OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 12 October 1989 *

Mr President,
Members of the Court,

1. By an order received at the Court Registry on 16 August 1988 the Tariefcommissie, Amsterdam, requested a preliminary ruling under Article 177 of the EEC Treaty on a question concerning the validity of Additional Note 6(a) of Chapter 2 of the Common Customs Tariff in the Annex to Council Regulation (EEC) No 3400/84 of 27 November 1984 amending Regulation (EEC) No 950/68 on the Common Customs Tariff. [1]

2. The Common Customs Tariff headings in that annex which are at issue in the present case are worded as follows: 'Dead poultry (that is to say fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), fresh, chilled or frozen' (Heading 02.02) and 'Other prepared or preserved meat or meat offal' (Heading 16.02).

With regard to Heading 16.02, it should be noted that the corresponding Explanatory Note of the Customs Cooperation Council (EN/AS 35, February 1982) states that it covers in particular: 'Meat and meat offals prepared or preserved by other processes not provided for in Chapter 2, including those merely covered with batter or bread crumbs, truffled or seasoned (e. g. with pepper and salt)'. [2]

It should also be noted that the Court itself, called upon to define the scope of Heading 16.02, ruled that:

'Heading 16.02 of the Common Customs Tariff must be interpreted as meaning that it also includes poultrymeat to which salt and pepper have been added even if the pepper may only be detected microscopically'. [3]

After the judgment in Case 175/82 was delivered, the Council, by means of Regulation No 3400/84, inserted into Chapter 2 of the Common Customs Tariff the Additional Note 6(a) at issue, which provides that:

'"Seasoned meat" of poultry, swine or bovine animals, excluding the products described in paragraph (c), falls within subheadings 16.02 B I, 16.02 B III (a) and 16.02 B III (b) 1 (aa) respectively. "Seasoned meat" shall be uncooked meat that has been seasoned either in depth or over the whole surface of the product with seasoning either visible to the naked eye or clearly distinguishable by taste.'

* Original language: Italian.

1 — OJ 1984, L 320, p. 1.

2 — It should be pointed out that although the Explanatory Notes to the Common Customs Tariff cannot modify the text of the Tariff itself, they nevertheless constitute an important factor in its interpretation enabling the scope of the various tariff headings or subheadings to be defined or clarified; see the judgment of 26 February 1980 in Case 54/79 *Hako-Schuh* v *Hauptzollamt Frankfurt am Main-Ost* [1980] ECR 311, paragraph 6.

3 — See the judgment of 17 March 1983 in Case 175/82 *Dinter* v *Hauptzollamt Köln-Deutz* [1983] ECR 969, paragraph 11.

3. It is precisely in application of Additional Note 6(a) that the Netherlands customs authorities refused to classify the goods presented by Van de Kolk under subheading 16.02 B I (a) 1 (bb), because they considered that the goods in question did not meet the conditions laid down in that note,[4] and in particular that the seasoning was not visible to the naked eye nor distinguishable by taste.

Van de Kolk therefore had to pay HFL 50 675.70 by way of agricultural levies and monetary compensatory amounts.

The Tariefcommissie, Amsterdam — to which Van de Kolk appealed — found that Article II(b)(ii) of the Brussels Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950,[5] which is binding on the Community, provides that each Contracting Party undertakes that, as respects its customs tariff . . . it will make no changes in the chapter or section notes in a manner modifying the scope of the chapters, sections and headings as laid down in the Nomenclature. The Tariefcommissie considered that Additional Note 6(a) may have changed the scope of Heading 16.02, as interpreted by the Court of Justice, in so far as it permits only meats with seasoning which is visible to the naked eye or distinguishable by taste to be regarded as seasoned but not meats with seasoning which is visible microscopically, as referred to by the Court. It has therefore asked the Court of Justice to rule on the validity of such a change.

4. However, the argument put forward by the national court rests on a premiss whose basis we must examine in more detail.

The Tariefcommissie took the view, as is expressly stated in the order making the reference, that in its judgment in *Dinter* the Court ruled on a particular aspect of the relationship between Headings 02.02 and 16.02 set out in the Convention on the Nomenclature and reproduced by the Community in the Common Customs Tariff, and that the Court of Justice thereby implicitly indicated the substance of the Community's obligation in that regard when applying the Convention.

5. In order to determine whether that view is correct, it is necessary first of all to describe — albeit briefly — the system set up by the Convention on the Nomenclature.[6]

In the Brussels Convention, which entered into force on 11 September 1959, the Contracting Parties noted that the progressive removal of quantitative restrictions results in customs tariffs becoming an increasingly important factor

4 — To be precise, the Customs Inspector reached that conclusion by wrongly applying a substantively identical provision in Commission Regulation (EEC) No 3678/88 (OJ 1988, L 366, p. 53). The Tariefcommissie then cleared up the error by correctly identifying the applicable provision.

