51.01 A of the Common Customs Tariff contained in Council Regulations Nos 1162/79 and 1481/80 does not cover yarn composed of both polyglycollic acid and lactic acid, even if the 10% of lactic acid which it contains does not affect the properties or use of that product and a subsequent amendment of the regulations has extended the suspension of duties to that product.

2. Although the Council has a wide discretion in applying Article 28 of the EEC Treaty regarding autonomous alterations or suspensions of Common Customs Tariff duties, the Council must, when deciding to suspend duties, select objective and verifiable criteria strictly limiting the scope of the suspension of duties to the products for which the user industries of the Community have clearly developed a need which the Council has actually been able to establish. Where necessary, it is for the importer seeking such an exemption to submit his application to the competent authorities so that an importer who has not made such an application cannot claim that he has been the victim of arbitrary or discriminatory conduct or a misuse of power because a decision to suspend duties taken by the Council applies only to a competitor's products and not to the similar products imported by him.

OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 27 February 1986 *

Mr President,
Members of the Court,

Pursuant to Article 177 of the Treaty establishing the European Economic Community the Bundesfinanzhof [Federal Finance Court] has asked the Court for a preliminary ruling on the interpretation and validity of Council Regulations Nos 1162/79 [1] and 1481/80 [2] temporarily suspending the autonomous common customs tariff duties on certain industrial products in so far as those regulations concern 'yarn wholly of polyglycollic acid' classified under subheading ex 51.01 A of the Common Customs Tariff.

Between January and September 1980 Ethicon GmbH, the plaintiff in the main proceedings, imported yarn called 'Polyglactin 910' composed as to 90% of polyglycollic acid and as to 10% of lactic acid or lactid. That yarn is intended for the manufacture in the Community of braid for surgical sutures.

When the yarn was cleared through customs, the Hauptzollamt Itzehoe [Principal Customs Office, Itzehoe], the defendant in the main proceedings, classified it under subheading 51.01 A of the Common Customs Tariff and charged customs duty at the rate of 9%.

The plaintiff appealed against the demands for payment of customs duty taking the view that it must be granted the customs duty exemption for 'yarn *wholly* of polyglycollic acid' falling within that tariff subheading.

* Translated from the French.

1 — OJ 1979 L 147, p. 1.

2 — OJ 1980 L 148, p. 1.

The relevant customs duties had first been suspended pursuant to Article 28 of the EEC Treaty by Council Regulation No 2990/74 of 26 November 1974, which entered into force on 1 January 1975. [3]

It was later periodically extended. In the period in which the yarn for which the plaintiff seeks exemption from customs duty was imported, the regulations mentioned above were in force (No 1162/79 from 1 July 1979 to 30 June 1980 and No 1481/80 from 1 July 1980 to 30 June 1981).

Following representations by the plaintiff in the main proceedings, the Council, by Regulation No 2196/80 of 11 November 1980, [4] which entered into force on 13 November 1980, also suspended customs duties on the product imported by the plaintiff.

That suspension of duties, which was in addition to the suspension of duties on 'yarn wholly of polyglycollic acid', was worded as follows:

'ex 51.01 A: Yarn containing not less than 88% polyglycollic acid'.

As from 1 July 1981 [5] the wording of that suspension of duties was changed to read as follows:

'ex 51.01 A: Yarn of a copolymer of glycollic acid and lactic acid for the manufacture of surgical sutures'.

A footnote states that control of the use for this special purpose is to be carried out pursuant to the relevant Community provisions.

It seems established that the two products have identical properties and that they are used for the manufacture of surgical sutures. The fact that the product imported by Ethicon also incorporates lactic acid has to do with patents. However, the question of patents is irrelevant in this case.

The Finanzgericht dismissed the application on the ground that the relevant suspension of duties covered 'yarn wholly of polyglycollic acid' falling within Common Customs Tariff subheading 51.01 A and not the products at issue, which were not covered until after the suspension of duties provided for by Regulation No 2916/80, mentioned above, came into force on 13 November 1980.

