In Case 77/71

Reference to the Court under Article 177 of the EEC Treaty by the Third Senate of the Finanzgericht München for a preliminary ruling in the action pending before that court between

GERVAIS-DANONE AG, 8 Munich 80, Sieberstra e 4,

and

HAUPTZOLLAMT MÜNCHEN-SCHWANTHALERSTRASSE,

— on the interpretation of Regulation No 950/68 of the Council of 28 June 1968 (OJ, L 172, p. 7);

— on the applicability and, if appropriate, interpretation of Regulation No 241/70 of the Commission of 9 February 1970 (OJ, L 32, p. 6);

— if appropriate, on the interpretation of Regulation No 160/66 of the Council of 27 October 1966 (OJ, No 195, p. 3361),

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and H. Kutscher, Presidents of Chambers, A. M. Donner (Rapporteur), A. Trabucchi, R. Monaco and P. Pescatore, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:
During the period from 12 August 1968 to 27 March 1969 the *plaintiff in the main action* (hereafter referred to as the *plaintiff*) obtained customs clearance in Germany for 56 consignments of a certain product of Yugoslav origin which was described essentially as mayonnaise. During the period from 4 December

1968 to 8 April 1969 it obtained customs clearance for thirty-three consignments of a product of Danish origin which was also described as mayonnaise. The products of Yugoslav origin had been described in the invoices attached to the customs declarations as 'diet mayonnaise', 'I A mayonnaise' or 'salad mayonnaise'.

With the exception of the goods described as 'salad mayonnaise', which bore the additional note 'as sample, guaranteed 6.5% egg yolk', the information as to the composition of the product stated '83% fats, 6.5% egg yolk, 0.5% salt and 5% acetic acid, without binding agents, colouring matter or preservatives'.

The products of Danish origin described as 'mayonnaise' or 'I A mayonnaise' contained no information as to their composition.

In accordance with the requirements of customs clearance the customs offices classified the products in question under heading 21.04 B of the Customs Tariff and without further formalities, issued a notice of assessment to import duty in a sum which corresponded to the classification of these products.

On 14 March 1969 the customs office took two samples from a consignment of the goods in question for their composition to be examined by the Zolltechnische Prüfungs-und Lehranstalt (Customs Technology Research and Training Institute) in Munich.

On the basis of the result of this examination the Zolltechnische Prüfungs-und Lehranstalt considered that, by reason of its weight in milk fats, the product in question had to be classified under tariff heading 21.07 F, VII, (a), 1.

Meanwhile, the Hauptzollamt (Principal Customs Office) München-Schwanthalerstraße carried out an inspection of all the imports made by the plaintiff and, in the light of the result of this inspection, decided that the product described as 'mayonnaise' was principally compised of milk fats. The Hauptzollamt shared the opinion of the Zolltechnische Prüfungs-und Lehranstalt in its observations and considered that, as the products in question constitute 'food preparations which are neither referred to nor included elsewhere', [they] 'had to be classified, as regards the salad mayonnaise, under tariff heading 21.07 F VII, (a), 1 ('Containing 45% or more but less than 65% by weight of milk fats') and, as regards all the other goods, under heading No 21.07 F VIII—a ('Containing 65% or more but less than 85% by weight of milk fats')'. In an amended notice of assessment dated 25 November 1969, in the wording of the version dated 5 March 1970, the Hauptzollamt claimed payment of an additional sum by way of customs duties and turnover tax on imports.

After unsuccessfully objecting to the amended notice of assessment the plaintiff instituted proceedings before the Finanzgericht München, in which it maintained that the contested decision was unlawful in that it constituted an attempt, which is unacceptable in a State governed by the rule of law, to classify a product under a different tariff heading without any legal basis for doing so when, according to the letter and spirit of the Customs Tariff such product falls under tariff heading 21.04. The sole object of this reclassification was in this way to make good the lacunae in Community law. As the German customs authorities had no power to amend tariff heading 21.04, their attempt to do so was unlawful.

The wide and general terms in which heading 21.04 is drafted show that from the point of view of Community law all sauces fall under this tariff heading without regard to their composition, even if they contain basic products which are governed by the market organizations. By only excluding from heading 21.04 food preparations based on milk fats which 'are clearly not intended for consumption in the unaltered state as sauces'

Regulation No 241/70 of the Commission confirmed this view. Moreover, as it amended the Common Customs Tariff this regulation was unlawful, as the Commission had no power to take such action. Regulation No 241/70 could also not be applied retrospectively.

