JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 23 MARCH 1977 [1]

Gervais-Danone AG
v Hauptzollamt München-Mitte
(preliminary ruling requested by the Bundesfinanzhof)

Case 86/76

Common Customs Tariff — Description of goods — Food preparations consisting mainly of milkfats — Tariff heading 21.07

Within the framework of the Common Customs Tariff, food preparations consisting mainly of milkfats are covered by tariff heading 21.07 and therefore cannot come under heading 15.13.

In Case 86/76,

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

GERVAIS-DANONE AG, Munich,

and

HAUPTZOLLAMT (PRINCIPAL CUSTOMS OFFICE) München-Mitte,

— on the interpretation of certain provisions of the Common Customs Tariff concerning in particular tariff heading 15.13;

— and, if appropriate, on the validity of Regulation No 496/69 of the Commission of 18 March 1969 (OJ, English Special Edition 1969 (I), p. 109) on the classification of goods under subheadings 21.07 F VIII and IX of the Common Customs Tariff,

1 — Language of the Case: German.

THE COURT (First Chamber)

composed of: A. M. Donner, President of Chamber, J. Mertens de Wilmars and G. Bosco, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts, the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. The main action concerns the tariff classification of mixtures of fats imported in several consignments from Switzerland by the company 'Gervais-Danone AG' of Munich between 20 December 1968 and 22 March 1969.

In the customs declarations the importer described the goods as 'imitation lard', giving the following composition:
— for the first two imports,
  85 % pure butyric fat (99·5 %)
  10 % refined suet of bovine animals
  5 % sesame oil;
— for the other imports,
  85 % butyric fat
  5 % curd
  5 % skimmed milk powder
  5 % refined suet of bovine animals.

The competent customs authorities cleared the goods into free circulation classifying them, as requested by the importer, under tariff heading 15.13 of the Common Customs Tariff (CCT), that is: 'Margarine, imitation lard and other prepared edible fats', a heading which does not set any limit as to the content by weight of milkfats. As in each case the customs declarations proved to be in accordance with a visual examination of the goods, no analysis was performed. The competent national authorities carried out an analysis, by samples, only in respect of the last consignments imported.

Before the customs formalities pertaining to the last consignment imported were completed, Regulation No 469/69 of the Commission of 18 March 1969 (OJ, English Special Edition 1969 (I), p. 109) entered into force. That regulation excluded imitation lard containing 65 % or more by weight of milkfats from tariff heading 15.13, and provided for its classification under tariff heading 21.07 ('Food preparations not elsewhere specified or included'). Article 1 of the regulation provides more precisely that the said goods shall fall within subheading 21.07 F,

— VIII, if they contain 65 % or more but less than 85 % by weight of the said fats;
— IX, if they contain more than 85 %.

Following the aforementioned analyses, the customs laboratory (Zolltechnische Prüfungs- und Lehranstalt, hereinafter referred to as the 'ZPLA') did not detect the presence of refined suet of bovine animals in the samples examined and found on the other hand that they contained more than 85 % by weight of butyric fat. In accordance with the aforementioned regulation, the ZPLA thus concluded that those samples should not be classified under tariff heading 15.13 but under tariff heading 21.07. The customs authorities accordingly amended the levy decisions, and classified the goods in question under tariff subheading 21.07 F IX, in so far as they contained more than 85 % by weight of butyric fat. The said authorities issued an additonal assessment in respect of the difference in the duties resulting from the amendment of the classification.

The importer contested this assessment before the Finanzgericht (Finance Court) München and sought classification of the products in dispute under tariff heading 15.13. However, by a decision of 9 February 1972, the Finanzgericht dismissed the application, and held that the said products fell within tariff subheading 21.07 F IX. The importer appealed to the Bundesfinanzhof against that judgment, and by an order of 27 July 1976 the Bundesfinanzhof decided to suspend the proceedings and refer the following questions to the Court of Justice under Article 177 of the EEC Treaty:

'1. Before the entry into force of Regulation No 496/69 of 18 March 1969 was tariff heading 15.13 of the Common Customs Tariff to be interpreted as meaning that mixtures of fats consisting of
(a) 85 % butyric fat (99·5 %)
10 % refined suet
5 % sesame oil
or
(b) 85 % butyric fat
5 % curd
5 % skimmed milk powder
5 % refined suet of bovine animals
fall within that tariff heading?
2. If Question 1 is answered in the affirmative:
Is Regulation 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 implementing provisions of Regulation No 97/69 of 16 January 1969?'

