JUDGMENT OF THE COURT (SECOND CHAMBER)
6 OCTOBER 1983 [1]

Lohmann GmbH & Co. KG v Oberfinanzdirektion Frankfurt am Main (reference for a preliminary ruling from the Bundesfinanzhof)

(Common Customs Tariff — Classification of absorbent gauze — Heading No 30.04 and subheading 55.09 A I)

Case 289/82

Common Customs Tariff — Tariff headings — "Wadding, gauze, bandages . . . put up in retail packings for medical or surgical purposes" within the meaning of heading No 30.04 — Concept

Heading No 30.04 of the Common Customs Tariff must be interpreted as meaning that the expression "put up in retail packings for medical or surgical purposes" implies that a product, in order to be classified under that heading, must not exceed the dimensions which enable it to be sold by retail to any user, including individual persons. That heading therefore excludes a product which is packed in such a way that it can be sold, without re-packing, only to hospitals or other large-scale users.

In Case 289/82

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the action pending before that court between

LOHMANN GMBH & Co. KG, whose registered office is at Neuwied,

1 — Language of the Case: German.

and

OBERFINANZDIREKTION [Principal Revenue Office] FRANKFURT AM MAIN

on the interpretation of heading No 30.04 of the Common Customs Tariff,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, O. Due and K. Bahlmann, Judges,

Advocate General: G. F. Mancini
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. On 14 April 1981 Lohmann GmbH & Co. KG, (hereinafter referred to as "Lohmann") whose registered office is at Neuwied, applied to the Oberfinanzdirektion Köln [Principal Revenue Office, Cologne] for a binding customs tariff ruling (verbindliche Zolltarifauskunft) in respect of a product described as "absorbent gauze" (Verbandmull) imported from Yugoslavia.

2. The product is a bleached, permeable, plain-weave fabric, wholly of cotton, 80 centimetres wide, concertina-folded, packed in five pieces of 40 metres each, labelled and not impregnated or coated with pharmaceutical substances; it is used for medical or surgical purposes.

3. The Oberfinanzdirektion Köln referred the request to the Oberfinanzdirektion Frankfurt am Main which, by an official tariff classification opinion of 19 May 1981, classified the product under tariff subheading 55.09 A I of the Common Customs Tariff ("Other woven fabrics of cotton, containing 85% or more by weight of cotton, of a width of less than 85 cm"). Products classified

under that tariff subheading were subject at the material time to an autonomous customs duty of 17% and a conventional customs duty of 13%.

4. On 5 June 1981 the company lodged an objection in respect of that decision with the Oberfinanzdirektion Frankfurt am Main.

It supported its objection by arguing that the product in question was covered by Chapter 30 (Pharmaceutical products) and in particular by tariff heading No 30.04 of the Common Customs Tariff (Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in retail packings for medical or surgical purposes). At the material time an autonomous duty of 17% and a conventional duty of 10.1% were prescribed in respect of goods covered by that heading.

5. By a decision of 10 August 1981 the Oberfinanzdirektion Frankfurt am Main rejected the objection. It considered that although the product in question was, by virtue of its packaging and labelling, put up in retail packings, that was not done for medical or surgical purposes on account of the dimensions of the product; that conclusion was confirmed by Commission Regulation (EEC) No 2282/79 of 17 October 1979 on the classification of goods under subheading 55.09 A I of the Common Customs Tariff. (Official Journal 1979, L 262, p. 23), Article 1 of which provides:

"Lengths of absorbent cotton fabric (known as 'gauze'), not impregnated or coated with pharmaceutical substances, 100m long and 0.65 m wide, concertina-folded, individually wrapped and labelled, shall be classified in the Common Customs Tariff under subheading:

55.09 Other woven fabrics of cotton:

A. Containing 85% or more by weight of cotton:

I. Of a width of less than 85 cm."

6. Lohmann appealed to the Bundesfinanzhof [Federal Finance Court], against that decision.

7. The Bundesfinanzhof, by order of its Seventh Senate dated 12 October 1982, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling under Article 177 of the Treaty:

"1. Is tariff heading No 30.04 of the Common Customs Tariff to be interpreted as meaning that the phrase 'put up in retail packings for medical or surgical purposes' requires conformity with specific maximum dimensions?

