of the fact that the values of milkfat content, owing to factors of uncertainty in the method of analysis laid down in the said Annex, are determined approximately.

Lecourt Monaco Pescatore

Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 6 February 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 JANUARY 1973 [1]

Mr President,
Members of the Court,

In the proceedings for a preliminary ruling in respect of which I am today giving my opinion, the material question is whether Article 7 (3) of Regulation No 83/67 (OJ of 26. 4. 1961, p. 1597) as read with Annex V to the Regulation, was valid. The provision in question reads: 'The percentage by weight of the milkfat content of a product shall be determined according to the method described in Annex V'. The Annex mentioned then describes in detail the method to be used.

An understanding of the present proceedings requires the following preliminary statement.

Regulation No 83/67 is of importance in connection with the trade arrangements applicable to certain goods resulting from the processing of agricultural products, established by Regulation No 160/66 (OJ of 28. 10. 1966, p. 3361). The trade arrangements cover goods arising from the processing of agricultural products subject to a common organization of the market. Their object is to even up the protection through market regulation of production within the Community. With this in view, a charge is imposed on the import from third countries of processed agricultural products, a charge which is made up of two elements, that is to say, on the one hand a customs duty based on value for the protection of the foodproducing industry in the Community, and on the other, a variable element, fixed by reference to the agricultural products contained in the commodity and the difference between the prices ruling in

1 — Translated from the German.

the importing country of the Community and those ruling in the world market. Regulation No 160/66 applied (amongst other things) — and this is of prime concern — to goods within tariff heading 18.06 ('Chocolate and other food preparations containing cocoa') and thus to products also containing milkfat. Annex I to Regulation No 83/67 accordingly lays down the customs specifications and Annex II refers to the 'Quantity of basic products to be taken as having been used in the manufacture of 100 kilograms (net) of a commodity.' Subsequently these Annexes were replaced by Annexes A and B to Regulation No 735/68 of 18 June 1968 (OJ L 138 of 21. 6. 1968). Accordingly, within tariff heading 18.06 unter D II a distinction is made between products with a milkfat content of more than 6·5 % but less than 26 % by weight (b) and those with a milkfat content of 26 % by weight or more (c). In respect of the former class it is to be taken that 85 kilograms of whole milk powder have been used in the production of 100 kilograms of the commodity; in the case of the latter that 50 kilograms of butter have been used in the production of 100 kilograms of the commodity. As already stated, Article 7 of Regulation No 83/67 provides for the ascertainment of milkfat content by reference to the method described in Annex V to the Regulation itself. The details will be elucidated later. The variable elements were, consistently with this, fixed by the Commission; in respect of the third quarter of 1968, this was done in the Commission's Regulation No 822/68 (OJ L 150 of 29. 6. 1968).

These provisions are of moment to the plaintiff in the preliminary question proceedings — an importing firm resident in Cologne. On 21 August 1968 the firm imported from Austria into the Federal Republic of Germany products within tariff heading 18.06. According to information given by the producer, the commodities involved were of at least 25 but not more than 26 per cent by weight of milkfat and so products which were to be treated as 'other food preparations containing cocoa' within tariff heading 18.06-D-II-b-2. An examination of two samples made by the Zolltechnische Prüfungs- und Lehranstalt Munich, in accordance with the method prescribed in Annex V to Regulation No 83/67 nevertheless showed that the milkfat content was in the one case 26·9 % and in the other 26·1 %. Accordingly the responsible Customs Office treated the imported goods as food preparations containing cocoa within heading 18.06-D-II-c-2 and fixed the charge accordingly.

The importing firm, however, considers the impost is unjustified. It takes the view that the results of the examination are erroneous, because the testing procedure prescribed in Annex V to Regulation No 83/67 is incomplete and not accurate enough and is consequently contrary to law. Accordingly the firm appealed against the assessment and, being unsuccessful in that regard, laid the matter before the Munich Finanzgericht. The arguments adduced — and we shall come to them shortly — appear to have impressed the Finanzgericht. As a result, the Court, sharing the view expressed by the plaintiff as to the validity of Article 7 (3), as read with Annex V, of Regulation No 83/67, suspended the proceedings by Order made on 14 June 1972 and referred to the European Court of Justice the preliminary question of validity.

We propose now to discuss the problems raised.

