85 % pure butyric fat (99·5 %)
10 % refined suet
5 % sesame oil

or

85 % butyric fat
5 % curd
5 % skimmed milk powder
5 % refined suet of bovine animals.

Donner Mertens de Wilmars Bosco

Delivered in open court in Luxembourg on 23 March 1977.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 9 MARCH 1977

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Bundesfinanzhof. The appellant in the proceedings before that Court is Gervais-Danone AG. The respondent is the Hauptzollamt München-Mitte.

The question at issue between the parties is as to the classification under the Common Customs Tariff (the 'CCT') of certain goods which were imported by the appellant from Switzerland into the Federal Republic of Germany in a series of importations taking place between 20 December 1968 and 22 March 1969. In the customs entries submitted on behalf of the appellant the goods were, in each case, described as 'imitation lard'. The Bundesfinanzhof, in its Order for Reference, describes them, more neutrally, as 'mixtures of fats'.

In the case of the first two importations in the series, the composition of the goods was stated in the invoices accompanying the customs entries to be: 85 % butterfat, 10 % refined suet and 5 % sesame oil. In the case of the other importations it was stated to be: 85 % butterfat, 5 % curd, 5 % skimmed milk powder and 5 % refined beef suet. In every case the goods were entered under

heading 15.13 of the CCT, which covers 'Margarine, imitation lard and other prepared edible fats'. In the case of every importation except the last, the German customs authorities accepted that that was the correct classification of the goods and cleared them for free circulation on that footing.

Before the last consignment was cleared, however, Commission Regulation (EEC) No 496/69 of 18 March 1969 came into force. That Regulation was adopted under Article 3 of Council Regulation (EEC) No 97/69 of 16 January 1969, which, Your Lordships remember, empowers the Commission to adopt provisions 'for the application of the nomenclature of the Common Customs Tariff as regards classification of goods', in particular where those provisions are in accordance with the opinion of the Committee on Common Customs Tariff Nomenclature. Your Lordships will also remember that, in Case 37/75 *Bagusat KG* v *Hauptzollamt Berlin-Packhof* [1975] ECR 1339, the Court held that the effect of Article 3 was to confer on the Commission 'acting in cooperation with the customs experts of the Member States' a wide discretion as to the choice between two or more headings in the CCT that might fall to be considered in classifying particular goods, the only limit on that discretion being that the Commission may not amend the text of the CCT. In Cases 30/71 *Siemers & Co.* v *Hauptzollamt Bad Reichenhall* (Rec. 1971 (2) at p. 929) and 77/71 *Gervais-Danone AG* v *Hauptzollamt München-Schwanthalerstraße* (ibid. at p. 1138) — the 'mayonnaise cases' — the Court held that a regulation adopted under Article 3 could not apply to importations effected before the regulation entered into force.

Regulation No 496/69 provided that 'products containing 65 % or more by weight of milkfats and containing other fats such as lard, suet or coconut oil and normally used in the fine pastry and biscuit-making industries' should fall within subheading 21.07 F of the CCT. Putting it very shortly for the moment, that subheading covers 'food preparations not elsewhere specified or included' other than those falling within subheadings 21.07 A to E.

It is not, as I understand it, in dispute between the parties that the products imported by the appellant were of a kind 'normally used in the fine pastry and biscuit-making industries'. Indeed the appellant put in an expert's report (Annex I to the appellant's observations) designed to show that they were of such a kind.

It is also common ground between the parties that those products could not be classified as 'butter', within heading 04.03 of the CCT. That view is endorsed by the Bundesfinanzhof.

The Commission, for its part, appears to have reservations on those points. It went so far as to suggest, in its observations, that the products in question might fall within heading 04.03. This suggestion was however, to some extent at least, based on the alleged results of certain tests carried out by a 'Zolltechnische Prüfungs- und Lehranstalt' on samples taken from the last two consignments imported by the appellant and on an allegation that it was not scientifically possible to detect the presence of small quantities of suet in such products. The latter allegation drew from the appellant a further expert's report (put in at the hearing) designed to disprove it. I do not, my Lords, propose to pursue the issues so raised, as they appear to me to have no bearing on the questions referred to the Court by the Bundesfinanzhof.