The amended assessment decision is based upon Regulation No 160/66 of the Council. As this regulation provides for the imposition of the variable and the fixed component of the levy on imports in respect of the products governed by tariff heading 21.07, which is not included in Annex II to the EEC Treaty, it is void in that the Council has not been authorized to provide for the imposition of levies in respect of the products under heading 21.07.

Finally, the applicant maintained that as the national authorities were no longer entitled to provide 'verbindliche Zolltarifauskünfte' (binding customs tariff notices) referred to in paragraph 23 of the German Customs Law, it could claim to have acted in good faith.

The Hauptzollamt (principal customs office) the *defendant in the main action,* maintains that according to the Explanatory Notes to the Brussels Nomenclature the conclusive factor in classification under heading 21.04 is—apart from strong seasoning—that the products concerned are preparations intended to improve the flavour of certain foods. Contrary to the argument put forward by the applicant, the sole purpose of Regulation No 241/70 is to ensure the uniform application of the customs tariff in the Member States of the EEC. It does not constitute an amendment but merely an explanation of the Customs Tariff, adopted on the basis of Regulation No 97/69 of the Council and founded on Article 28 of the EEC Treaty.

As regards the applicant's statement that the German tax authorities were no longer in a position to issue 'verbindliche Zolltarifauskünfte', the Hauptzollamt maintains that this information, which does not constitute generally binding interpretations (allgemein verbindliche Auslegungen) of the definitions of the Common Customs tariff, are still valid after the entry into force of the Common Customs Tariff.

By order of 23 July 1971 received at the Court Registry on 11 August 1971 the Finanzgericht München requested the Court to give a preliminary ruling under Article 177 of the EEC Treaty on the following questions:

II. (a) Does it make any difference for the classification of a product described as 'diet mayonnaise', 'I A mayonnaise', or 'salad mayonnaise' under heading 21.04 of the Common Customs Tariff whether the product has been manufactured by using butter, butteroil, fractionated dry butterfat or vegetable fats and if so, what difference?

(b) Is trade usage ('Verkehrsauffassung') relevant for the classification of a product under heading 21.04 or 21.07? If so, is the trade usage in all the Member States decisive or can a trade usage prevailing solely in one Member State be taken into account if it diverges from the trade usage in other Member States?

(c) Was Regulation No 241/70, by virtue of its content, already applicable on 27 May and 9 July 1968, or not until 13 February 1970?

(d) In the event of an affirmative answer to question (c):

(1) Must the word 'clearly' in Regulation No 241/70 be understood as meaning that on the basis of the properties of the product at the relevant date it must be plainly discernible that the product is not intended for consumption

in the unaltered state as sauce, mixed condiment or mixed seasoning?

(2) By whom (the Customs Office or the appropriate trade circles) must this be discernible? In this connexion may reference be made to the trade usage in the importing country?

(3) Is it sufficient for the word 'clearly',

(a) that the commercial documents show that the product is not intended *ab initio* for consumption in the unaltered state as sauce, mixed condiment or mixed seasoning, or

(b) can this be deduced from the circumstances of the further treatment of the product after the relevant date? If so, what conditions must be fulfilled for this deduction?

II. (a) Since the entry into force of Regulation No 950/68 are the Oberfinanzdirektionen (Regional Finance Authorities) still entitled to issue binding customs tariff notices ('verbindliche Zolltarifauskünfte') under paragraph 23 of the German Customs Law?

(b) If (a) is answered in the negative: was this also the case before the entry into force of Regulation No 950/68 with regard to products that were subject to EEC commercial rules, in this case, Regulation No 160/66 of the Council?

The plaintiff, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided to open the oral procedure without holding any preparatory inquiry.

Gervais-Danone AG, represented by F. Modest, the Government of the Federal Republic of Germany, represented by H. Lauberau, and the Commission of the European Communities, represented by Peter Kalbe submitted their oral observations during the hearing on 1 December 1971.

The Advocate-General delivered his opinion at the hearing on 14 December 1971.

II — Observations submitted to the Court

The observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

On question I (a)

The *plaintiff* maintains that in part the question is wrongly worded. The classification of particular goods under heading 21.04 does not depend on their description. The composition, the physical properties and the suitability of such goods for a specific purpose—in particular to improve the flavour of certain foods—, could alone be taken into consideration. In general, the use of milk fats as the basic ingredient in the composition of sauces cannot influence their classification under heading 21.04 of the Common Customs Tariff. This is already apparent from the Explanatory Notes to the Brussels Nomenclature and was confirmed by Regulation No 241/70 of the Commission. As regards classification under heading 21.04 the only decisive factor is the presence of flavouring ingredients in the products in question, composed either of milk fats or vegetable fats, which render it likely that their intended purpose is to improve the flavour of certain foods.