In an appeal on a point of law lodged by the plaintiff against that judgment the Bundesfinanzhof referred the following questions to the Court:

(1) Must the suspension of customs duties on 'yarn wholly of polyglycollic acid' ex subheading 51.01 A of the Common Customs Tariff provided for in Council Regulation (EEC) No 1162/79 and Council Regulation (EEC) No 1481/80, both temporarily suspending the autonomous Common Customs Tariff duties on certain industrial products, be interpreted — contrary to the wording but taking account of the purpose as expressed *inter alia* in subsequent measures suspending customs duties — as covering yarn for the manufacture of surgical sutures consisting as to 90% of polyglycollic acid and as to 10% of lactid (lactic acid), the addition of which has no effect on its properties or its use?

(2) If question 1 must be answered in the negative:

3 — OJ 1974 L 319, pp. 6 and 7.

4 — OJ 1980 L 304, p. 1.

5 — Regulation No 1533/81, OJ 1981 L 155, p. 1.

Is the suspension of customs duties referred to in Question 1 invalid for infringing the prohibition of discrimination laid down in Community law on the ground that it applies solely to 'yarn wholly of polyglycollic acid' but not to yarn consisting as to 90% of polyglycollic acid and as to 10% of lactid having the same properties and application as yarn consisting as to 100% of polyglycollic acid which is imported and processed by a competitor of the importing and manufacturing undertaking?

(3) If Question 2 must be answered in the affirmative:

What consequences ensue from the invalidity of the suspension of customs duties referred to in Question 1?

The facts of this case clearly bear much resemblance to Case 227/84, *Texas Instruments Deutschland GmbH* v *Hauptzollamt München-Mitte*, in which the Court delivered judgment on 14 November 1985 ([1985] ECR 3639).

In the *Texas Instruments* case a suspension of customs duties originally granted by a Council regulation on electronic memories ('EPROMS') with certain external dimensions was later extended to electronic memories of the same type but having larger external dimensions. The court making the reference asked the Court whether the first regulation suspending customs duties was contrary to the general principle of equal treatment because it made exemption from customs duties dependent on the dimensions of the housing. The Court ruled that it was not contrary to that principle.

In the present case, however, the legal approach in the order for reference is not quite the same, since the main question raised by the Bundesfinanzhof is the question of the wide interpretation of the regulations concerned.

The question of their validity is raised only as an alternative issue.

Without a thorough examination it is not therefore possible to suggest that this case should be decided on the basis of the judgment in the *Texas Instruments* case.

I — Interpretation of Regulations Nos 1162/79 and 1481/80 (Question 1)

The plaintiff in the main proceedings argues that in adopting within a relatively short period Regulation No 2916/80 in order to extend a suspension of Common Customs Tariff duties to Polyglactin 910 and in amending by Regulation No 1533/81 (Official Journal 1981, L 155, p. 1 and p. 4) the definition of the product exempted from customs duties by adding the words 'for the manufacture of surgical sutures', the Council implied that its intention *from the outset*, that is *from 1975*, was to suspend customs duties not only on 'yarn wholly of polyglycollic acid', which was expressly mentioned, but also on all synthetic yarn for the manufacture of surgical sutures, even if it contained less than 100% polyglycollic acid. In other words, the Council had in view the product's use and not its chemical composition. The plaintiff suggests that that aim is also clear from a reading of the preambles to the regulations in question which refer to the need to 'meet the needs of user industries in the Community'.

Finally, the plaintiff and the Bundesfinanzhof refer to the judgment of the Court in Case 292/82 (*Firma E. Merck* v *Hauptzollamt Hamburg-Jonas* [1983] ECR 3781) in which the Court held that 'in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objective of the rules of which it is part'.

It is suggested that it is therefore permissible to construe the regulations at issue in a manner contrary to their wording but taking account of their aims.

What view is to be taken of those arguments?

1. It must be observed first of all that the text of the regulation suspending customs duties on 'yarn wholly of polyglycollic acid' is quite clear. It clearly covers only yarn composed as to 100% of polyglycollic acid. The plaintiff itself admits that a literal interpretation of that regulation cannot lead to any other result.

