In Case 30/71

Reference to the Court under Article 177 of the EEC Treaty by the IIIrd Senate of the Finanzgericht München in the action pending before that court between

KURT SIEMERS & Co., 40 Neuer Wall, Hamburg 36, undertaking belonging to Kurt Günter Willi Siemers, Hamburg,

and

HAUPTZOLLAMT BAD REICHENHALL,

— on the interpretation of Regulation No 950/68 of the Council of 28 June 1968 (OJ L 172, p. 1);

— 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 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 — Summary of facts and of procedure

The facts and procedure may be summarized as follows:
On 30 May and 9 July 1968 the plaintiff in the main action (hereinafter called the plaintiff) applied for customs clearance in Germany of two consignments of goods described as 'Diet-Mayonnaise'. In both cases the customs authorities, deciding not to inspect the goods, classified them under heading 21.04 B of the Common Customs Tariff and by an

informal notice of duty imposed import duty in accordance with the classification of the goods.

As regards the import of 9 July, the plaintiff stated that the product was made of wine vinegar, whole egg, salt and butter oil.

After import the plaintiff sold these goods to a company 'Agricola AG', Hamburg, which processed them into butter fat. On the basis of observations made on 5 September 1969 by the Betriebsprüfungsstelle Zoll (AwlÜ) (Customs Division of the Businesses Inspectorate) regarding the examination of the plaintiff's imports, the German Customs Office issued an amended duty notice on 22 October 1969 in which it claimed additional duty. Following the opinion expressed in the observations of the Betriebsprüfungsstelle, the Customs Office considered that the product in question constituted a 'food preparation not elsewhere specified or included' and should be classified under heading 21.07.

The *plaintiff* brought an action against this classification before the Finanzgericht München before which it founded its argument on the fact that the imported product consisted of butter oil mayonnaise. Mayonnaise is mentioned in the explanatory notes to the German Customs Tariff, Note I (1) to heading 21.04. Since the explanatory notes make no distinction, it is irrelevant whether the base of the mayonnaise is milk fat or vegetable fat.

Regulation No 241/70 of the Commission of 9 February 1970 (OJ L 32, p. 6) shows that the goods in question must be classified under heading 21.04 of the Common Customs Tariff, because, in issuing this regulation, the legislature intended to amend the state of law. This is shown by the fact that the regulation fixes the date on which it enters into force and by the fact that the heading refers to 'classification of goods'. Even if the regulation was only of an interpretative nature, the product in question could not be classified under heading 21.07 in the absence of the requisite conditions being fulfilled for this classification which refers to products which are not intended for use as sauce or condiment or mixed seasoning.

Finally the plaintiff maintained that in view of the fact that the national administrations were no longer entitled to issue 'verbindliche Zolltarifauskünfte (binding customs tariff notices) the plaintiff could rely on good faith.

The *Hauptzollamt* (Principal Customs Office), the defendant in the main action, takes the view that the product in question, having regard to its physical attributes and in particular the flavour characteristics, constitutes neither mayonnaise nor any other mixed condiment or mixed seasoning within the meaning of heading 21.04.

This view is confirmed by Regulation No 241/70 which excludes from tariff heading 21.04: 'food preparations based on milkfats', which contain various ingredients (egg yoke, vinegar, salt, for example) used also in the preparation of sauces, mixed condiments or mixed seasonings and which are clearly not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings.

Contrary to the plaintiff's argument, the sole purpose of Regulation No 241/70 is solely to ensure uniform application of the Common Customs Tariff in the Member States of the EEC.

As regards the plaintiff's statement that the German revenue authorities are no longer entitled to issue 'verbindliche Zolltarifauskünfte', the Hauptzollamt maintains that these notices do not constitute a generally binding interpretation of definitions of the Common Customs Tariff and therefore are still permissible after the latter had entered into force.

In view of the foregoing the German court by order dated 27 May 1971, registered at the Court of Justice on 15 June 1971, referred the following questions to the Court for a preliminary ruling:

I (a) Does it make any difference for the classification of a product de-

scribed as 'diet-mayonnaise' under heading 21.04 of the Common Customs Tariff whether the product has been manufactured by using butter, butter fat or fractionated butter oil, 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 in 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 automatically discernible that the product is not intended for consumption in the unaltered state as a 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 a 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 still empowered to issue binding customs tariff notices ('verbindliche Zolltarifauskünfte') under Article 23 of the German Zollgesetz?

(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 in accordance with 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 views of the Advocate-General, the Court decided to open the oral procedure without holding a preparatory inquiry.

Kurt Siemers & Co., represented by Peter Wendt, the Government of the Federal Republic of Germany, represented by Horst Laubereau and Harry Schäpe and the Commission of the European Communities, represented by Peter Kalbe, presented oral argument at the hearing on 5 October 1971.