The fact is, or so it seems, that, on the strength of Regulation No 496/69, and in apparent disregard of the rulings of the Court in the 'mayonnaise cases', the German customs authorities reclassified the goods imported by the appellant under subheading 21.07 F and, on that footing, assessed the appellant to additional duty.

Against that additional assessment the appellant appealed to the Finanzgericht of Munich, without success. Hence its further appeal to the Bundesfinanzhof. The grounds of that appeal are briefly:

(1) That, apart from Regulation No 496/69, the imported goods fell within heading 15.13;

(2) That, in so far as Regulation No 496/69 purported to transfer the goods from that heading to subheading 21.07 F, it was *ultra vires,* because such a transfer could only be effected by an amendment of the CCT; and

(3) That, in any case, Regulation No 496/69 could not apply to the importations effected before it entered into force.

The questions referred to the Court by the Bundesfinanzhof reflect the first two of those contentions. They are as follows:

'(1) Before the entry into force of Regulation (EEC) No 496/69 of 18 March 1969 was heading 15.13 of the Common Customs Tariff to be interpreted as meaning that mixtures of fats consisting of

(a) 85 % pure butterfat (99·5 %)
10 % refined suet
5 % sesame oil

or

(b) 85 % butterfat
5 % curd
5 % skimmed milk powder
5 % refined beef suet

fell within that tariff heading?

(2) If question 1 is answered in the affirmative:
Is Regulation (EEC) No 496/69 of 18 March 1969 valid or is it invalid, as it does not specify the content of tariff headings 15.13 and 21.07 but amends them and consequently is not covered by the enabling provisions of Regulation (EEC) No 97/69 of 16 January 1969?'

The argument on question 1 ranged over three chapters of the CCT.

The first was Chapter 4, which comprises, among other things, 'Dairy produce'. Such produce comes within the first four headings of the chapter, of which the contents may be summarized as follows:

04.01 — Fresh milk and cream;
04.02 — Preserved, concentrated or sweetened milk and cream;
04 03 — Butter;
04.04 — Cheese and curd.

It is to some extent relevant that those products are the main ones listed in Article 1 of Council Regulation (EEC) No 804/68 of 27 June 1968, which created the common organization of the market in milk products. I must also mention that the Explanatory Notes to the Brussels Nomenclature state that heading 04.03 includes butterfat.

The next relevant chapter is of course Chapter 15. This is entitled 'Animal and vegetable fats and oils and their cleavage products; prepared edible fats; animal and vegetable waxes'.

It is striking that none of the specific kinds of animal fat described under the various headings of Chapter 15 is a milkfat. Indeed, with only two exceptions, all the fats so described (e.g. lard, whale-oil, etc.) are of such a nature that they can only be obtained by killing the animal concerned, or at least inflicting on it severe surgery. The exceptions are 'wool grease and fatty substances derived therefrom (including lanolin)' (heading 15.05) and 'beeswax and other insect waxes' (heading 15.15).

The impression thus given that the animal fats comprised in Chapter 15 are distinct from milkfats is confirmed by the notes at the beginning of the chapter. These list various products specifically named in certain headings in other chapters of the CCT and expressly state that Chapter 15 does not cover those products. Among the products thus mentioned are pig and poultry fat not rendered or solvent-extracted (heading 02.05), cocoa butter (heading 18.04) and greaves (heading 23.01). But there is no

mention in the notes of butter itself. One deduces that the authors of the CCT considered that any such mention would be superfluous.

As regards, more particularly, heading 15.13, two observations are called for.

The first is that the English and French texts of the Explanatory Notes to the Brussels Nomenclature are not quite the same. The English text hints that products falling under that heading may contain butter only as an exceptional additive; the French text, to my mind, makes that clear. The English text is, so far as material, as follows:

'This heading covers solid edible preparations of fats. They are generally mixtures of:
(1) Different animal fats and oils, or
(2) Different vegetable fats and oils, or
(3) Both animal and vegetable fats and oils.