5 — *United Nations Treaty Series*, Vol 347, p 127 (official texts in English and French)

6 — There is, moreover, no dispute that the Community has taken over from the Member States the commitments arising from the convention in question and is bound by those commitments; see the judgment of 19 November 1975 in Case 38/75 *Nederlandse Spoorwegen* v *Inspecteur der Invoerrechten en Accijnzen* [1975] ECR 1439, p. ra-graphs 21 to 23. In that regard it should be pointed out that in Council Decision 87/369/EEC of 7 April 1987 (OJ 1987, L 198, p. 1), the Council approved, on behalf of the Community, the International Convention on the Harmonized Commodity Description and Coding System, which was adopted in Brussels on 14 June 1983 and which was intended to replace the 1950 Brussels Convention as the international basis for customs tariffs and statistical nomenclatures.

in international trade and, desiring to simplify international customs tariff negotiations, decided to adopt a common basis for the classification of goods.[7]

The fundamental provision in the Convention is Article II(a) under which each Contracting Party undertakes to compile its customs tariff in conformity with the Nomenclature set out in the annex to the Convention, subject to such textual adaptations as may be necessary to give effect to the Nomenclature in its domestic law as from the date on which the Convention comes into force in respect of it.

The Convention requires each Contracting Party, as respects its customs tariff, not to omit any of the headings of the Nomenclature nor to add any new headings nor to depart from any of the numbers of the headings (see Article II(b)). The Contracting Parties are also required to include in their own customs tariffs the General Rules for the Interpretation of the Nomenclature and to make no changes in the chapter or section notes in a manner modifying the scope of the chapters, sections and headings as laid down in the Nomenclature.

Articles III, IV and IX establish a mechanism which is institutionalized and permanent — albeit not binding — with a view to securing uniformity in the interpretation and application of the provisions of the Convention relating, in particular, to the application of the Nomenclature.

To achieve that aim, Article III provides that the Customs Cooperation Council[8] is to establish a Nomenclature Committee (hereinafter referred to as 'the Committee') on which the Contracting Parties are represented.

The functions of the Committee, exercised under the authority of the Customs Cooperation Council and in accordance with any directions which the Council may give, are listed in Article IV; they are: (a) to collate and circulate information concerning the application of the Nomenclature in the customs tariffs of the Contracting Parties; (b) to study the procedures and practices of the Contracting Parties in relation to the classification of goods and, accordingly, to make recommendations to the Council or to the Contracting Parties to secure uniformity in the interpretation and application of the Nomenclature; (c) to prepare explanatory notes as a guide to the interpretation and application of the Nomenclature; (d) on its own initiative or on request, to furnish to Contracting Parties information or advice on any matters concerning the classification of goods; (e) to submit to the Council proposals for any amendments to the Convention; (f) to exercise such other powers and functions of the Council in relation to classification of goods as the Council may delegate to it.

Finally, Article IX provides that any dispute between the Contracting Parties concerning the interpretation or application of the Convention is so far as possible to be settled by negotiation between them. Any dispute which is not settled by negotiation is to be referred by the Contracting Parties in dispute to the Committee which can make recommendations or, if the Committee is unable to settle the dispute, refer the matter to the Cooperation Council which can in turn make recommendations. The Contracting Parties may agree in advance to

7 — See the preamble to the Convention.

8 — Established by the Convention establishing the Customs Cooperation Council adopted in Brussels on 15 December 1950 (*United Nations Treaty Series*, Vol. 157, p. 129).

accept the recommendations of the Committee or Council as binding.

6. In my view, two basic features emerge from the foregoing.

In the first place, contrary to what is claimed by the plaintiff in the main proceedings, it is clear that the individual is not directly affected by the tariff headings as laid down in the Nomenclature in the annex to the Convention.

As we have seen, the Nomenclature is no more than the basis upon which the Contracting Parties establish their own customs tariffs; it is the headings in those tariffs that the individual comes into contact with and that the Court is usually called upon to interpret.

Secondly, it should be emphasized that, precisely because the interpretation of the various headings is of a highly technical nature and must take into account their practical implementation by the Contracting Parties, the Convention makes provision for an institutionalized and permanent system with a view to securing uniformity in the interpretation of the headings of the Nomenclature.

In that context, the interpretation of the various tariff headings, as laid down in the Common Customs Tariff, given by the Court of Justice of the European Communities, is but one part of a wider procedure for interpreting the headings of the Nomenclature. Similarly, the regulatory and legislative practice applying in the legal orders of the Contracting Parties also influence the interpretation of the headings of the Nomenclature.

7. It follows that it is one thing to interpret a heading of the Common Customs Tariff without a specific additional note explaining its scope but quite another to assess the validity of any additional note, drawn up after delivery of a judgment interpreting the heading of the Common Customs Tariff, with regard to the obligation imposed by the Convention not to change the scope of the corresponding heading of the Nomenclature.

To consider, on the other hand, that a given interpretation by the Court of a heading of the Common Customs Tariff can automatically be applied to the corresponding heading of the Nomenclature in the annex to the Convention and necessarily precludes the adoption by the Community legislature of additional notes which attribute a different scope to that heading, would lead to the unfortunate result, which is moreover extraneous to the logic of an inherently dynamic system of freezing the interpretation of the headings of the Nomenclature, permanently binding the legislature to a particular judicial interpretation.