The *Government of the Federal Republic of Germany* observes that the milk

fats are unsuitable for use as a basic product in the preparation of mayonnaise. The physical properties of mayonnaise imply the use of fats with a low melting point. As the melting point of butter and butterfat is rather high they cannot be used as basic ingredients in mayonnaise. The diet mayonnaise differs from ordinary mayonnaise by virtue of its better digestive properties. As these properties depend on the unsaturate sebatic acid content, the use of butterfat —which has a higher saturate sebatic acid content than vegetable fats—as the basis of such mayonnaise is impossible. The specialized literature on the subject refers to a process for the preparation of dry butterfat with a low melting point and a high unsaturate sebatic acid content. The cost of carrying out this process is, however, an obstacle to its application in practice.

As regards the 'salad mayonnaise' the Government of the Federal Republic of Germany observes that this differs from ordinary mayonnaise by virtue of its lower fat content and the use of different flavouring ingredients. The fat content varies from 50 to 80%.

Moreover, mayonnaise with a fat content of more than 50% must be distinguished from that with a content of less than 50%. Mayonnaise with a fat content of less than 50% might contain butter or butteroil without losing its characteristics as mayonnaise if, through the application of stabilizing agents, the melting point is lowered.

The Government of the Federal Republic of Germany concludes from this that goods described as 'diet mayonnaise' or 'salad mayonnaise' of a milk fats content of more than 50% cannot be classified under heading 21.04 of the Common Customs Tariff.

If the fat content of goods described as mayonnaise, I A mayonnaise, diet mayonnaise or salad mayonnaise is less than 50%, the use of butter or of butteroil does not prevent their classification under heading No 21.04 if they constitute sauces, mixed condiments or mixed seasonings.

The *Commission of the European Communities* observes that the Explanatory Notes on the Convention on the Brussels Nomenclature of 1955 show that the use of milk fats as basic ingredients in sauces, mixed condiments or mixed seasonings cannot as such influence the classification of the products in question.

On question I (b)

The *plaintiff* observes that as most of the ingredients which may be used in the preparation of the sauces and the possible variations in their composition are not defined, the question is, as regards sauces in general, lacking in any sense.

To the extent that the question refers to standard sauces, such as mayonnaise, hollandaise sauce, béarnaise sauce or ketchup trade usages exist which are essentially determined by the external characteristics and similar uses of these sauces in the preparation of certain dishes. No trade usages exist as regards their composition. This view is confirmed by the Proposal for a Council Directive on the approximation of the laws of the Member States concerning mayonnaise, mayonnaise-based sauces and other emulsified sauces intended for flavouring (OJ 1970, C 18, p. 9). The *Government of the Federal Republic of Germany* observes that neither the 'General Rules for the Interpretation of the Customs Nomenclature' nor those concerning the interpretation of the nomenclature in the Common Customs Tariff contain provisions referring to prevailing trade usage. As such usage only exists in relation to individual products the question must be answered in relation to mayonnaise alone. As regards mayonnaise trade usages exist throughout the world: it is a seasoned or flavoured emulsion of a more or less liquid nature which is added to meats or fish.

The use of a fat of a low melting point as a basic ingredient constitutes the decisive criterion.

The *Commission* maintains that trade usage must be taken into account in every case in which flavourings must be classified in order to determine whether the goods in question are intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings, since neither the text of the customs tariff nor the Explanatory Notes to the Brussels Nomenclature concerning heading 21.04 lay down any clear and specific principles. It also observes that trade usage can only be employed as a means of interpretation in cases in which it is clearly defined. Having regard to the importance of a uniform application of the Common Customs Tariff it is clear that it is not permissible to take into account trade usages which are only prevalent in one Member State.

On question I (c)

The plaintiff considers that Regulation No 241/70 is void for the following reasons:

(a) Regulation No 97/69 of the Council of 16 January 1969 (OJ L 14, p. 1) authorizes the Commission to clarify the Common Customs Tariff without however modifying its content and scope. The sole aim of Regulation No 241/70, which is based upon Regulation No 97/69, is to make good the lacuna which resulted from the fact that as sauces, condiments or seasonings which are composed of milk fats or olive oil are covered by heading 21.04, they thus fall outside the common agricultural market system. It thus amends the content and scope of the Common Customs Tariff. By limiting the content of heading 21.04 and by extending the content of heading 21.07, Regulation No 241/70 constitutes a measure which is not covered by the authorization given by Regulation No 97/69 and which, therefore, is unlawful.