The Advocate-General delivered his opinion at the hearing on 27 October 1971.

II — Written observations submitted to the Court

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

Question I (a)

The plaintiff maintains that it follows from the explanatory notes to the Brussels Nomenclature of 1955 (explanatory notes to heading 21.04, in particular paragraphs (1) and (4) that milkfats may be used in the preparation of sauces, mixed condiments and mixed seasonings. In the absence of relevant Community provisions, the explanatory notes constitute an important guide to the interpretation of the Common Customs Tariff.

The Commission proposal to the Council for a directive on the approximation of the laws of Member States on mayonnaise, sauces processed from mayonnaise and other emulsified condiment sauces (OJ 1970, C. 18, p. 93) and in particular Article 6, likewise shows that milkfat constitutes the normal ingredient in the manufacture of the said products.

In the third place, Regulation No 241/70 itself clearly shows that sauces, mixed condiments and mixed seasonings may contain milkfats.

The *Government of the Federal Republic of Germany* states that milkfats are not suitable as a basis for mayonnaise. The physical qualities of mayonnaise require fat with a low melting point. Since butter and butter oil have quite a high melting point they cannot be used as a basis for mayonnaise. Diet-mayonnaise is distinguishable from normal mayonnaise in that it is more easily digestible. Since this quality depends on the unsaturated fatty acid content, the use of butter oil, which has a higher saturated fatty acid content than vegetable oil, does not come into question as a basis for such mayonnaise.

It is true that a process for the manufacture of butter oil with a low melting point and a high unsaturated fatty acid content is mentioned in technical literature. The high manufacturing costs associated with the process are however an obstacle to its practical use.

Further, a distinction must be made between mayonnaise with a fat content of more than 50% and one with a fat content of less than 50%. Mayonnaise with a fat content of less than 50% may contain butter or butter oil without losing the quality of mayonnaise, if the melting point is lowered by the stabilizing agents.

The *Government of the Federal Republic of Germany* concludes from this that goods specified as diet-mayonnaise with a milkfat content of more than 50% cannot be classified under heading 21.04 of the Common Customs Tariff.

As regards goods described as mayonnaise with a fat content of less than 50%, the use of butter or butter oil does not prevent classification under heading 21.04 if it has the character of mixed condiment or mixed seasoning.

The *Commission of the European Communities* observes that it appears from the Explanatory Notes to the Brussels Nomenclature of 1955 that the use of milkfat as a basic ingredient in sauces, mixed condiments and mixed seasonings cannot as such affect the classification of the products in question.

Question I (b)

The *plaintiff* observes that it is difficult to find a trade usage in the present case. Since there are great differences in consumer habits in the different parts of the Community, it is impossible to refer to a trade usage in all Member States for the classification of the products in question. To take into account the trade usage in a single Member State in classifying the goods is, however, incompatible with the uniform application of the Common Customs Tariff.

The *Commission* maintains that in all cases where seasoning products must be classified regard must be had to trade usage to determine whether the goods in question are intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings because neither the wording of the

tariff nor the Brussels Explanatory Notes to heading 21.04 contain clear and specific rules. The Commission further observes that trade usage can be referred to as a means of interpretation only where such usage is clearly defined. In view of the importance of a uniform application of the Common Customs Tariff, it is obvious that it is not possible to take account of trade usage which exists in only one Member State.

The *Government of the Federal Republic of Germany* observes that neither the 'règles générales pour l'interprétation de la nomenclature tarifaire' nor those on the interpretation of the Nomenclature of the Common Customs Tariff contain provisions referring to trade usage. Since there could be a trade usage only in respect of the particular product, the question should be answered only in respect of mayonnaise. There is a world-wide trade usage in respect of mayonnaise: it is a seasoned or aromatic emulsion of a more or less liquid nature which is used as an additive to meat or fish. The use of a fat having a low melting point as the basic ingredient is the decisive criterion.

Question I (c)

The *plaintiff* takes the view that Regulation No 241/70 of the Commission, by reason of Article 2 thereof, entered into force on 13 February 1970. In the absence of a provision making it retroactive the said regulation did not apply on 27 May and 9 July 1968. The question from the Finanzgericht on the applicability of Regulation No 241/70 'by virtue of its content' has its origin in the unfounded argument of the Hauptzollamt that the regulation has only a declaratory effect. However, it appears from fundamental provisions such as those of Regulation No 97/69 of the Council and Article 28 of the EEC Treaty that the regulations creates law, having as sole object an amendment of the Common Customs Law. Further it is beyond doubt that Regulation No 241/70 is applicable, likewise by virtue of its content, only as from 13 February 1970.