However, derogations from the Common Customs Tariff must be interpreted restrictively and only on the basis of the General Rules for the Interpretion of the Nomenclature of that tariff.

I share the Commission's view set out on page 7 of its observations of 8 May 1985 where it states that 'any attempt to go beyond the clear text of the tariff for equitable reasons based on the circumstances of a particular case means no longer interpreting and applying the tariff uniformly and on the basis of its actual wording in every case but defining its scope *a priori* according to the economic needs of individual importers. The tariff nomenclature would therefore lose its objectiveness and cease to fulfil its regulatory function. The Common Customs Tariff lays down specific, strict rules of classification precisely in order to prevent any subjective interpretation incompatible with the requirements of legal certainty'.

Legal certainty would indeed be undermined if, in the case of all the products covered by a decision adopted under Article 28, the possibility of its being extended by interpretation to other products which could be used for the same purpose had to be examined and even accepted.

It remains to consider whether objective factors are discernible in this case suggesting that the Council intended to say something other than what it actually said.

2. No argument for interpreting Regulations Nos 1162/79 and 1481/80 widely can be derived from their preambles or from the preambles to Regulations Nos 2916/80 and 1533/81.

As was stated by the Council and Commission in the *Texas Instruments* case (see paragraph 9 of the judgment), the number of products in respect of which customs duties are suspended is normally over 1 000 a year.

As far as I have been able to ascertain, the preambles to such regulations are always worded identically.

The reasons invariably given for suspending tariff customs duties are insufficient or non-existent production in the Community and the desire to meet the needs of user industries.

However, acknowledgment of that need is strictly limited to the products listed in each decision. The extension by analogy of suspensions of duties provided for in a decision to other products meeting the same needs is contrary to the aim and legal character of the Common Customs Tariff.

Finally, it must not be forgotten that Article 28 is purely a procedural provision and does not prescribe the policy to be followed by the Council in the matter of the suspension of customs duties.

The fact that a given product is not produced in the Community and that the user industries need to import the product does not automatically confer a right to have customs duties suspended.

The needs of the Community may in fact still be met if the customs duty provided for is paid on the imported products. Financial considerations, for instance, might militate against the suspension of duties.

The only restriction on the Council's discretion is the principle of equal treatment. I shall consider, in connection with Question 2, whether there has been a breach of that principle in this case.

3. As regards the argument that the suspension of duty enacted in 1974 should be interpreted with reference to Regulations Nos 2916/80 and 1533/81, which also suspended duty on the product imported by the plaintiff in the main proceedings, the following points must be made.

Unlike in the *Texas Instruments* case, the original suspension of duty was not extended (which could easily have been done by replacing the words 'yarn wholly of polyglycollic acid' by the words 'yarn containing not less than 88% polyglycollic acid' covering both types of product); instead, an extra heading was added to the original heading.

Furthermore, as was pointed out above, a condition concerning the product's use was introduced by Regulation No 1533/81.

Since the adoption of that regulation, the suspension of duty regarding Polyglactin 910 covers 'yarn of a copolymer of glycollic acid and lactic acid *for the manufacture of surgical sutures*'.

The same condition regarding use was not extended to 'yarn wholly of polyglycollic acid' imported by the plaintiff's competitor.

During the oral procedure it emerged that that amendment was not fortuitous: the product imported by Ethicon may in fact also be used for purposes other than the manufacture of surgical sutures, namely for making protheses.

According to Ethicon, the same applies to the competing product.

Be that as it may, it is a fact that since 1975 the competing product has been exempt from customs duty irrespective of its intended use.

It is not therefore possible to argue, as the plaintiff does, that the granting of exemption from customs duty on Polyglactin 910 intended to be used in the manufacture of surgical sutures shows that from 1975 the Council really intended to exempt from duty all the products capable of being used for a particular purpose and not a product having a specific chemical composition.

4. Although the plaintiff in the main proceedings does not formally request that Regulation No 2916/80 should be applied retroactively, its application, if granted, would in fact lead to that result.

However, in its Resolution of 27 June 1974 concerning measures to be taken with a view to simplifying the task of the customs administrations (Official Journal 1979, C 79 of 8 July 1974, p. 1), the Council resolved to ensure that provisions having a retroactive effect would not be adopted save in exceptional cases justified by compelling economic reasons.