2. If the answer to Question 1 is in the affirmative, what are those maximum dimensions?"

8. The order of the Bundesfinanzhof was registered at the Court of Justice on 3 November 1982.

9. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 5 January 1983 by the Commission of the European Communities, represented by its Legal Adviser, R. Wägenbaur, and by T. van Rijn, a member of its Legal Department, and on 20 January 1983 by Lohmann, the plaintiff in the main proceedings, represented by D. Ehle, Rechtsanwalt, of Cologne.

10. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. Nevertheless it requested the plaintiff in the main proceedings to transmit two documents to it; this was done within the period laid down. The Court also requested Lohmann and the Commission to clarify a number of questions at the hearing.

11. By order of 9 March 1983 the Court assigned the case to the Second Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure of the Court.

II — Written observations submitted to the Court

1. *Lohmann*, the plaintiff in the main proceedings, considers that the product in question is covered by heading No 30.04 of the Common Customs Tariff on the basis that it is gauze put up in retail packings for medical or surgical purposes.

A — The facts

(a) It states that the absorbent gauze imported from Yugoslavia is a product which conforms to German Industry Standard DIN 61630 formulated by the Ausschuß Krankenhauswesen im deutschen Normenausschuß [the Hospital Committee of the German Standards Association] and by the Fachnormenausschuß Textil- und Textilmaschinenindustrie im deutschen Normenausschuß [the Textile and Textile Machinery Industry Standards Committee of the German Standards Association]. According to Standard DIN 61630 the gauze may be delivered either in lengths of 40 m in a package of five such pieces laid one on top of the other or in lengths of 240 m in rolls.

(b) The trade description of the product in question corresponds to specifications in the Pharmacopoeia Europaea.

(c) Lohmann sells the product in question without altering it in any way, without repacking it and without separating the individual pieces. 91.6% thereof is delivered in the Federal Republic of Germany to hospitals, 4.3% to chemists and 4.1% to first-aid centres in companies and other large-scale consumers. The purchasers use the product directly in their medical and surgical work and each time cut the amount of gauze which they require.

(d) According to an expert report drawn up by the Bundesvereinigung Verbandsstoffe und medizinische Hilfsmittel eV [Federal association for dressings and medical appliances] the gauze imported by Lohmann is, according to the terms of tariff heading No 30.04, put up in retail packings for medical or surgical purposes by virtue of the fact that it proceeds directly to the consumer for use in the manner intended without any alteration.

B — First question

(a) A literal and semantic interpretation of tariff heading No 30.04 of the Common Customs Tariff with regard to the concept of products "put up in retail packings" leads to the conclusion that it relates to products which are objectively capable of being sold directly to the ultimate consumer without any additional packaging; such an interpretation is confirmed by judgment of the Court of 11 February 1982 in Case 278/80 *(Chem-Tec B. H. Naujoks* v *Hauptzollamt Koblenz* [1982] ECR 439) and by the Explanatory Notes to the Customs Cooperation Council Nomenclature with regard to tariff heading No 30.04.

According to the case-law of the Court the important factor is that the product should, objectively, be in a form which lends itself to retail sale without additional packaging; that requirement corresponds to the criterion laid down by the Customs Cooperation Council according to which the product must be recognizable, by virtue of its packaging, particularly from the labelling, as being intended exclusively for direct sale to consumers without any other re-packaging.

Thus in the interpretation of the wording of tariff heading No 30.04 of the Common Customs Tariff the question of possible maximum dimensions is of no significance.

(b) The concept of retail sale cannot be separated in the present case from the use of the product for medical or surgical purposes; a logical and teleological interpretation leads to an interpretation of that concept in relation to all its potential users, to their practices and to the use to which they intend to put the product.

The needs of the individual and those of hospitals are quantitatively different. The same product must necessarily be packaged in different ways according to the type of user envisaged, regard being had to the specific use to which each user intends to put the product.

It is not possible to fix maximum dimensions for the product in keeping with the different destinations of the product.

(c) The Common Customs Tariff does not lay down a consistent definition of tariff heading No 30.04 so that its clear wording involves specific maximum dimensions. Furthermore such an unwritten expansion of the wording of tariff heading No 30.04 cannot be deduced from Regulation No 2282/79.

If Regulation No 2282/79 is presumed to be lawful, it provides that lengths of cotton fabric (absorbent gauze) of a clearly-defined size (100 m long and 0.65 m wide) cannot be classified under tariff heading No 30.04. The regulation relates to fabric the size of which is 65 square metres which is considerably different from the lengths which are the subject of the present proceedings and the size of which is 32 square metres (40 x 0.8 m). The regulation is therefore only a guide in so far as a fabric exceeding a certain maximum length or width can no longer, be "regarded" as put up in retail packing.