The *Commission* maintains that Regulation No 241/70 is applicable to all cases relating to the classification of products in question which have to be decided after its entry into force for the following reasons. By virtue of their content, provisions of the nature of those of Regulation No 241/70 are only explanatory, having as their objective clarification of the scope of the tariff headings to which they refer. The implied recommendation of the Court of Justice contained in its judgment of 18 June 1970, *Hauptzollamt Bremen-Freihafen* v *Bremer Handelsgesellschaft* (manioc flour) Case 74/69, [1970] ECR, to take formal measures to ensure the uniform application of the Common Customs Tariff inspired the Commission to act in such a way. In view of its legal form, Regulation No 241/70 compels authorities and courts of the Member States to apply the uniform interpretation which it gives to text of the tariff. It likewise follows from its legal form that as from its entry into force the authorities and courts are obliged to assess and decide the questions which they have to settle in accordance with the rules which it sets out. The regulation has its legal basis in Regulation No 97/69 of the Council of 16 January 1969 (OJ L 14, p. 1), and in particular Article 3 thereof which authorizes the Commission to adopt the provisions required for the application of the Nomenclature of the Common Customs Tariff as regards classification of goods. The scope of this power is determined by its objective, in particular to define the Common Customs Tariff. From this it likewise appears that Regulation No 241/70 is of a declaratory nature. Finally an argument in favour of the declaratory nature of the said regulation is to be found in the penultimate recital where the Explanatory Notes to the Brussels Nomenclature are referred to.

The *Government of the Federal Republic of Germany* observes that Regulation No 241/70 is an authentic rule of interpretation and must be applied on this ground to every question of interpretation to be decided after 13 February 1970.

Question I (d) (1)

The *plaintiff* maintains that having regard to its answer to Question I (c), an opinion from it on this question would be superfluous. However it observes that the question whether it is clear that the goods are intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings, cannot be decided except on the basis of the physical properties of the goods alone. These properties form the sole objective criterion to assess the nature of their intended consumption. The application of criteria other than the physical properties in the tariff classification would make the uniform application of the Common Customs Tariff impossible.

The *Commission* states that the word 'clearly' means that the competent authorities must classify the goods in question under heading 21.07 when it is established that having regard to trade usage and their specific intended consumption, they are not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings.

The *Government of the Federal Republic of Germany* observes that the classification of the products in question must depend on physical properties and the external characteristics which they possess at the time when the classification is being considered.

Question I (d) (2)

The *plaintiff*, the *Commission* and the *Government of the Federal Republic of Germany* are unanimously of the opinion that the customs authorities are alone competent to decide the characteristics of the product to be classified.

Question I (d) (3)

The plaintiff observes that commercial documents cannot be used to determine the ultimate intended consumption of the products since such documents contain only rarely information of a decisive scope. It is contrary to the meaning of the word 'clearly' to seek to infer from the circumstances surrounding the manner in which the product is subsequently treated, the use for which the product was intended at the date relevant for tariff classification.

The *Commission* observes that it has no objection to account being taken of commercial documents or circumstances surrounding the manner in which the product is subsequently treated in order to infer whether it is 'clearly' intended for consumption in the unaltered state.

The *Government of the Federal Republic of Germany* is of the same opinion as the Commission.

Question II (a)

According to the *plaintiff* it appears from the case-law of the Court of Justice (*Hauptzollamt Hamburg* v *Bollmann*, Case 40/69 (turkey rumps), [1970] ECR and *Hauptzollamt Bremen-Freihafen* v *Krohn*, Case 74/69 (manioc flour), [1970] ECR) that Member States cannot issue rules of interpretation of the Common Customs Tariff or take measures affecting it. This means that legislative measures and measures by the executive amending or supplementing the Common Customs Tariff are not open to Member States. In view of the fact that the verbindliche Zolltarifauskünfte are measures executing the Common Customs Tariff binding on the customs authority it is clear that they are incompatible with Community law. Although the verbindliche Zolltarifauskünfte are in form executive measures they have in substance the effect of legislative acts for they bind an uncertain number of parties for an indeterminate time. For this reason they are

unlawful even if the case-law of the Court relates only to legislative measures.

The *Commission* observes that the objective of the verbindliche Zolltarifauskünfte is the protection of legitimate confidence of parties in the interpretation of the Common Customs Tariff by the authorities of a Member State. In so far as they are concerned with the interpretation of individual cases they are compatible with Community law. In such a case the possible wrong interpretation of the customs tariff by a verbindliche Zolltarifauskünfte has the same consequences as an incorrect classification in the ordinary way by the customs authorities. A small number of wrong classifications is inevitable and does not prejudice the correct functioning of the Common Customs Tariff. However if the verbindliche Zolltarifauskünfte assumed the character of authoritative interpretations and automatically applied to numerous and roughly identical cases, the correct functioning of the Common Customs Tariff would be jeopardized in the event of a wrong interpretation. This would be all the more so since review by a court of law of the interpretation given is not likely. It follows from these considerations that the Oberfinanzdirektionen are entitled in the absence of Community rules to issue verbindliche Zolltarifauskünfte in so far as they relate to the interpretation of the Common Customs Tariff in a particular case.