2. Gervais-Danone AG, represented by Fritz Modest, and the Commission of the European Communities, represented by its Legal Adviser, Peter Kalbe, submitted written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

By an order of 26 January 1977, the Court assigned this case to the First Chamber, under Article 95 (1) of the Rules of Procedure.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations submitted by Gervais-Danone

Relying upon an expert's report produced as Annex I to its observations, *Gervais-Danone* first of all points out that the products referred to in the present case were not merely mixtures of various fats with a preponderant percentage of butter; they were also

edible fats which had undergone preparation. More particularly, the mixtures included what are by common agreement referred to as 'shortenings' (obtained by the texturation of oils or fats) and 'emulsified fats'.

Simple fats or mixtures of fats to which refined suet of bovine animals, curd and/or skimmed milk powder are added, are better suited to cooking than pure simple fats, such as butyric fat or lard. These cooking properties are greatly enhanced when fats have subsequently been processed by texturation or emulsification.

Even if, in relation to other mixtures, mixtures of fats based mainly on butyric fat do not manifest structural differences as regards cooking properties, at all events they have the advantage of bringing out the desired taste of butter. That is the reason why such mixtures, in particular 'shortenings' and emulsified fats, are used in fine pastry and biscuit making.

After setting out these considerations, Gervais-Danone goes on to point out, as regards the law, that pursuant to Articles II a and II b of the Brussels Convention of 15 December 1950, the Common Customs Tariff adopted heading 15.13 without any amendment from the wording used since 1955 by the Customs Cooperation Council of Brussels in its nomenclature. By so doing, the Council of the European Communities made plain its intention also to adopt the content and scope of that heading. Established case-law of the Court has specifically acknowledged that, although they do not have mandatory force, the explanatory notes formulated by the Cooperation Council before the entry into force of the CCT constitute essential factors in the interpretation of the tariff headings, as long as the Community authorities have not adopted annotations or more precise provisons on the date of the imports which are in question.

The fact that the entry into force of the common organization of the agricultural markets altered the economic relations and balance of interests between importers and exporters in regard to the various tariff headings does not make it permissible to change the content and scope of the tariff headings, in so far as those headings are adopted by the CCT without any amendment. Such change is permissible only if the tariff heading itself is amended. However, such amendment is superfluous within the framework of the common organization of a market. Indeed, such organization has other means at its disposal to prevent disturbances on the market and to avoid distortions of competition, without having to amend a tariff heading: it can call upon the appropriate system of levies and refunds.

The products under tariff heading 15.13 fall precisely within the common organization of the market in oils and fats, established by Regulation No 136/66 of the Council of 22 September 1966 (OJ, English Special Edition 1965-1966, p. 221).

Supposing that a prepared edible fat, mostly consisting of milkfats, had provoked disturbances on the market, the Council could have eased those difficulties by amending Article 2 (1) of the said regulation and instituting levies or refunds, but in no case could it have attempted to attain the same result by changing the classification of certain products by artificial annotations.

Moreover, the second recital of the preamble to Regulation No 97/69 of the Council of 16 January 1969 (OJ, English Special Edition 1969 (I), p. 12), upon which Regulations Nos 496/69 and 663/69 of the Commission (OJ, English Special Edition 1969 (I) p. 109 and p. 190) are based, empowers the Commission to adopt provisions intended to 'specify the content of the headings or subheadings of the Common Customs Tariff without, however, amending the text thereof'.

Although it is true that the wording of that recital is not absolutely clear, none the less it cannot be inferred therefrom that although the Commission is bound by the wording of a tariff heading, it can however, by means of closer definition, amend the content and the scope thereof. Such a practice is forbidden in the internal legal orders of the Member States, including the Federal Republic of Germany, which on the contrary acknowledges the general legal principle according to which the interpretation of a legal instrument is not bound to the literal meaning, but to the actual intention and express purposes of that instrument.