In the present case the Council did not make Regulation No 2916/80 retroactive. In view of its general attitude towards the adoption of provisions having retroactive effect in customs matters, one is therefore justified in concluding that the Council had no intention to give such effect, even by implication, to that regulation.

The fact that the Council derogated in this case from another rule which it adopted in that resolution, namely to ensure that changes in the Common Customs Tariff take effect every year on 1 January and, where appropriate, on 1 July, is a further reason for drawing that conclusion.

In the present case the first suspension of customs duty on Polyglactin 910 entered into force on 13 November.

One may therefore assume that the Council considered that the introduction of the customs exemption in question was of some urgency, no doubt because of the treatment applied to the competing product, but not so urgent as to justify a retroactive measure.

All those facts likewise indicate that 'the true intention of the legislature' was not to grant from 1975 or the beginning of 1980 exemption from tariff duties on all synthetic yarn used for manufacturing surgical sutures whatever its composition.

5. It remains to be seen whether the decision of the Court in Case 292/82, *Merck* v *Hauptzollamt Hamburg-Jonas*, may cast doubt on the argument set out above.

There is some similarity between the facts of the two cases.

In the *Merck* case the legislative authority, in that case the Commission, was also informed at a certain stage of a fresh fact and it also adapted its rules as quickly as possible to the new situation.

The Commission learned that mannitol and sorbitol were actually products made from a substance not attracting production refunds. Consequently, the Commission arranged for the higher export refund paid on the other goods not attracting production refunds to be paid on mannitol and sorbitol.

The Commission did not dispute that Merck's argument was well founded. On the contrary, it explained that it had no intention of reducing export refunds on goods not attracting production refunds.

It therefore admitted in a way that it had made a mistake due to its ignorance of a particular fact.

The Court therefore ruled that seven regulations covering the period prior to the correction of the error had to be interpreted as providing for an export refund to be granted on the commodities in question higher than that which was actually laid down in those regulations. Mannitol and sorbitol, in respect of which no production refund had been granted, had to be treated as if they appeared in Table II of the Annex to those regulations whereas they actually appeared in Table I.

The Court based its reasoning on the need 'to give practical effect to the provisions in question in keeping with the purposes of the Community rules of which they form part' (paragraph 17 of the decision).

The Court also ruled that consideration of the questions raised disclosed no factor of

such a kind as to affect the validity of the regulations concerned as so construed.

In my view, however, the judgment in the *Merck* case has no effect on the present case.

The 'Community rules' involved in the *Merck* case were an agricultural market organization.

It was not disputed that mannitol and sorbitol attracted an export refund.

Nor was it disputed that the amount of that refund had to depend on whether or not a production refund had been granted on the basic products used in the manufacture of those commodities.

It was therefore legitimate to interpret the implementing regulations according to the aim of the 'basic' regulation and to apply the principle of giving practical effect to such regulations.

The present case is different in these respects:

It does not involve a system of 'Community rules' in the sense of a complex mechanism requiring relatively complicated calculations and whose practical effect could be lost if certain facts are not taken into account.

The practical effect of Regulations Nos 1162/79 and 1481/80, namely the creation of the possibility of importing the product in question free of customs duties, was achieved as soon as those Council Regulations, based on Article 28 of the Treaty, entered into force.

There is no discrepancy between the aim of those regulations and their enacting terms. Nor is there any discrepancy between the enacting terms of the two regulations and Article 28 because, as was pointed out above, Article 28 does not lay down a policy but only a procedure.

It is not therefore possible to deduce from the Court's judgment in the *Merck* case criteria which ought to be followed in the present case requiring the Court to interpret Regulations Nos 1162/79 and 1481/80 in a sense contrary to their wording.

II — The validity of Regulations Nos 1162/79 and 1481/80 (Question 2)

Should the Court answer Question 1 in the negative the Bundesfinanzhof would then like to know whether the suspension of customs duties referred to in Question 1 is invalid for infringing the prohibition of discrimination on the ground that it applies solely to 'yarn wholly of polyglycollic acid' but not to yarn consisting as to 90% of polyglycollic acid and as to 10% of lactid.

