OPINION OF ADVOCATE GENERAL DARMON

delivered on 26 February 1992 *

Mr President,
Members of the Court,

1. The Bundesfinanzhof has submitted a question to the Court on the classification in the Common Customs Tariff [1] ('CCT') of 'unsterile calf foetus serum'.

2. In 1982 Boehringer Mannheim GmbH ('Boehringer') imported into the Community deep-frozen goods which were declared as 'calf foetus serum'.

3. The Hauptzollamt (Principal Customs Office) Mannheim released the goods for free circulation, originally classifying them under sub-heading 05.15 B [2] ('animal products not elsewhere specified or included; dead animals of Chapter 1 or Chapter 3, unfit for human consumption' other than fish, crustaceans and molluscs), exempt from customs duties.

4. The customs authorities subsequently changed their interpretation and considered that the goods came under heading 38.16 [3] ('prepared culture media for development of micro-organisms'), to which an autonomous duty of 11% and a conventional duty of 6.4% apply.

5. Boehringer was required to pay DM 47 810.95 in respect of those duties; it brought an application against the later classification to the Finanzgericht, whose decision was in turn appealed against by the Hauptzollamt.

6. The Bundesfinanzhhof, which is thus hearing the appeal on a point of law, asks the following questions:

'Should unsterile calf foetus serum have been classified in 1982 under sub-heading 05.15 B or heading 38.16 of the Common Customs Tariff? If not, under which other heading of the Common Customs Tariff should such goods have been classified?'

7. Blood serum may be defined as the liquid part of the blood, consisting of plasma from which the fibrin has been removed. It is about 80% water, the remainder being a complex liquid.

* Original language: French.

1 — As amended by Council Regulation (EEC) No 3300/81 of 16 November 1981 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1981 L 335, p. 1).

2 — In Chapter 5, 'Products of animal origin, not elsewhere specified or included'.

3 — In Chapter 38, 'Miscellaneous chemical products'.

8. The goods imported by Boehringer cannot be included under sub-heading 05.15 B unless they cannot be included under a more specific heading. [4]

9. It must therefore first be ascertained whether calf serum comes under heading 38.16. If not, sub-heading 05.15 B will have to be considered.

10. Can calf serum be regarded as 'prepared culture media for development of micro-organisms' within the category of 'miscellaneous chemical products', in the same way as 'composite solvents and thinners for varnishes and similar products' (38.18), insecticides (38.11) and spirits of turpentine (38.07)?

11. The Customs Cooperation Council's explanatory notes on nomenclature state that heading 38.16 covers various *preparations* in which bacteria, moulds, yeast and other micro-organisms required for medical purposes (e. g., for obtaining antibiotics) or for other scientific purposes or in industry can find nourishment and multiply.

They are usually *prepared* from meat extracts, fresh blood or blood serum, and often contain additional ingredients. Acids, digestive ferments or alkalies may be *added* to bring them to the required degree of acidity or alkalinity, etc.

They ('Toutes ces *préparations*' in the French text) are usually in liquid form (broths), paste or powders but may also be in tablets or granule form, and are *sterilized* and put up in sealed glass bottles, tubes, ampoules or tins.

The heading *does not cover* [5] products not *prepared* as culture media, *for example*, blood or egg albumin (heading 35.02). [6]

12. The important words in the title of heading 38.16 and the explanatory notes are in my opinion the words 'prepared' and 'preparations'.

13. It is clear that a prepared culture medium for development of micro-organisms is a product which has been *processed* in order to obtain industrial products,

4 — See Rule 3(a) of the Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, in Regulation No 3300/81, cited above, Section 1.

5 — Emphasis in the Explanatory Notes.

6 — See the Explanatory Notes, February 1981 version, heading 38.16, my emphasis.

some of which are highly sophisticated: the note refers to antibiotics, for example.

14. Unsterile calf *foetus* serum is the liquid part of the blood obtained by decantation, as was not disputed by the representative of the Commission, who was questioned on this point at the hearing. Even in the deep-frozen state, it is a raw product, not a worked one. In my opinion, it therefore does not correspond to the definition of heading 38.16. [7]

15. The Commission, arguing that calf serum does nevertheless come under that heading, relies on Rule 2(a) of the general rules for the interpretation of the CCT, which states that 'any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as imported, the incomplete or unfinished article has the essential character of the complete or finished article'.

16. In the Commission's opinion, if unsterile serum cannot be classified under heading 38.16 as a finished product, it comes under that heading as an 'incomplete' or 'unfinished' article. [8] The Commission considers that all that is lacking to make the serum usable as a culture medium is sterilization. [9]

17. That argument is not convincing.

18. Firstly, the Explanatory Note to Rule 2(a) clearly states that that part of the rule 'does not normally apply' to goods of sections I to VI. [10] Calf serum can, however, only come under Section I (live animals; animal products) or Section VI (products of the chemical and allied industries).