Therefore, when Regulation No 97/69 stipulated that the Commission should not amend the text of the headings or subheadings of the Common Customs Tariff which it purports to specify, that regulation did not empower the Commission to amend the content and scope of the said headings or subheadings.

Consequently the Commission cannot adopt explanatory regulations which in reality have the effect of amending tariff headings. Although the Commission has wide discretion in the classification of new products, in respect of which no clear practice has hitherto emerged, that discretion is not however so wide that further specification of the headings would involve amendment thereof.

After putting forward these general considerations, Gervais-Danone examines the two questions referred to the Court for a preliminary ruling.

1. *As to the first question,* Gervais-Danone maintains that, according to the meaning and scope of tariff heading 15.13 of the CCT, that heading covers *all* prepared edible fats, to the extent to which they are not expressly provided for by any other heading. It follows from the habitual meaning of the term ('fats' and not 'oils') and from comparison with the preceding tariff headings, in particular heading 15.07 concerning 'vegetable oils', that heading 15.13 refers essentially to solid or hydrogenated prepared edible fats, as opposed to fluid oils.

After stating what is understood by the terms 'margarine' and 'imitation lard', which appear in heading 15.13, Gervais-Danone maintains that, taking into account the words 'other ... fats', the expression 'other prepared edible fats', which is also contained in that heading, refers to mixtures of fats of any kind (such as imitation lard) and to emulsified fats (such as margarine).

However, it also follows from a comparison with the preceding headings of Chapter 15, as well as from General Rules Nos 3 (a) and 3 (b) for the interpretation of the Brussels Nomenclature, which are reiterated in Regulation No 950/68 of the Council of the European Communities, that any other preparation of natural or artificial fats is to be classified under heading 15.13, in so far as fat remains the characteristic ingredient of the product. Thus the heading in dispute is a collective or residuary heading for all solid fats which have undergone preparation and are therefore no longer natural and pure but whose characteristic ingredient is fat.

This analysis is confirmed by the explanatory notes of the Customs Cooperations Council of Brussels relating to heading 15.13, which distinguish three categories of prepared edible fats. As the abovementioned expert's report proves, the products in dispute fulfil the minimum conditions laid down for the first and second of those categories.

On the other hand, it cannot be disputed that butter and butyric fat can be emulsified and processed into an emulsion in the same way as other solid and hydrogenated fats. Thus emulsified butyric fat possesses the same properties

and may be used in the same way as the other emulsified fats falling within tariff heading 15.13. The same is true of mixtures of solid fats whose preponderant ingredient is butyric fat. From the point of view of the Customs Cooperation Council, it would have been illogical, at the time of the establishment of the Nomenclature, to exclude from that heading an emulsion or a mixture of fats based on butyric fat. Moreover, that Council did not do so, and the Council of the European Communities eventually adopted heading 15.13 as drawn up and interpreted by the Customs Cooperation Council.

The grounds stated by the Commission in its Regulations Nos 496/69 and 663/69 as the basis thereof do not stand up to examination. It is not correct to state that butyric fat does not constitute a fat within the meaning of Chapter 15 of the CCT, and that in that tariff it must be considered not as an animal fat but as a milk product, so that an emulsion based on butyric fat does not fall within heading 15.13. Apart from the fact that such an argument is refuted by the Bundesfinanzhof in its order making the reference, it should be pointed out:

— that the Customs Tariff considers and treats butter and butyric fat both as a milk product and as an animal fat, which corresponds to the reality;

— that the classification of a single product under different chapters is found in the CCT also in the case of products of the milling industry, which fall within either Chapter 11 or Chapter 23 according to their starch content;

— that in its Regulation No 496/69, the Commission contradicts itself, since it classifies under heading 21.07 only products containing 65 % or more by weight of milkfats. This implies in effect that, according to the same regulation, a mixture of fats containing 64 % of milkfats whose prime ingredient is still a milkfat would continue to fall within tariff heading 15.13;