In its judgment in the *Texas Instruments* case the Court held that 'although Article 28 leaves the Council considerable discretion, it is for the Court to ascertain whether or not the manner in which the Council has carried out the duties thereby entrusted to it constitute a misuse of power or gives rise to discrimination'.

I do not believe that there has been a misuse of power or discrimination in this case.

1. Although it may be argued that before 13 November 1980 yarn without lactid and yarn with lactid were treated differently for a few months, that difference of treatment must be regarded as a normal consequence of the fact that the Council takes action in such matters only on the initiative of traders and manufacturers if such initiatives are taken up by a Member State or the Commission.

That approach is logical. The European Economic Community is based on the principle of Community preference which is reflected in the Common Customs Tariff. The Council and Commission are, so to speak, its guardians.

It is for persons seeking a derogation from that tariff to request such a derogation, to explain its economic expediency and to define as precisely as possible the product which in their view should receive such preferential treatment.

Furthermore, traders and manufacturers are well advised to examine regularly, if need be with the assistance of their trade associations, the decisions of the Council suspending Common Customs Tariff duties in order to see whether a particular product description requires amendment in order to cover any variant of the same product or an allied product for which the reasons for suspending duties would be equally valid.

The Council's function is to decide, on the basis of the information and views made available to it by the representatives of the Member States and by the Commission, whether Common Customs Tariff duties should be totally or partly suspended and what the definition of the relevant product should be.

It is the duty of the Council to ensure, on the basis of the facts which have been submitted to it at the time when it must take its decision, that the principle of equal treatment is observed.

I consider it quite legitimate for the Council, when defining the customs exemption, to take into account the precise characteristics of the product to which the application relates.

It is in fact conceivable that a product having even only slight differences in its composition or other characteristics could be used for purposes other than those for which the first product is used and when used for such other purposes might enter into competition with products made in the Community.

2. Clearly, it may also happen that in cases such as this case or the *Texas Instruments* case the Council subsequently learns of the existence of a product which is not covered by the exemption but which can be used for the same purpose.

If it thus appears that the principle of equal treatment is in point, the Council obviously has the duty to act promptly to ensure that the two products are treated in the same way as soon as possible.

It did so in the present case.

As I have already pointed out, the Council, which did not receive the request from the German Government until August 1980, exempted Polyglactin 910 from customs duties as from 13 November 1980. It therefore derogated from the rule which it had itself laid down in its Resolution of 27 June 1974 concerning measures to be taken with a view to simplifying the task of the customs administrations, namely that tariff changes are to take effect every year on 1 January and where appropriate on 1 July.

In view of the time lag inherent in the Council's internal organization and working practices, the Council undoubtedly acted promptly.

3. Thirdly, it must be emphasized that the regulations in question, Nos 1162/79 and 1481/80, exempted a product, 'yarn wholly

of polyglycollic acid', and not a trader from customs duty.

The plaintiff in the main proceedings was also at liberty at any time to import such yarn free of duty for processing purposes.

4. Finally, it must again be pointed out that Regulations Nos 1162/79 and 1481/80 merely extended an exemption from customs duties granted for the first time *in tempore non suspecto*, namely five years before Ethicon's product was imported into the Community.

It is not therefore possible to conclude that those regulations were meant to assist or handicap certain traders or manufacturers or that they introduced discrimination.

III — The consequences which would ensue from the invalidity of the suspension of customs duties (Question 3)

Since Question 2 has been answered in the negative, there is no need, in my view, to answer Question 3.

Costs

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

To sum up, I propose that the questions submitted by the Bundesfinanzhof should be answered as follows:

(1) The suspension of customs duties on 'yarn wholly of polyglycollic acid' falling under subheading 51.01 A of the Common Customs Tariff provided for in Council Regulation No 1162/79 of 12 June 1979 and No 1481/80 of 9 June 1980 must not be interpreted as also covering similar yarn but composed of polyglycollic acid and lactic acid.

(2) Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of those regulations.