As already stated, the Regulation in question is concerned with prescribing the chargeable milkfat content of processed agricultural products in accordance with the requirements of the market organization. It is a matter not easy of achievement, because the commodities in question contain other fats (such as cocoa fat) which as such cannot be separated from milkfats. For this reason, the total fat content is ascertained and from it the butyric index is deduced in accordance with a method

precisely described, and then, from this and from the known fact that on average milkfat discloses a given butyric index, the milkfat content is arrived at.

The applicant in these proceedings for a preliminary ruling has had a number of things to say about this method, which the Commission itself admits produces only approximate values which can occasionally deviate from the actual milkfat content of a commodity.

In the first place the plaintiff considers the testing procedure is incomplete. It omits a check or blank test ('Blindversuch') paying attention to fat without milkfat content. Such a test, says the plaintiff, would show to what extent any analysis (by reason of the materials used and other considerations) could lead to a finding of an excessive milkfat content and would allow a corresponding deduction from the results of an examination.

Secondly, the plaintiff asserts that the procedures prescribed are not accurate enough, because they can lead to different results according to the identity of the person making the test. This has been known for a long time and because of it and in another connection (the International Bureau for Cocoa and Chocolate having found that in its own experience differences arose as between one testing official and another) an improved method has as a result been used in the chemistry of foodstuffs, calling for the application of a more precise gas chromatographic procedure.

Finally, the plaintiff finds fault with the analysis procedure employed by the Community in that it works only on the basis of an average butyric index. The procedure leaves out of account that the butyric index of milkfat varies from 15·4 % to 24·5 % according to the season and essential prevailing conditions. This gives rise to erroneous results of a test which can lead to the assumption of a milkfat content that is too high.

In the view of the plaintiff all these factors justify the objection that the Council in laying down the analysis procedure in Annex V to Regulation No 83/67 offended against the laws of logic, of nature and the principles derived from scientific experience. Accordingly, one can speak of an infringement of the principle of proportionality and of the protection of confidence as well as of misuse of powers, seeing that the matters adumbrated above could lead to an excessive charge on imported goods: considerations which point to the invalidity of the Regulation.

Let us begin the examination occasioned by the reasoning thus advanced by turning to the first point raised, namely the absence of a so-called blank test in the method of analysis in Annex V to Regulation No 83/67. It must be conceded that the omission of a control test of this sort and the deduction of a corresponding blank value necessarily leads to an excessive butyric index of the order of between 0·84 % an 1·4 % and thus to an excessive milkfat content. This means in practice that importers do not use to the full the milkfat content coming within the sub-headings of tariff heading 18.06, but are compelled to leave a safety margin in relation to the higher demarcations of the various sub-headings. Thereby a displacement of the limits as between the individual tariff sub-headings occurs.

In assessing the importance of this aspect, it may be said immediately that a preliminary point advanced by the plaintiff in these proceedings appears not to be particularly helpful. It is that the classification in the tariff according to the amount of milkfat content is a matter of *substantive* law whereas the method of analysis for ascertaining the milkfat content is a matter of *procedural* law, and since procedural rules may not alter substantive law that method is not permitted to alter the tariff classification. In reality, any such distinction in the present connection would appear to be quite artificial, because the whole system in Regulation No 83/67 emanates from the Council. The relevant legislative intention of the Council is thus to be

deduced from the contents of the Regulation as a whole. Thus, seeing that the Council, as supreme legislator in this field, has power to make essential tariff alterations, obviously the Council cannot be denied the right to bring about the corresponding result through issuing orders as to a particular testing procedure (which might perhaps not be warranted if the Council limited itself to establishing the tariff specifications, leaving the Commission to specify by order an appropriate testing procedure.

Next it is important to recognize that we are concerned with a system of charges applicable to third countries and that the Council in assessing the need to protect the internal interests of the Community as against third countries possesses an area of discretion. This implies a certain freedom in evaluation and judgment and certainly includes the possibility of an adjustment of the criteria of demarcation as between tariff headings. If in this way the protection of production within the Community is not excessively strengthened, one can only with difficulty speak of a misuse of powers or of an infringement of the principle of proportionality. That must be the case in the present situation in relation to the values referred to in respect of the omission of a blank test. Thus, seeing that excessive adjustments are not involved, the invalidity of the method of analysis cannot be asserted.