The *Government of the Federal Republic of Germany* maintains that it is clear that the verbindliche Zolltarifauskünfte are permissible because they have the same effect as classification of the products within the framework of the normal customs procedure. They must be regarded as administrative acts which bind only the customs offices. Parties concerned have a right of appeal to the Bundesfinanzhof against the verbindliche Zolltarifauskünfte.

Question II (b)

The *plaintiff*, *Commission* and the *Government of the Federal Republic of Germany* observe that their opinion on the previous question likewise applies to the power of the Oberfinanzdirektionen to issue verbindliche Zolltarifauskünfte before the entry into force of Regulation No 950/68 with regard to products coming under Regulation No 160/66 of the Council.

Grounds of judgment

1 By order dated 27 May 1971, which arrived at the Court on 15 June 1971, the Finanzgericht München, pursuant to Article 177 of the EEC Treaty, 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" under heading 21.04 of the Common Customs Tariff whether the product has been manufactured by using butter, butter fat or fractionated butter oil, and if so, what difference'. Then it is asked whether the tariff classification depends on trade usage (Verkehrsauffassung) or on the 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. The imports were made on 30 May and 9 July 1968, the first, therefore, before 1 July 1968, the date of the entry into force of the Common Customs Tariff. Nevertheless, at the date of this import the products of heading 21.07 of the Brussels Nomenclature were subject to the provisions of Regulations No 160/66/EEC of the Council of 27 October 1966 establishing a marketing system for certain goods derived from the processing of agricultural products. Thus the question put may in this respect be interpreted as relating to the distinction between heading 21.07, incorporated in this regulation, and heading 21.04.

4 In order to ensure the uniform interpretation and application of the Brussels Nomenclature of 1950, 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 notices 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 notices 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, meat and fish) and are manufactured from various substances (eggs, 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 pro-

ducts 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, butter fat or fractionated butter oil 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 Regulation No 241/70 cannot be applied for the purpose of determining the classification of products imported before its entry into force. This regulation, which makes detailed provision for the conditions for classification under heading 21.07, is of a legislative nature and cannot have retroactive effect.

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, butter fat or fractionated butter oil 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 Oberfinanzdirektionen, 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 the 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 im-

porters 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, so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on 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, in particular Article 177;
Having regard to Regulations Nos 160/66 of the Council of 27 October 1966 and 950/68 of the Council of 28 June 1968 and Regulation No 242/70 of the Commission of 9 February 1970;
Having regard to the Protocol on the Statute of the Court of Justice of the European Community, in particular 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 order dated 27 May 1971 of the Finanzgericht München, hereby rules:

1. **The classification of a product under heading 21.04 of the Common Customs Tariff is precluded if the use of butter, butter fat or**

fractionated butter oil 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 Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 24 November 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 27 OCTOBER 1971[1]

Mr President,
Members of the Court,

In the case referred for a preliminary ruling with which I am dealing today there are once again tariff classifications problems, that is, questions which relate to the interpretation and application of the Common Customs Tariff. First I must relate the following facts.

On 30 May and 9 July 1968, Kurt Siemers & Co., Hamburg, the plaintiff in the main action, imported from Switzerland into the Federal Republic of Germany certain quantities of a product which the firm described as 'diet-mayonnaise' and which consisted, at least according to the firm's declaration in respect of the second import— of 'wine-vinegar, whole egg (probably deep frozen), salt and butter oil'. In accordance with the firm's application, the competent customs offices, without an examination, that is without taking samples, classified the product under heading 21.04 ('sauces, mixed condiments and mixed seasonings') and imposed, in addition to turnover tax, merely the relevant customs duty. The goods were later sold to a firm in Hamburg, which apparently processed them into butter oil and allegedly exported them, against refunds, to third countries.

On the basis of a memorandum from the Customs Division of the Businesses Inspectorate of 5 September 1969 regarding the examination of the plaintiff's imports, from which it emerged that the product was not regarded in the trade as mayonnaise, that is as condiments and seasonings or sauces, and consequently could be classified only under heading 21.07 as 'food preparations not elsewhere specified or included', the appropriate customs office issued an amended tax assessment on 22 October 1969 and, since products under tariff heading 21.07, in so far as they contain milk products, are covered by the marketing system of Regulation No 160/66 of 27

1 — Translated from the German.