In that connection it is necessary to remember that the setting of specific maximum dimensions by Regulation No 2282/79 has given rise to legal uncertainty: in restricting itself to stating negatively that lengths of cotton fabric above certain dimensions may no longer be classified under tariff heading No 30.04 the regulation leaves completely open the question to the extent to which fabrics of smaller dimensions may still be covered by that heading. In Community law the principle of a legal certainty requires, according to the Court's case-law, that a product is to be classified under that tariff heading whose requirements as expressly defined in the Common Customs Tariff it meets; supplementary legal measures which create an ambiguous legal position are irrelevant in that respect.

In any case Regulation No 2282/79 is devoid of any legal effect. Regulation (EEC) No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special

Edition 1969 (I), p. 12) authorizes the Commission to specify the content of the headings and subheadings of the Common Customs Tariff without, however, amending the text thereof; but Regulation No 2282/79 amounts to an amendment of the content of a tariff heading, which is unlawful. In fixing maximum dimensions the legislature determines when a product may no longer be regarded as put up in retail packing regardless of its actual capability of being sold by retail. That amounts to an improper amendment of the content of the tariff heading in question. It should be noted that until Regulation No 2282/79 came into force the tariff system accorded with actual practice with regard to retail sale.

(d) No method of interpretation will lead to an interpretation of the express wording of tariff heading No 30.04 to the effect that it involves conformity with certain maximum dimensions by way of an unwritten extension of the concept of retail sale.

C — Second question

(a) The relationship established by tariff heading No 30.04 between the concept of retail sale and that of the use of the product for medical or surgical purposes means that in order to determine possible maximum dimensions account is to be taken of the needs of the purchasers and, in particular, of the fact that it is a question of different types of consumers having different requirements as regards the packaging of the product.

Hospitals, which are the main purchasers of gauze for surgical purposes, are not able to work in the sphere of surgical operations either with gauze packaged in small quantities or with a variety of packets of gauze of all sorts of different sizes. They require large pieces so that an appropriate amount may be cut to meet medical or surgical needs or for operations. Maximum dimensions cannot be fixed except inasmuch as they are customary, functional and economic.

(b) The only appropriate actual criterion for classification by reference to the dimensions of the gauze is usage, underlined by its functional and economic characteristics; such usage is laid down in advance by Standard DIN 61630 in the Federal Republic of Germany.

It is necessary not to exceed the maximum dimensions fixed by that standard.

2. In essence the *Commission* submits the following observations.

A — First question

(a) The tariff classification of a product is based on its objective characteristics and properties in the condition in which it is when imported. In the present case the customs official, before classifying the product under tariff heading No 30.04, must examine it to see if, at the time of importation, it has the characteristics of gauze put up in retail packing for medical or surgical purposes.

(b) The concept of being put up in retail packing means that the product must be capable of being sold directly to consumers without any further packaging. The answer to the question whether a particular product meets that

requirement depends on its objective characteristics at the time of importation, in particular its labelling and its dimensions.

The concept of "retail sale" extends not only to sale at the retail stage but also to direct sale to clinics and other medical institutions.

(c) As regards the purpose for which the product is used ("for medical or surgical purposes") it is necessary to remember that absorbent gauze covered by tariff heading No 30.04 may be used for other than medical or surgical purposes in particular as a packaging material for certain types of cheese, as filter cloths for milk, as an ancillary material for heat insulation, as an ancillary material for book-binding and for the manufacture of sanitary towels. The possibility that the product may be used for other than medical purposes leads to greater importance being attached to other aspects of the packaging, in particular the labelling and the dimensions.

(d) As regards the customary dimensions it is necessary to note that in the retail trade and, in particular, in chemists' shops absorbent gauze is normally sold in pieces measuring 90 cm by 100 cm at most, that is to say in pieces of approximately 1 square metre, that the bandages usually available to the public are generally either 1, 2, 3, 5 or 10 cm wide and between 3 and 5 or sometimes even 10 metres long and that it is also possible to obtain compresses of sterile gauze in squares 5 cm by 5 cm, 10 cm by 10 cm and the like. Absorbent gauze of the dimensions of that which is the subject of the main proceedings (40 m by 0.80 m) is not sold in retail shops.

On the other hand gauze for dressings of those dimensions does appear in the catalogues published by specialist firms and aimed at clinical establishments in the form of packets "for hospitals". Such lengths of gauze do not seem to correspond to any direct requirement on the part of such institutions; the packets "for hospitals", which contain, for example, gauze for dressings in pieces between 40 cm and 1 m in width and between 40 m and 1 000 m in length, are cut to the required size, sterilized and packed for use only by the institution itself.