The fats and oils of these mixtures may be previously hydrogenated. They may be worked by emulsification (e.g. with skimmed milk), churning, texturation (pounding with air to modify the texture or crystalline structure), etc., and may contain added lecithin, starch, colouring, flavourings or vitamins. They may also contain butter or lard.

.....

The principal preparations of this kind are margarine (made to resemble butter in appearance, consistency, colour, etc.), shortenings (produced from texturized oils or fats) and imitation lard.'

The French text of the second and last paragraphs is as follows:

'Ces mélanges peuvent être émulsionnés avec du lait, du petit lait ou autrement et être malaxés ou avoir été traités par texturation (martelage par de l'air comprimé afin d'en modifier la texture et la structure cristalline) ou additionés de lécithine, de fécule, de colorants organiques, de substances aromatiques, de vitamines ou même de beurre.

.....

Les principales de ces graisses alimentaires préparées sont la margarine et le similisaindoux (appelés aussi, dans certains pays, *beurre de margarine, beurre artificiel, succédané du beurre, succédané du saindoux ou lard compound*), la caractéristique essentielle de ces produits étant d'offrir certaines analogies avec le beurre ou le saindoux du point de vue des caractères extérieurs (aspect, consistance, couleur, etc.), ainsi que les produits dits *shortenings* (obtenus à l'aide d'huiles ou graisses traitées par texturation).'

Thus, from a consideration of Chapter 15 as a whole, and of those Explanatory Notes, it does not look as though heading 15.13 is intended to comprise products consisting mainly of butter or butterfat.

The second general observation I must make about that heading is that the products comprised in it, in company with a number of other products included in Chapter 15, are covered by the common organization of the market in oils and fats created by Council Regulation No 136/66/EEC of 22 September 1966: see Article 1 (2) of that regulation. Under that organization they are not, when imported from third countries, subject to levy, but only to the customs duty prescribed by the CCT.

Lastly I come to Chapter 21 of the CCT. This is entitled 'Miscellaneous edible preparations'.

The edible preparations listed there are miscellaneous indeed, including as they do such diverse products as coffee substitutes and extracts, mustard, sauces, chutney, soups, yeasts, prepared baking powders, prepared cereals and pastas. What is significant, however, to my mind, for present purposes, is that subheadings C, D, and E of heading 21.07 all comprise products pincipally

derived from milk, i.e. under C, ice-cream, under D, prepared yoghourt and powdered milk, and under E, cheese fondues, and that, when one comes to subheading F, one finds that it is divided into nine sections, the preparations to be classified under each depending on the percentage of milkfats (by weight) that they contain.

That is not to say that heading 21.07 is the only heading in the CCT comprising preparations containing milkfats. There are many others, e.g. heading 17.04 (sugar confectionery, not containing cocoa), heading 18.06 (chocolate and other food preparations containing cocoa), heading 19.02 (preparations used as infant food or for dietetic or culinary purposes), subheading 19.08 B (pastry, biscuits and cakes other than gingerbread), and heading 22.02 (non-alcoholic beverages). It is however noteworthy that each of those headings classifies the goods comprised in it, in so far as they contain milkfats, by reference to the precise percentage of milkfats that they contain. This is in contrast with the rather vague wording of heading 15.13, and confirms the impression that that heading does not comprise products containing milkfats, except as an occasional additive: where the CCT is really concerned with milkfats it deals with them with precision.

So far as the common organization of agricultural markets is concerned, the products comprised in heading 21.07 are subject to the 'arrangements applicable to certain goods resulting from the processing of agricultural products' instituted by Council Regulation No 160/66/EEC of 27 October 1966, since replaced by Council Regulation (EEC) No 1059/69 of 28 May 1969. Under those arrangements such products are, on importation from a third country liable to a charge consisting of a fixed component for the protection of the Community processing industry and a variable component to offset any difference between the Community prices of the agricultural products entering into their composition and the prices of the latter products on the world market.