The foregoing has said all that was necessary to deal with the question whether the Council can be said, by reason of the absence of a blank test in a method of analysis provided for in Annex V, to have committed a breach of the laws of logic and of nature as well as of the principles resulting from scientific experience (a situation which in the view of the plaintiff could not be postulated if the more up-to-date and more precise testing procedure referred to above had been ordained). Of course, in the present connection, one could lean to the view that for the purpose of assessing a charge to duty based on the component ingredients of a commodity, a procedure should always be stipulated that would be as exact as possible. Nevertheless, no imperative principle of law requires the legislator to observe unremittingly the laws of nature. The legislator has, on the contrary, an area of discretion (this applies, as said above, to the Council) and can in using it, as other cases on the problem of ascertaining the sugar content of a commodity have shown, unquestionably employ a fiction, that is to say — taking the present case as an example — provide that in certain conditions a commodity is to be treated as though it discloses a given milkfat content. A further consideration which may well be of some importance is that the need for a simple administrative scheme has to be borne in mind, and account taken of the need to lay down a procedure for analysis within a short space of time, and thus without long tests of the precision of the testing method. These considerations are indeed most pertinent. In my view they render it unwarrantable, by an appeal to natural law, to describe the application of approximate values as contrary to law, in spite of the fact that subsequently, after gaining some experience, as well as the knowledge that a sufficient protection can be guaranteed thereby, a certain corrective deduction is ordered (as was the case in Regulation No 1061/69 (OJ 1969, L 141).

Further, I do not apprehend a breach of law in regard to the basic principle of the protection of confidence (forseeability and calculability of import dues) a principle relied upon by the plaintiff for the claim that the importer was entitled to assume from the tariff specifications in Regulation No 83/67 that an importation of good with a milkfat content of up to 26 % by weight was possible without the risk of being saddled with a higher impost as a result of the analysis procedures employed. As regards this assertion, the simple answer must be that the testing procedures were contained as an essential part in the Regulation itself.

Importers must when embarking on their transactions take into account the stated procedures and hedge their orders with special terms accordingly. If suitable specialists were called in, this need not give rise to any particular difficulties. This would make possible the achievement of a safety margin (already referred to) below the higher limits of the demarcation and avoid the danger of being charged on the basis of a higher milkfat content. If the matter is looked at in this way, there can really be no question of an infringement of the principle of protection of confidence.

Finally, the view may be advanced in a few words that to the extent that the prescribed analysis procedure produced a higher milkfat proportion and with it a higher charge than that to be expected from the actual milkfat content, this circumstance did not result in an infringement of Article 13 of Regulation No 160/66, proscribing the exaction of customs duties and charges having equivalent effect. Indeed — and this is lost sight of in the argument advanced for the plaintiff — such charges having been forbidden in Regulation No 160/66, if the Council itself within the scope of this system provided for the imposition of charges to be made according to certain criteria laid down by it, any resulting charge obviously cannot be regarded as one proscribed by Regulation No 160/66.

Just as the absence of a blank test and a corresponding deduction under the method of analysis provided for in Annex V to Regulation No 83/67 do not give rise to justifiable criticism, so a similar point raised by the plaintiff must also fail, namely the fact that tests made under the prescribed procedures must necessarily vary as between various testing personnel. Consistently with the considerations already advanced and subject to there being no question of excessively high disparities (which seems not to be the case) this particular facet of the testing procedures could hardly be criticised. In particular, one could not approve what the plaintiff considers would be correct, of setting for the sake of safety a flat-rate deduction to cover in every case a possible fluctuation. Such a procedure must surely be dismissed, because the apprehended inexactitudes could work also in favour of importers and because in such a case the provision of a flat-rate deduction for a safety margin would put the protective purposes of the system in peril.

In reviewing the criticisms advanced by the plaintiff, one must now turn to and discuss the third point mentioned in my introductory remarks, that is as regards the fluctuations in the butyric index of milkfat, which under the procedures prescribed by the Council, envisaging an average value, were likewise ignored.