(e) The essential question is therefore whether imported absorbent gauze the dimensions of which are such that hospitals and similar institutions have to cut it to size, to sterilize it and to package it may be classified under tariff heading No 30.04 of the Common Customs Tariff. The reply to that question can only be in the negative.

Hospitals and similar institutions may, it is true, be regarded as being included in the concept of "retail trade" provided however that the product is offered in a form such that it may be used directly without the need for repackaging; in fact the fulfilment of that requirement depends in particular on the maximum dimensions. To accept that the product may be recut in hospitals and similar institutions on the basis of their special requirements and may be the subject of repackaging is tantamount to opening the door to abuse, the more so since it is not possible to ascertain the actual use to which it will be put once the product has been put into free circulation.

(f) The reply to the first question put by the Bundesfinanzhof can only be affirmative.

B — Second question

(a) The question of the maximum dimensions which must not be exceeded relates in the present case to wadding,

gauze, bandages and the like which are capable, in practice, of being used immediately, regard being had to the needs of hospitals and similar institutions, without any further cutting. In that respect it is necessary to take into account the fact that the needs of hospitals and similar institutions are not necessarily the same as those of retail shops, particularly of chemists shops.

(b) It does not appear to be necessary for the Court to lay down maximum dimensions; in order to assist the Bundesfinanzhof to give its judgment it is sufficient to state that absorbent gauze offered in pieces measuring 40 m by 80 cm is not capable of immediate use.

C — Replies to the questions put

The following reply may be given to the questions put by the Bundesfinanzhof:

Tariff heading No 30.04 of the Common Customs Tariff is to be interpreted as meaning that the expression "put up in retail packings for medical or surgical purposes" implies that the maximum dimensions which correspond directly to the needs of the consumers, including hospitals and similar institutions, must be adhered to. A product described as gauze for dressings, which is imported in pieces measuring 40 m by 80 cm does not comply with that requirement.

III — Oral procedure

At the sitting on 5 May 1983 Mr Ehle, for Lohmann, the plaintiff in the main proceedings, and Mr Wägenbaur, for the Commission of the European Communities, presented oral argument and answered questions put by the Court.

The *plaintiff in the main proceedings* explained, in particular, the relevance of the fact that the contested product is packaged in accordance with Standard DIN 61630, stated the reasons why the packaging of the gauze by consumers cannot affect its classification under heading No 30.04, provided information regarding the use of the product in hospitals and outlined the reasons which preclude any departure from that tariff heading.

The *Commission* explained, *inter alia*, the purpose and the scope of Regulation No 2282/79 and enlarged upon the considerations which preclude classification of the contested product under heading No 30.04.

The Advocate General delivered his opinion at the sitting on 14 July 1983.

Decision

1 By order of 12 October 1982 which was received at the Court of Justice on 3 November 1982, the Bundesfinanzhof [Federal Finance Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of heading No 30.04 of the Common Customs Tariff.

2 The file on the case shows that on 19 May 1981 the Oberfinanzdirektion [Principal Revenue Office] Frankfurt am Main issued at the request of the plaintiff in the main proceedings a binding customs tariff opinion on a product referred to as "absorbent gauze". The plaintiff described the product as follows:

"A bleached, permeable, plain-weave fabric woven wholly out of cotton. It is imported from Yugoslavia by the metre (200 metres = five pieces of 40 metres each) and is used for 'medical treatment'. The woven fabric is 80 centimetres wide, concertina-folded, packed in five pieces of 40 metres each, labelled and not impregnated or coated with pharmaceutical substances."

3 The Oberfinanzdirektion classified the product under subheading 55.09 A I of the Common Customs Tariff:

"Other woven fabrics of cotton:

A. Containing 85% or more by weight of cotton:

I. Of a width of less than 85 cm . . ."

4 The plaintiff lodged an objection against that customs tariff opinion on the ground that the product was put up in retail packings for medical or surgical purposes and therefore fell within heading No 30.04 of the Common Customs Tariff.

5 The Oberfinanzdirektion rejected that objection on the ground that, although the packaging and labelling of the gauze fulfilled the conditions for goods put up in retail packings, it could not be regarded as put up in retail packings for medical or surgical purposes because the dimensions of each piece, which were 40 metres long and 80 centimetres wide were not normal for retail packings. In support of that view, the Oberfinanzdirektion relied upon Commission Regulation (EEC) No 2282/79 of 17 October 1979 on the classification of goods under subheading 55.09 A I of the Common Customs Tariff (Official Journal 1979, L 262, p. 23).