8. The above considerations help to define the scope of the judgment in *Dinter*, in which the Court interpreted Heading 16.02 of the Common Customs Tariff.

In the judgment in *Dinter*, in a case where there was no specific additional note and the explanatory note was in fact not very enlightening, since it referred to meat seasoned with salt and pepper without specifying what is actually meant by 'seasoned meat', the Court merely applied a general principle of interpretation according to which the decisive criterion for the classification of goods under the Common

Customs Tariff must generally speaking be sought in the objective characteristics and properties of the products.[9]

The Court thus concluded that Heading 16.02 of the Common Customs Tariff must be interpreted as meaning that it also includes poultry meat to which salt and pepper have been added even if the pepper can only be detected microscopically.

9. The Council subsequently adopted Additional Note 6(a) in which it specified that 'seasoned meat' is uncooked meat that has been seasoned either in depth or over the whole service of the product with seasoning either visible to the naked eye or clearly distinguishable by taste.

In the present case the Court is called upon to determine not whether the additional note in question is in conformity with the interpretation of Heading 16.02 of the Common Customs Tariff given in its judgment in *Dinter*, a question which would be irrelevant since the Council may legislate freely, but rather — and this is something quite different — whether, as the result of the adoption of such a note, the Council has necessarily changed the scope of the corresponding heading in the Nomenclature of the Convention, a heading which the Court, as I have said, did not interpret in its judgment in *Dinter*.

10. It should above all be pointed out in that regard that the Court has already had occasion to rule on the validity of the criterion of visibility to the naked eye as a decisive requirement for the customs classification of goods.

9 — See paragraph 10 of the judgment in *Dinter*, cited above.

In Case 317/81[10] the Court stated that the expression 'can be seen with the naked eye' in Note 2(A)(a) to Chapter 59 of the Common Customs Tariff is to be interpreted as meaning that the impregnation, coating or covering of the fabric must be directly visible on simple visual examination; the Court also pointed out that it is for the Member States to designate the authorities and persons required to undertake the tariff classification of products and to decide their training in order to enable them properly to fulfil such tasks.

The Court noted that although difficulties caused by the application of a Community provision may be relevant to its interpretation, they are not of such a nature as to call its validity in question, and then stated that the application of the note in question, as interpreted above, did not seem to present special difficulties.

It held that in cases where the persons entrusted with the task by the Member State were not able by simple visual examination to ascertain that the fabric had been treated, it followed from the note that such treatment, if it had in fact taken place, was not sufficient to transfer the fabric from the tariff heading normally applicable to a fabric of that type to another specific heading. The note in fact rejected any examination exceeding the capacities of such persons for the purpose of checking whether or not the fabric had undergone such treatment.

11. With regard to the adoption of the criterion of taste as a method for classifying goods, it must be stated that, as the Commission has rightly pointed out, the

10 — See the judgment of 30 September 1982 in Case 317/81 *Howe & Bainbridge BV* v *Oberfinanzdirektion Frankfurt am Main* [1982] ECR 3257, paragraphs 14, 17, 19 and 20.

science of sensory analysis has been progressively developed and has become an increasingly widely used tool for analysing food products.

Sensory analysis was standardized in the Federal Republic of Germany by Standard DIN 10954 and received international acceptance when the International Standards Organization, Geneva, devised Standard ISO 4120 in 1983.

When applied scientifically, sensory analysis is highly accurate and the four basic flavours, namely sweet, acid, salty and bitter, can be detected in small amounts.

12. Finally, it must be emphasized that the Commission has explained the reasons for the adoption of such rigorous methods of classification.

The addition of some seasoning or other to meat falling within Chapter 2, even in extremely small quantities and only on a part of the surface, might enable the meat to be transferred from Chapter 2 to Chapter 16. It would later be possible to restore the meat to its initial state, thereby causing a serious risk of distortion of trade.

The adoption of the criterion of taste, as opposed to that of visibility to the naked eye, is also attributable to the increasingly widespread use of seasonings which are liquid and therefore not visible to the naked eye.

13. In the light of the above considerations, namely (a) the generic nature of Heading 16.02 (other prepared or preserved meat or offal) of Chapter 16 (concerning preparations of meat, of fish, of crustaceans or molluscs) of the Nomenclature in the annex to the Convention; (b) the fact that Explanatory Note EN/AS 35 of February 1982 is of little help in interpreting the heading in question since it does not explain what is to be understood by 'seasoned meat'; (c) the need for a better definition of the concept of seasoning, since it is reasonable to argue that the mere addition of a few grains of salt or pepper does not really constitute seasonings, I conclude that consideration of the question referred to the Court has revealed nothing to suggest that specific information such as that given in the note at issue is such as to change the scope of Heading 16.02 in relation to Heading 02.02 of the Nomenclature in the annex to the Convention.

I therefore propose that the reply to the Tariefcommissie, Amsterdam should be that consideration of Additional Note 6(a) to Chapter 2 of the Common Customs Tariff, as laid down by the Council in the annex to Regulation No 3400/84, has disclosed no factor of such a kind as to affect the validity of the said note.