It is obvious from the outset that the criticism levelled by the plaintiff here cannot be accepted, for the good reason that we are concerned with a complex of rules in relation to which the setting of flat rates plays a part in various respects, an aspect which — mindful of the area of discretion available to the Council — can hardly be challenged. It is to be noted that it is not every imported commodity that is to be taxed in accordance with its exact content of milkfat; on the contrary, the commodities are put in groups within tariff heading 18.06, which are subject to the same charge, in spite of varying fat-content. Moreover, the variable elements of the charge do not follow the fluctuations in the rates of the Community levy, but the charges are fixed only once a quarter in accordance with the mean of the c.i.f. prices. In applying such a system it is clearly justifiable to proceed on the basis of the average butyric index of the milkfat and to ignore the actual fluctuations. Of course, it is conceivable that an importer might be allowed to bring rebutting evidence in the interests of an exact system of taxing the milkfat content by reference to the butyric index. In the proceedings (before the Court) it was, however, far from clear how the rebutting evidence could be clearly adduced and without considerable

difficulties for the customs procedures; essentially the matter is above all one involving a question of what is practicable, and there can be no question of a breach of law so long as the system in fact laid down did not — as already shown — have the effet of imposing an excessive burden. In particular, for present purposes the consideration must be dismissed that in respect of the maximum possible fluctuations in the values of the butyric index there should always be a deduction; this departure from average values in favour of the importer would patently militate against the protective aim of the system on account of the inadequate taxation of the actual milkfat content.

Further, there remains the question whether the establishment as a basis of an average butyric index involves — as asserted by the plaintiff — an infringement of the principle of equal treatment, because in the light of the actual fluctuations of the butyric index flowing from seasonal and other essential conditions, this can lead to a differential charge on goods having in fact the same milkfat content. I agree with the Commission that this question is to be answered in the negative. In that regard it is pertinent to note that all importers can be affected in the same way. It would be otherwise only if the butyric index fluctuated according to the particular country from which the commodity originated, so that by reference to the source of imports differential taxation arose as between importers carrying on business within the various Member States. However, the various statements made in the course of the proceedings do not adequately substantiate such a view.

It can thus be concluded that the detailed criticisms made by the plaintiff in the main action afford no justification for regarding Article 7 (3) of Regulation No 83/67, read in conjunction with Annex V, as contrary to law. This result would not be affected if it were shown that in another Member State there was applied at the material time a more exact system, such as the one based on gas chromatography, for ascertaining milkfat content. Obviously, the fact that to that extent a Member State had acted in breach of treaty obligations, could not lead to the conclusion that a similar procedure should be adopted in other Member States.

However, I cannot yet conclude my opinion in the Lütticke case. There remains the question whether the occasion arises for testing the validity of Regulation 83/67 *ex officio* for other reasons. This stems from the plaintiff's assertions that in the enactment of regulations by the Council there frequently arise mistakes and errors; this justifies, it is said, an applications for the production by the relevant Community authorities of all minutes, drafts and materials relative to Annex V of Regulation No 83/67, as well as to the subsequently enacted Regulation No 1061/69. This would disclose the considerations underlying the enactment of the Regulation in question and its subsequent amendment, and enable the regularity of the legislative procedures to be examined.

I agree with the Commission that the suggestion should not be acceded to. Where a national Court raises the bare issue of the validity of a legal provision of the Community, the issue in proceedings for a preliminary ruling must be restricted to an examination of the objections raised and viewpoints expressed on its validity. I do not subscribe to the view that the examination must be extended, just because one of the parties raises the point, there being otherwise no indicative element putting the Court on enquiry. Otherwise the procedure for a preliminary ruling would become over-burdened and give rise to the danger of unnecessary delays. In spite of occasional mistakes and errors in Council regulations (which do not lead to a corresponding inference in relation to Council legislation as a whole) there is less reason to accede to the application seeing that by and large the vigilance of

the authorities concerned with the preparation of Community legislation guarantees the imposition of necessary checks where appropriate. The Court can, therefore, refrain from callling for the production of the material designated by the plaintiff for the purpose of examining the background of the legislation to see whether the legislative process (concerning such matters as necessary majorities, effective representation of the Member States, formal and 'timetable' requirements) has followed its proper course.

To conclude, therefore, my opinion as summarized is that the preliminary question raised by the Munich Finanzgericht should be answered as follows:

An examination of Article 7 (3) of Regulation No 83/67, as read in conjunction with Annex V, does not, taking into account the representations made by the plaintiff in the main action, afford any ground for questioning the validity of the provision in question.