6 The plaintiff brought an action against that decision before the Bundesfinanzhof claiming that the gauze in question is sold almost exclusively to

hospitals in the packing in which it is made up on its manufacture in Yugoslavia and is therefore put up in retail packings for medical or surgical purposes within the meaning of heading No 30.04. In its view, it follows from the Explanatory Notes to the Customs Cooperation Council Nomenclature on heading No 30.04 that sale directly to hospitals also qualifies as retail sale.

7 The plaintiff disputes both the relevance and the validity of Regulation No 2282/79. It considers that since that regulation expressly concerns only pieces of fabric 100 metres long and 0.65 metres wide, it is not applicable either directly or by analogy to the product in question. The plaintiff also claims that the regulation is invalid since it exceeds the authorization granted to the Commission by Regulation (EEC) No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special Edition 1969 (I), p. 12), inasmuch as the effect of the contested regulation is not merely to interpret but to amend the tariff heading in question.

8 For its part, the Bundesfinanzhof considers that, were it not for Regulation No 2282/79, the goods in question would undoubtedly come within heading No 30.04 precisely because they are put up in retail packings. In its opinion, it does not follow from the text of that heading that the dimensions of the goods are relevant for classification purposes. However, since the Commission has laid emphasis on that aspect in Regulation No 2282/79, the Bundesfinanzhof considers that the interpretation of the tariff heading in question is open to doubt and holds itself bound, under the first and third paragraphs of Article 177 of the EEC Treaty, to refer the questions raised by Regulation No 2282/79 to the Court of Justice for a preliminary ruling. If, in spite of its scope being limited to goods of specific dimensions, that regulation is applicable to goods of different dimensions, the Bundesfinanzhof expresses doubt as to whether, in adopting the regulation, the Commission did not overstep the bounds of the authorization conferred upon it by Regulation No 97/69.

9 In order to resolve those doubts, the Bundesfinanzhof referred the following two questions to the Court of Justice for a preliminary ruling:

"1. Is tariff heading No 30.04 of the Common Customs Tariff to be interpreted as meaning that the phrase 'put up in retail packings for

medical or surgical purposes' requires conformity with specific maximum dimensions?

2. If the answer to Question 1 is in the affirmative, what are those maximum dimensions?"

Interpretation of tariff heading No 30.04

10 Heading No 30.04 of the Common Customs Tariff reads as follows:

"Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in retail packings for medical or surgical purposes . . ."

11 That heading was the subject-matter of the following Explanatory Note drawn up by the Customs Cooperation Council:

"Wadding and gauze for dressings (usually of absorbent cotton) and bandages, etc., not impregnated or coated with pharmaceutical substances, are also classified in this heading, provided they are exclusively intended (e.g., because of the labels affixed or special folding) for sale directly without re-packing, to users (private persons, hospitals, etc.) for use for medical or surgical purposes."

12 It is not disputed that, having regard to their labelling, folding and packaging, the goods in question are in fact packed for medical or surgical purposes.

13 The Commission contended, during the proceedings before the Court, that the goods in question could still be used for other purposes, for example for wrapping certain types of cheese, as filter cloths for milk, as an ancillary material for thermal insulation or book-binding and for the manufacture of sanitary towels. It appears, however, that goods such as those at issue cannot be used for the above purposes in view of their specific packaging as described by the Bundesfinanzhof. That part of the Commission's observations must therefore be disregarded since it is not relevant to the questions raised.

14 Since it is thus established that the product in question can be used only for medical or surgical purposes, the crux of the problem is whether goods which are presented in the manner described may be regarded as "put up in retail packings".

15 The Explanatory Note to the Customs Cooperation Council Nomenclature throws some light on that point, specifying that the product must, by virtue of its packaging, clearly be "exclusively intended for sale directly without re-packing to users (private persons, hospitals, etc.)".

16 That note is based on a wide interpretation of the expression "put up in retail packings", inasmuch as it includes as possible purchasers not only typical retail customers but also establishments such as hospitals which use large quantities of the material in question. However, to extend that expression to cover goods that are suitable for use by hospitals or similar institutions but are not put up in packings that can also be sold to individuals in retail trade would be to exceed the scope of heading No 30.04.

