is invalid in so far as it requires a product which is the end result of a completed process of sugar extraction from sugar beet and which is of no further use to the sugar industry as a raw material to be classified under tariff subheading 12.04 A ("sugar beet").'

13 — See the judgment in *Fancon*, cited above.