The reason why I have, in the case of the products falling within the first four headings of Chapter 4, within heading 15.13 and within heading 21.07, referred to their status under the common organization of agricultural markets, is that the Commission, in its observations, reminded us of the authorities in this Court where it is held that the interpretation of one heading in the CCT in relation to another must, in a case of doubt, take into account the function of the CCT in regard to the requirements of the systems of organization of those markets as well as its purely customs function: Cases 72/69 *Hauptzollamt Bremen* v *Bremer Handelsgesellschaft* [1970] 1 ECR 427, 74/69 *Hauptzollamt Bremen-Freihafen* v *Krohn & Co.*, ibid. p. 451, and 12/71 and 14/71 *Henck* v *Hauptzollamt Emmerich* (Rec. 1971 (2) pp. 743 and 779). My own view is that there is no real doubt that the products in question in the present case were (quite apart from Regulation No 496/69) within subheading 21.07 F and not within heading 15.13. But, on those authorities, the Court is bound to take into account that the opposite view would be subversive of the common organization of the market in milk and milk products.

Reference was also made in argument to Rule A 3 of the General Rules in Section I of Part I of the CCT. That rule is in these terms:

'When for any reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

(b) Mixtures and composite goods which consist of different materials or are made up of different components and

which cannot be classified by reference to 3 (a) shall be classified as if they consisted of the material or component which gives the goods their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which involves the highest rate of duty *and if this rate is the same for several headings, they shall be classified under that one of such headings which occurs latest in the nomenclature of the tariff.'*

As to paragraph (a), it was submitted on behalf of the appellant, and indeed accepted by the Bundesfinanzhof, that heading 15.13 provided a more specific description than subheading 21.07 F. With all respect to the Bundesfinanzhof, it does not seem to me that that is so. No-one any longer suggests that the products imported by the appellant were 'imitation lard'. The submission of the appellant is that they were 'prepared edible fats', and it is doubts as to that that impelled the Bundesfinanzhof to refer the case to this Court. To my mind 'prepared edible fats' is no more specific a description than that effectively found in subheading 21.07 F, namely 'food preparations not elsewhere specified or included containing (such and such a percentage) by weight of milkfats'.

Paragraph (b) requires one to look for 'the material or component' in the mixture that gives it its 'essential character'. There was very little argument on this point and it is not adverted to by the Bundesfinanzhof in its Order for Reference. The first expert's report put in by the appellant suggests that in fact different mixtures or shortenings are needed by the pastry and biscuit-making industries for different purposes, and that no one ingredient in such a product gives it its 'essential character', though a preponderance of butterfat is needed in some cases, e.g. for the manufacture of 'petits-beurres'. I infer that the criterion in paragraph (b) is inapplicable in the present instance.

That leaves paragraph (c), which points clearly to subheading 21.07 F, since this is both that which involves the highest rate of duty and that which occurs latest in the nomenclature of the tariff.

The Commission drew our attention to some discussions that took place in 1963 in the Customs Cooperation Council, when the Australian authorities raised the question of the correct classification under the Brussels Nomenclature of 'powdered butter' or 'butter powder', which was then a new product. The CCC agreed that this should be classified under heading 21.07. The United Kingdom suggested that the CCC should at the same time consider the classification of five other products which it described as being on the 'borderline' between heading 15.13 and heading 21.07, namely:

'(i) butter with a small quantity of added sugar though not sufficient sugar to deem the product "sweetfat";

(ii) butter with an addition of concentrated vanilla essence;

(iii) a product consisting of butter and lard in equal proportions;

(iv) butter with added milk powder; and

(v) butter fat made from butter by the extraction of water.'

In fact the CCC was unable to agree on the classification of any of those products except (iii), which it held to be within heading 15.13. (See the Annex to the Commission's observations.) I do not for my part find that evidence of much assistance, if only because of the contrast between the Brussels Nomenclature, where heading 21.07 consists simply of the words 'food preparations not elsewhere specified or included', and the CCT where that heading has five and a half pages of detailed description of the goods that it comprises. I doubt however if the CCC, had it had the benefit of the full argument submitted to this Court, could have come to the conclusion that a

mixture consisting of butter and lard in equal proportions was within heading 15.13. In any event, rulings of the CCC are not binding in law.