(b) The Commission introduced obscure and indefinite concepts into Regulation No 241/70 which renders its interpretation impossible. This is already apparent from the questions referred by the Finanzgericht, in particular questions I (d) (1), (2) and (3). Since it does not provide an unambiguous interpretation of the Common Customs Tariff the regulation has no legal effect.

The applicant considers that if Regulation No 241/70 were regarded as valid, then in view of Article 2 thereof it came into force on 13 February 1970. This view is confirmed by the conduct of the Commission over the fixing of the date of entry into force of the regulations on the classification of goods in the Common Customs Tariff. The Commission's practice is explained by the fact that although the interpretations given are formally of a declaratory nature, in commercial practice they have the effect of legislation, particularly when the new interpretations result in the classification of certain products under another heading in the nomenclature, which leads to a change in the duty imposed.

Regulation No 241/70 alters the legal position if not formally, then at least materially, by limiting the real content of heading 21.04.

The *Government of the Federal Republic of Germany* maintains that Regulation No 241/70 constitutes an authentic rule of interpretation and must for this reason be applied to any question of interpretation to be considered after 13 February 1970.

The *Commission* observes that, for the following reasons, Regulation No 241/70 is applicable to any dispute concerning the classification of the products in question which has to be settled after its entry into force.

As regards their content, provisions such as those contained in Regulation No 241/70 are merely explanatory in nature and intended to clarify the scope of the headings in the tariff to which they refer. The implied recommendation of the Court of Justice in the judgment of 18 June 1970 in *Hauptzollamt Bremen-Freihafen* v *Bremer Handelsgesellschaft* (manioc flour), (Case 74/69, [1970] ECR 451), that formal measures be taken in order to ensure the uniform application of the Common Customs Tariff has encouraged the Commission to act in such a way. The legal form of Regulation No 241/70 obliges the authorities and the courts in the Member States to apply the uniform interpretation of the text of the Tariff given by this regulation. It is also clear from its legal form that, from the entry into force of this regulation, authorities and courts are obliged to assess and resolve the problems which are before them in accordance with the rules which it enunciates. The legal basis of this Regulation was to be found in Regulation No 97/69 of the Council of 16 January 1969 (OJ L 14, p. 1) and in particular in Article 3 which authorizes the Commission to draw up the provisions required for the application of the nomenclature of the Common Customs Tariff as regards classification of goods. The extent of this power is determined by its purpose, which is in particular to elucidate the Common Customs Tariff. This also shows Regulation No 241/70 to be declaratory in nature. Finally, an argument in favour of the declaratory nature of this regulation is to be found in its penultimate recital, in which reference is made to the Explanatory Notes to the Brussels Nomenclature.

On Question I (d) (1)

The *plaintiff* maintains that in the light of its reply to Question I (c) it is unnecessary to express any opinion on this question. However, it observes that the question whether it is clear that the goods are not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings can only be assessed on the basis of the physical properties of the goods. These properties form the only objective criterion by which its intended purpose can be judged. The application to the question of tariff classification of a criterion other than that of the physical properties of the goods renders it impossible to apply the Common Customs Tariff in a uniform manner.

The *Government of the Federal Republic of Germany* observes that the classification of the products in question must depend on the physical properties and external characteristics of such products at the time to be taken into consideration for determining the classification.

The *Commission* maintains that the term 'clearly' signifies that the competent authorities must classify the goods in question under heading 21.07 when it is established that, taking trade usage and the specific purpose of the goods into account, they are not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings.

On Question I (d) (2)

The *plaintiff*, the *Commission* and the *Government of the Federal Republic of Germany* are all of the opinion that the customs authorities is the only body competent to assess the characteristics of the product to be classified.

On Question I (d) (3)

The *plaintiff* observes that the ultimate purpose of the goods may possibly be deduced from the commercial documents. In the rare cases in which it is clear that the importer does not intend the products imported to be consumed in the unaltered state, conclusions may properly be drawn from this fact as regards the classification of the products.

The *Government of the Federal Republic of Germany* and the *Commission* do not oppose the consideration of the commercial documents or circumstances surrounding the subsequent treatment of the product in order to decide therefrom whether it is 'clearly' intended for consumption in the unaltered state.