17 It is evident, therefore, that gauze to be used for medical or surgical purposes cannot be classified under heading No 30.04 where it is packed in such a way that it can be intended for sale only to large-scale users, such as hospitals, but cannot be sold just as it is to individuals.

Commission Regulation No 2282/79

18 Commission Regulation No 2282/79, the relevance and validity of which have been called in question before the Bundesfinanzhof, contains the following provision:

"Article 1

Lengths of absorbent cotton fabric (known as 'gauze'), not impregnated or coated with pharmaceutical substances, 100 m long and 0.65 m wide, concertina-folded, individually wrapped and labelled, shall be classified in the Common Customs Tariff under subheading:

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55.09 Other woven fabrics of cotton:

A. Containing 85% or more by weight of cotton:

I. Of a width of less than 85 cm."

19 The preamble to that regulation, which was adopted on the basis of Regulation No 97/69 of the Council, states that "in order to ensure uniform application of the nomenclature of the Common Customs Tariff, provision must be made for the classification of lengths of absorbent cotton fabric (known as 'gauze'), not impregnated or coated with pharmaceutical substances, 100 m long and 0.65 m wide concertina-folded, individually wrapped and labelled". The preamble repeats the wording of heading No 30.04 and goes on to state that "in view of their dimensions, these articles, even if they are individually wrapped and labelled, cannot be considered at the time of importation as being put up in retail packings for medical or surgical purposes" and that since they cannot be classified under heading No 30.04, they must, "having regard to their nature and dimensions", be classified under subheading 55.09 A I.

20 When asked the reasons underlying that measure, the Commission stated that it was adopted on a proposal from the French delegation within the Committee on Common Customs Tariff Nomenclature, established by Regulation No 97/69, and that the dimensions specified in Regulation No 2282/79 are the normal dimensions of gauze used in French hospitals.

21 The legislative technique adopted in Regulation No 2282/79 is undoubtedly open to question, since, by referring to the normal dimensions of surgical gauze in one Member State, that regulation has created uncertainty in the law for all the other Member States, as is shown by the present dispute. Nevertheless, as the Commission has explained, the principle of that regulation is in conformity with the interpretation set out above, inasmuch as the criterion of "retail sale" excludes from heading No 30.04 woven fabrics which are packed in such a way that they can be used only by hospitals or other large-scale users.

22 Consequently Regulation No 2282/79 provides useful guidance for the interpretation of heading No 30.04 and accordingly, without its being necessary or even desirable to lay down specific dimensions, heading No 30.04 excludes all pieces of woven fabric whose dimensions and packaging appear to rule out retail sale to individuals.

23 In the light of all the foregoing considerations, the answer to the first question must be that heading No 30.04 of the Common Customs Tariff is to be interpreted as meaning that the expression "put up in retail packings for medical or surgical purposes" implies that a product, in order to be classified under that heading, must not exceed the dimensions which enable it to be sold by retail to any user, including individual persons. That heading therefore excludes a product which is packed in such a way that it can be sold, without re-packing, only to hospitals or other large-scale users.

24 In the light of that answer, the second question submitted by the Bundesfinanzhof is devoid of purpose.

Costs

25 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the questions referred to it by the Bundesfinanzhof by order of 12 October 1982, hereby rules:

Heading No 30.04 of the Common Customs Tariff must be interpreted as meaning that the expression "put up in retail packings for medical or surgical purposes" implies that a product, in order to be classified under that heading, must not exceed the dimensions which enable it to be sold by retail to any user, including individual persons. That heading therefore excludes a product which is packed in such a way that it can be sold, without re-packing, only to hospitals or other large-scale users.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 6 October 1983.

For the Registrar

H. A. Rühl

Principal Administrator

P. Pescatore

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 14 JULY 1983 [1]

Mr President,
Members of the Court,

1. The questions referred to the Court for a preliminary ruling in this case concern the classification for customs purposes of a product described as "absorbent gauze". The Bundesfinanzhof [Federal Finance Court] seeks a definition of the scope of heading No 30.04 of the Common Customs Tariff, *inter alia* in relation to Commission Regulation (EEC) No 2282/79 of 17 October 1979, in order to enable it to resolve a dispute between the Oberfinanzdirektion [Principal Revenue Office] Frankfurt am Main, and Lohmann GmbH & Co. KG, Neuwied (hereinafter referred to as "Lohmann").

Lohmann imports from Yugoslavia bleached, permeable plain-weave fabric woven wholly out of cotton, which is concertina-folded and not impregnated

1 — Translated from the Italian.