The appellant based an argument on the 'precipitate manner' in which Regulation No 496/69 was adopted.

The circumstances in which that regulation was adopted were described to us by counsel for the Commission at the hearing – see also Annex 2 to the appellant's observations, which contains the relevant minutes of the Committee on Common Customs Tariff Nomenclature. It seems that what happened was that the Italian customs authorities suddenly found themselves confronted with a customs entry relating to a product containing over 65 % butterfat which the importer claimed should be classified under heading 15.13. Those authorities got into touch with the Commission for guidance. As a result the Commission drafted Regulation No 496/69 and placed the draft before a meeting of the Committee on Common Customs Tariff Nomenclature which was held on 13 and 14 March 1969. The urgency and importance of the matter were emphasized to the Committee by its Chairman, the representative of the Commission (Regulation No 97/69, Article 1 (1)). The representatives of five Member States (there were of course then only six) approved the principle embodied in the draft. The German representative, however, expressed the view that the goods in question were within heading 15.13 as they constituted 'edible mixtures of animal and vegetable fats' and the Explanatory Notes to the Brussels Nomenclature allowed goods containing butter to be classified under that heading. It must be borne in mind that, by that time, the German authorities had already let in under heading 15.13 the bulk of the importations in the present case. We were told by the Commission at the hearing that the only known cases of anyone seeking to import a product containing a preponderance of butterfat into the Community under heading 15.13 were that Italian one and the present one. At all events, the result of the discussion in the Committee was that, by a majority (the German representative dissenting), the Committee delivered an opinion favourable to the Commission's proposal, and so Regulation No 496/69 was adopted. The present litigation evinces how loyally the German authorities accepted the decision thus reached. I can see nothing in that episode that supports the appellant's argument.

I should however add this, although it does not bear directly on the present case. In the course of the discussion in the Committee the view was expressed that the Committee should, at an early date, consider whether a limit should be fixed on the butter content of products within heading 15.13. The upshot of that was the adoption by the Commission, on 9 April 1969, with the concurrence of the Committee, of Regulation (EEC) No 663/69 (OJ L 86 of 10. 4. 1969) 'on the classification of goods under heading No 15.13 of the Common Customs Tariff'. This provides (by Article 1) that:

'Margarine, imitation lard and other prepared edible fats containing milkfats shall continue to be classified under heading No 15.13 of the Common Customs Tariff if their milkfat content does not exceed 10 % by weight.'

The use there of the words 'continue to be' is, in the circumstances, odd. Odder still is the fact that Regulation No 663/69 did not repeal Regulation No 496/69, so that one is left with the untidy situation in which one Regulation (No 496/69) expressly includes in subheading 21.07 F products 'normally used in the fine pastry and biscuit-making industries' that contain 65 % or more by weight of milkfats, whilst another (No 663/69) implicitly excludes from heading 15.13 'margarine, imitation lard and other

prepared edible fats' containing more than 10 % by weight of milkfats. Counsel for the Commission conceded at the hearing that, so far as the regulations of the Commission were concerned, this left the position of products containing between 10 % and 65 % of milkfats uncertain. It also leaves uncertain the position of any products containing 65 % or more of milkfats that are not 'normally used in the fine pastry and biscuit-making industries'. It is to be hoped that, when Your Lordships have delivered Judgment in this case, the Commission will, in the light of that Judgment, take steps to substitute for Regulations No 496/69 and No 663/69 a more coherent and comprehensive piece of legislation.

I should perhaps finally record that the appellant also put in evidence (as Annex 3 to its observations) a document showing that, in February 1970, the Swiss customs authorities cleared under heading 15.13 a consignment of a product described as imitation lard ('Kunstspeisefett') and containing 85 % butterfat. But of course the question for Your Lordships is not what the Swiss Customs (any more than the German) may have thought or done on this or that occasion, but what is the correct interpretation of the CCT.

In the result I am of the opinion that, in answer to question 1 referred to the Court by the Bundesfinanzhof, Your Lordships should rule that at no time have the products described in that question fallen within heading 15.13 of the CCT. On that footing, question 2 does not arise.