On Question II (a)

The *plaintiff* claims that the case-law of the Court of Justice (Judgments of 18 February 1970, *Hauptzollamt Hamburg* v *Bollmann,* Case 40/69 [1970] ECR 69 and 8 December 1970, *Bakels* v *Oberfinanzdirektion München,* Case 14/70, [1970] ECR 1001), show that the Member States have no power to draw up binding rules of interpretation for the measures affecting it. This signifies that the Member States are not entitled to adopt legislative or executive measures to amend or supplement the Common Customs Tariff.

Although the 'verbindliche Zolltarifauskünfte' formally constitute executive measures, their substantial effect is that of legislative measures since they are binding on the customs authority in respect of an indefinite quantity of consignments and over an indefinite period. For this reason they are unlawful even though the case-law of the Court only concerns legislative measures.

The *Government of the Federal Republic of Germany* maintains that it is clear that the 'verbindliche Zolltarifauskünfte' are lawful as their effect is the same as that of the classification of the products within the context of the ordinary customs procedure. They must be regarded as administrative instructions which are only binding on the customs offices. Persons subject to the jurisdiction of the customs authorities are entitled to appeal to the Bundesfinanzhof against the 'verbindliche Zolltarifauskünfte'.

The Commission observes that the aim of the 'verbindliche Zolltarifauskünfte' is to protect the legitimate expectations of persons subject to the jurisdiction of the customs authorities as regards the interpretation of the Common Customs Tariff by such authorities in a Member State. To the extent to which they are concerned with interpretations of individual cases they are compatible with Community law. In such a case the consequences of a possible mistaken interpretation of the Customs Tariff on the basis of a 'verbindliche Zolltarifauskünfte' are the same as an incorrect classification through the ordinary procedures followed by the customs authority. A small number of mistaken classifications are inevitable and do not adversely affect the proper functioning of the Common Customs Tariff. However, if the 'verbindliche Zolltarifauskünfte' assume the nature of generally applicable interpretations and, therefore, apply automatically to numerous cases which are almost identical, the proper functioning of the Common Customs Tariff might be endangered in the case of a mistaken interpretation. This is all the more possible in that it is unlikely that a judicial body will consider the interpretation given. These considerations show that in the absence of any Community regulation the Oberfinanzdirektionen are still entitled to issue 'verbindliche Zolltarifauskünfte' to the extent to which they are required for the occasional interpretation of the Common Customs Tariff.

On Question II (b)

The *plaintiff,* the *Government of the Federal Republic of Germany* and the Commission observe that their reply to the preceding question also applies to the problem of the power of the Oberfinanzdirektionen to issue 'verbindliche Zolltarifauskünfte' before the entry into force of Regulation No 950/68 in relation to products governed by Regulation No 160/66 of the Council.

Grounds of judgment

1 By an order dated 23 July 1971, pursuant to Article 177 of the EEC Treaty, which arrived at the Court on 11 August 1971, the Finanzgericht München has submitted for a preliminary ruling two questions regarding the interpretation of Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (OJ 1968, L 172). The first question concerns the interpretation of headings 21.04 and 21.07 of the Common Customs Tariff and the effect of Regulation No 241/70 of the Commission of 9 February 1970 (OJ 1970, L 32) on the application of these headings to imports effected before the entry into force of this Regulation and the second relates to the compatibility of verbindliche Zolltarifauskünfte (binding customs tariff notices) issued under Article 23 of the German Zollgesetz (Customs Law) with Regulation No 950/68.

The first question

2 The first question seeks in the first place to ascertain whether it makes 'any difference for the classification of a product described as diet mayonnaise, I A mayonnaise or salad mayonnaise under heading 21.04 of the Common Customs Tariff whether the product has been manufactured by using butter, butteroil or fractionated dry butterfat and if so, what difference'. Then it is asked whether the tariff classification depends on trade usage (Verkehsauffassung) or on provisions of Regulation No 241/70 which did not come into force until after the imports in question.

3 It appears from the documents in the case that the dispute is whether the product in question should be classified under heading 21.04 (sauces; mixed condiments and mixed seasonings) or heading 21.07 (food preparations not elsewhere specified or included) of the Common Customs Tariff.

4 In order to ensure the uniform interpretation and application of the Brussels Nomenclature of 1950, as revised in 1955,—which the Common Customs Tariff has adopted—Articles III and IV of the Brussels Convention provide that a Nomenclature Committee shall prepare explanatory notes and classification opinions under the supervision of the Customs Cooperation Council.