— that the solution adopted in Regulation No 496/69 does not correspond to the practice hitherto followed by the Member States, or by several of them, in particular the Federal Republic of Germany, which classified under heading 15.13 a mixture or an emulsion of butyric fat mainly composed of milkfats. During the discussions concerning Regulation No 496/69, the members of the German delegation on the Nomenclature Committee firmly defended the argument that such mixtures or emulsions containing more than 65 % by weight of fats in addition to other fats (lard, suet etc. ...) fall within tariff heading 15.13. This could be verified if the Court were to examine Annex II to the applicant's observations and to order production of all the documents and files of the Nomenclature Committee relating to Regulation No 496/69;

— that the States which are Members of the Cooperation Council but not of the Community continue to classify the products in dispute under heading 15.13. This is true of Switzerland (cf. Annex III to the observations);

— that the Commission is completely wrong when, on the basis of the second paragraph of the Explanatory Notes to the Brussels Nomenclature relating to heading 15.13 ('... these mixtures ... may contain added lecithin, starch ... or vitamins. They may also contain butter or lard'), it infers therefrom by an argument *a contrario sensu* in the second and third recitals of the preamble to Regulation No 663/69, that butter is clearly allowed only as an additive in margarine, imitation lard and other edible fats, and then only to the extent to which such addition is required to improve the products, without causing them to lose their essential characteristics. If the Customs Cooperation Council had really intended to give to the abovementioned addition the scope

which the Commission attributes to it, it would have been in contradiction with the meaning, the content and the scope of tariff heading 15.13 and even with Chapter 15, which covers all edible fats and does not exclude prepared butyric fats, which constitute a substance quite different from butter. Moreover, from the technical point of view, it is not correct to claim that the addition of butyric fat to a mixture of fats brings about the modification thereof or the loss of the essential characteristics thereof (cf. Annex I to the observations).

On the basis of these observations, Gervais-Danone proposes that the first question should be answered as follows:

'Before the entry into force of Regulation No 496/69 of 18 March 1969, tariff heading 15.13 of the Common Customs Tariff was to be interpreted as covering mixtures and emulsions of fats consisting of

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

or

(b) 85 % butyric fat
5 % curd
5 % skimmed milk powder
5 % suet of bovine animals.'

2. *As to the second question,* relating to the validity of Regulation No 496/69, Gervais-Danone considers it necessary to examine that regulation in conjunction with Regulation No 663/69.

Regulation No 496/69 stipulates that mixtures and emulsions of fats containing 65 % or more by weight of milkfats shall fall within tariff subheading 21.07 F (and no longer within heading 15.13). On the other hand, Regulation No 663/69 specifies that such mixtures and emulsions shall continue to be classified under heading 15.13 only if their milkfat content does not exceed 10 % by weight.

These two regulations are in contradiction with each other. Indeed, if it is accepted that the regulation is valid as being an 'explanatory regulation', it follows that emulsions and mixtures of fats containing more than 10 % but less than 65 % by weight of milkfats continued to be classified under heading 15.13, until the entry into force of Regulation No 663/69. In that case, Regulation No 663/69 would be the one which would have to be considered as invalid, in that it amends both Regulation No 496/69 and the tariff heading itself.

If, on the other hand, Regulation No 663/69 is considered as valid, Regulation No 496/69 is the one which would become void.

Therefore the two regulations cannot both be valid. Indeed, supposing that they were both valid, it would be impossible to know under which heading to classify mixtures and emulsions of fats containing more than 10 % but less than 65 % of milkfats. If, under Regulation No 496/69, those products fell within heading 15.13, they could not be classified under that heading pursuant to Regulation No 663/69: for this reason, they do not fall within either heading 15.13 or heading 21.07.