19. Even if the wording 'not normally' means that it cannot be altogether excluded that Rule 2(a) of the rules of interpretation might exceptionally apply to a heading in Section VI, can it be maintained — without overstraining the wording of the provisions — that a prepared culture medium for development of micro-organisms is a 'complete' or 'finished' article, while serum in the untreated state is an 'incomplete' or 'unfinished' culture medium?

20. In *International Flavors and Fragrances* v *Hauptzollamt Bad Reichenhall* [11] the Court was invited to interprete the second sentence of Rule 2(a) of the rules of interpretation. [12] In that judgment the Court declined to regard morello cherry concentrate and black currant concentrate as fruit juice imported 'unassembled or disassembled'.

21. Similarly, an unsterile serum is not a prepared culture medium for development of micro-organisms in an unfinished state. The culture medium in question is not strictly

7 — For the same reasons, this product cannot come under heading 30.01 — referred to briefly by the representative of the Commission at the hearing — which includes *inter alia* 'other animal substances *prepared* for therapeutic or prophylactic uses, not elsewhere specified or included'.

8 — Observations of the Commission, p. 6.

9 — Ibid, p. 7.

10 — Point III of the explanatory note to Rule 2(a).

11 — Case 295/81 [1982] ECR 3239.

12 — Any reference in a heading to an article 'shall also be taken to include a reference to that article complete or finished ..., imported unassembled or disassembled.'

speaking a finished product but an intermediary product which is used as the basis for the development of micro-organisms which are in turn used for the manufacture of chemical or industrial products, and only these constitute the finished product. The inappropriateness of the terms shows sufficiently clearly here that Rule 2(a), intended essentially for industrial products of sections VII to XX of the CCT, does not apply to products of this type.

22. Furthermore, does unsterile serum have the 'essential character' of a prepared culture medium for the development of micro-organisms? The mere fact that it is used as a basis and an ingredient which goes to make that culture medium does not permit the conclusion that it has its 'essential character'. In fact, only a product which is so close to the finished product that it can come under the same tariff heading as the finished product can be accepted as having such character. It is thus necessary at the very least that the finished product can be recognized through the unfinished product. That is not the case here.

23. Secondly, as has been noted above, the *explanatory notes* of the nomenclature *clearly exclude from heading 38.16 products 'not prepared as culture media'*.

24. Finally, it is evident that a product which can be used for purposes other than the development of micro-organisms cannot come under heading 38.16. Although the representative of the Commission stated at the hearing that *sterile* serum was used solely for the constitution of culture media for development of micro-organisms, the representative of Boehringer casts doubt on that statement, mentioning other possible uses for the serum, *inter alia* in the production of diagnostic substances.

25. From this I conclude that, in the present state of the information available to the Court, it has not been shown that *unsterile* calf serum is used only for the purpose referred to in heading 38.16. [13]

26. To be sure, Council Regulation (EEC) No 1945/86 of 18 June 1986 temporarily suspending the autonomous Common Customs Tariff duties [14] classified 'unsterile blood serum obtained from the blood of a bovine foetus or non-immunized newly-born calf' under tariff heading 38.16. However, the purpose of that regulation was not to carry out a tariff classification. The indication of the tariff heading in the table annexed to the regulation was intended merely to identify as precisely as possible the goods in respect of which duties were suspended, by using the existing tariff classification. Consequently, Regulation No 1945/86 cannot be regarded as a classification, in the strict sense of the word, for Common Customs Tariff purposes.

27. I therefore consider that calf foetus serum does not come under heading 38.16.

28. Since heading 05.15 of the nomenclature ('animal products not elsewhere specified or

13 — See also the order of the Bundesfinanzhof of 25 September 1990, *in fine*.

14 — OJ 1986 L 174, p. 7.

included; dead animals of Chapter 1 or Chapter 3, unfit for human consumption') expressly includes 'animal blood, liquid or dry, edible or not', [15] calf serum must come under that heading, more specifically sub-heading B relating to products other than fish, crustaceans and molluscs.

29. In conclusion, the complete *consistency* of the tariff classification in this respect should be noted. Raw serum in its unprepared state comes under sub-heading 05.15 B. It is a generic product of animal origin. Serum prepared in such a way that it can be assimilated to a chemical product comes under heading 38.16; it falls within the category of 'Miscellaneous chemical products', the subject of Chapter 38 of the nomenclature.

30. There is accordingly no need to answer the second question put by the Bundesfinanzhof.

31. I therefore propose that the Court rule as follows:

(1) The Common Customs Tariff, as amended by Council Regulation (EEC) No 3300/81 of 16 November 1981, must be interpreted as meaning that calf foetus serum does not come under heading 38.16.

(2) Such a product comes under subheading 05.15 B.

15 — Explanatory notes to the nomenclature, point 1; see also point 1(a) of the notes to Chapter 5 of Section 1 of Part II of the Common Customs Tariff.