5 Since the Community authorities had not issued any explanatory provisions or other more detailed provisions regarding heading 21.04 at the time of the imports in question, the abovementioned explanatory notes and classification opinions must be regarded as an authoritative source of information for the interpretation of this tariff heading. The relevant Brussels Explanatory Notes have the following wording: 'Under this heading come preparations, generally

strongly seasoned, which are intended to improve the flavour of certain foods (in particular, vegetables, fruits, flour starches, oil, vinegar, sugar, spices, mustard, flavouring, etc.). Such preparations may be more or less liquid—this applies especially to sauces—or in powder form and packaged in any way whatsoever (in bottles, glasses, jars, etc., and also hermetically sealed)'. The fourth paragraph of the notes to heading 21.04 mentions examples of products coming under this heading and in the first place mentions mayonnaise.

6 According to these Explanatory Notes the products covered by heading 21.04 are characterized by the fact that they are generally spiced and intended to improve the flavour of food. Thus such products must be preparations which are directly suitable for the purpose specified.

7 Consequently, the addition of butter, butteroil or fractionated dry butterfat to these products, which does not necessarily *per se* preclude the classification of a product under heading 21.04, is of decisive importance in so far as it is capable of impairing the flavour-improving qualities of these products. Whether this is the case the appropriate national authorities must decide on the basis of all the factual data connected with the method of manufacture or the composition of the product in question.

8 The legal basis of Regulation No 241/70 is to be found in Regulation (EEC) No 97/69 which authorizes the Commission to adopt the measures necessary for uniform application of the nomenclature of the Common Customs Tariff as regards classification of goods, the purpose of such provisions being to give further details of the content of the headings or subheadings of the Common Customs Tariff without in any way amending the text thereof. A regulation adopted under Regulation No 97/69 is of a legislative nature and cannot have retroactive effect. Therefore, Regulation No 241/70 cannot be applied for the purpose of determining the classification of products imported before its entry into force.

9 It must therefore be answered that the classification of a product under heading 21.04 of the Common Customs Tariff is precluded if the use of butter, butteroil or fractionated dry butterfat in the manufacture of the product impairs its direct suitability for improving the flavour of certain foods. It is for the competent national court to decide whether this is the case.

The second question

10 The Court is asked to decide whether the entry into force of the Common Customs Tariff can impair the legal effects of verbindliche Zolltarifauskünfte

(binding customs tariff notices) issued under Article 23 of the German Zollgesetz.

11 This provision stipulates that the Oberfinanzdirektion, on application, shall issue binding customs tariff notices regarding the tariff heading of the customs tariff to which a product belongs. On the one hand, it is provided that in the event of amendment or annulment of the notice, for three months thereafter the applicant may still demand tariff classification in accordance with the notice, in so far as the notice is not based on incorrect information supplied by the applicant. On the other hand, it is provided that the notice shall cease to have binding effect if the legal provisions applied in it are amended.

12 Although such a tariff classification in advance is not found in Community law, it is not prohibited by that law. The security which it provides for importers and the facilitation of work which it involves for the national authorities may induce these authorities to use such a procedure governed by their national law. This is all the more so where the notices in no way lay down legal rules of general application and fit into the framework of the normal procedures for the application of the tariff classification provisions to individual cases.

13 Accordingly, the entry into force of Regulation No 950/68 of the Council has not affected the legal effects of verbindliche Zolltarifauskünfte issued under Article 23 of the German Zollgesetz.

Costs

14 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities which submitted observations to the Court are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation Nos 160/66 of the Council of 27 October 1966 and 950/68 of 28 June 1966, as well as Regulation No 241/70 of the Commission of 9 February 1970;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Finanzgericht München by order of that court dated 27 May 1971, hereby rules:

1. **The classification of a product under heading 21.04 of the Common Customs Tariff is precluded if the use of butter, butteroil or fractionated dry butterfat in the manufacture of the product impairs its direct suitability for improving the flavour of certain foods. It is for the competent national court to decide whether this is the case.**

2. **The entry into force of Regulation No 950/68 of the Council has not affected the legal effects of verbindliche Zolltarifauskünfte issued under Article 23 of the German Zollgesetz.**

Lecourt Kutscher

Donner Monaco Pescatore

Delivered in open court in Luxembourg on 15 December 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 14 DECEMBER 1971[1]

Mr President,
Members of the Court,

The request for a preliminary ruling on which I am called upon to give an opinion today concerns questions with which I have already dealt in Case 30/71. My preliminary observations may therefore be quite brief.
As you are aware, from 12 August 1968

1 — Translated from the German.