In fact, Regulations Nos 496/69 and 663/69 are both void, since they do not confine themselves to annotating tariff heading 15.13, but amend its content and its scope. Indeed they purport to fix, by way of 'annotations', the percentage of one product which another product must contain in order to be able to be classified under one or the other tariff heading. However, such content is fixed in a contradictory way in the two regulations, since either the limit of 10 % on the content by weight of milkfats is correct, and consequently the limit of 65 % is mistaken, or the 65 % limit is correct and consequently the 10 % limit is mistaken. This shows that the determination of the percentage of

certain ingredients in a product or in a mixture of products is purely arbitrary and cannot be analysed in an 'annotation'. In so far as they can be allowed, such determinations and classifications on the basis of precise percentages can be carried out only within the tariff headings themselves, by means of adjustment to the subheadings contained therein. A classic example of this process is to be seen in the tariff classification of products of the milling industry falling within headings 11.01 and 11.02, and in the classification laid down for products under tariff heading 21.07.

A delimitation on the basis of precise percentages always eliminates the discretion which must be imputed to the customs authorities by virtue of the classification of goods according to tariff headings which do not lay down criteria expressed in percentage; therefore without exception it implies an amendment to the tariff itself.

This is true of the two regulations in issue. The Explanatory Notes to the Brussels Nomenclature themselves excluded neither mixtures nor emulsions of fats based on milkfats, nor did they define delimitation criteria expressed as percentages. On the other hand, the practice previously followed in one or more of the Member States was in accordance with the interpretation of tariff heading 15.13 adopted by those Notes, which is different from the interpretation applied by Regulation No 496/69. Finally, both Regulation No 496/69 and Regulation No 663/69 unlawfully amended the text of tariff heading 15.13 by supplementing it with the determination of the said percentages, and thereby contravened Regulation No 97/69.

Moreover, even supposing that the Court can accept that Regulation No 496/69 is valid, account must be taken of the principle of 'legal certainty', as the Court itself has already acknowledged in its case-law. Despite the argument followed in the past and still defended within the Nomenclature Committee before the adoption of Regulation No 496/69, after the entry into force of the regulation the Federal Republic of Germany retroactively classified under heading 21.07 mixtures and emulsions of fats based on milkfats imported before the entry into force of that regulation, on the ground that they contain more than 65 % of milkfats. Thus the German Government completely reversed its policy and applied Regulation No 496/69 retroactively, even though that regulation made no express provision for its retroactive application.

Retroactive application, whether direct or indirect, of Regulation No 496/69 is contrary to the principle of legal certainty, alluded to above.

On the basis of these observations, Gervais-Danone proposes that the second question should be answered as follows:

'(a) *Principally*

Regulation No 496/69 of 18 March 1969 is void because instead of annotating tariff headings 15.13 and 21.07 of the Common Customs Tariff it amends them and consequently is not covered by the enabling provisions of Regulation No 97/69 of 16 January 1969;

(b) *In the alternative*

Although Regulation No 496/69 of 18 March 1969 is valid, it cannot be applied retroactively, either directly or indirectly, by the Member States, because the wording of the Brussels Explanatory Notes also allows of an interpretation according to which mixtures and emulsions of fats containing more than 64 % of milkfats were to be classified under tariff heading 15.13.'

B — Observations submitted by the Commission of the European Communities

1. The first question

The Commission points out that the tariff headings to be considered for the

classification of butyric fat containing small added quantities of foreign substances are headings 04.03, 15.13 and 21.07.

Since the products to which each of these headings relates are covered by a common organization of the market, account must be taken in defining those headings both of the function which the CCT fulfils within the framework of the organization of the markets and of its function purely for customs purposes.

(a) The interpretation of the Common Customs Tariff Nomenclature

Tariff heading 21.07 groups together such 'food preparations' as are not specified or included under other headings of the Common Customs Tariff. Subheadings F II to F IX cover in particular preparations having a content by weight of milkfats varying from 1·5 % to more than 85 %. The mixing of milkfats with suet of bovine animals and sesame oil or with suet of bovine animals, curd and skimmed milk powder gives rise to products which must necessarily be considered as 'preparations' within the meaning of the tariff heading in question. Therefore the products in dispute can be classified under that tariff heading if they are not 'elsewhere specified or included'.

In fact, on the one hand, they are not expressly 'specified' under any other tariff heading. Granted, tariff heading 15.13 mentions 'imitation lard', but tariff classification as such depends only on the nature and objective composition of the product, not on the description which the importer applies to it.

On the other hand, the said products are also not 'included' under tariff heading 04.03 or 15.13.

Indeed, *tariff heading* 04.03 isolates 'butter' from the heading 'Dairy produce' of Chapter 4. The ambit of heading 04.03 is not limited to butter, but includes, in the absence of other autonomous tariff headings, the other forms which milkfat can take.

According to the Explanatory Notes to the Brussels Nomenclature relating to heading 04.03, that heading covers 'resolidified butter *(beurre fondu)*, dehydrated butter, butterfat, ghee (a kind of butter made from buffalo's milk) and rancid butter' (cf. the annex to the written observations). As to resolidified butter, it emerges from the Explanatory Notes to the CCT concerning heading 04.03 that, apart from resolidified butter properly so-called, that description covers other similar kinds of dehydrated butter.

If the butter or the resolidified butter contains other added substances, the product thus obtained is still butter within the meaning of heading 04.03, if it retains the essential characteristics of butter or resolidified butter. Thus the said heading includes, for example, butter containing very small quantities of herbs, spices and flavourings, essentially intended to improve the particular taste of the butter for certain consumers, and butter containing added sesame oil, which is used as a means of identification and affects neither the taste nor the use of the product.

Considering first the composition stated by Gervais-Danone for the product which the national court has designated by the letter (a), the presence of 10 % of suet of bovine animals and 5 % of sesame oil seems to exclude the possibility of speaking of the addition of very small quantities of foreign substances. On the other hand, the addition of negligible quantities of tasteless and odourless suet of bovine animals and sesame oil does not confer upon the resolidified butter any particular qualities, characteristics or opportunities for utilization in excess of those of the normal product.

Furthermore, the proportion of 5 % of sesame oil is too small for that oil to be

considered as an autonomous and decisive constituent of the fat. Therefore classification under heading 04.03 is not ruled out.

Similar considerations can be expressed in relation to the product designated by the letter (b) by the national court. By the addition of the curd and the skimmed milk powder, the pure butterfat merely contains, apart from the suet of bovine animals, the quantity of which is even smaller in this case, two other constituents of the common basic product (milk), which are found in small quantities even in normal butter. On the other hand, the total stated content of curd and milk powder probably represents more than the addition of 'very small quantities' within the meaning of the *Notes Explicatives du Tarif Douanier Commun* relating to heading 04.03.

On the other hand, *tariff heading* 15.13 falls within a chapter from which butter and other milkfats are in principle excluded. Since, as 'dairy produce' referred to in Chapter 4, they are the subject of autonomous rules, they cannot at the same time constitute an animal fat within the meaning of Chapter 15.

Heading 15.13 isolates two specific mixtures of fats from the other products in that chapter: 'margarine' and 'imitation lard'. The products in dispute constitute neither one nor the other of these products. As to the content of the term 'imitation lard', the descriptions 'imitation lard' and 'simili-saindoux', used in the original versions of the Brussels Nomenclature, leave no doubt about the fact that they refer exclusively to mixtures of fats based on lard. Moreover, according to German legislation, the word 'Kunstspeisefett' which is used to translate these descriptions signifies only 'preparations similar to lard, the fat content of which does not consist exclusively of lard'; which implies that those preparations, at least in part, contain lard. In this case, the products in dispute do not contain any lard.

Finally, as to 'other prepared edible fats', the question is essentially whether milkfat, containing small added quantities of suet and sesame oil, can also be considered as such a 'prepared edible fat'. This possibility is excluded by the wording of the Common Customs Tariff, from which it emerges that milkfat is the subject-matter of an autonomous tariff heading (04.03), and that mixtures of milkfats with other fats and products are expressly covered by tariff heading 21.07, as particular food preparations. Therefore the expression 'other prepared edible fats' in tariff heading 15.13 should not be interpreted *a priori* as having any other meaning than that which it has in all other parts of Chapter 15, namely that of animal or vegetable fats not specified in the said chapter, excluding milkfat and preparations thereof. Thus that expression constitutes a collective description serving as a 'catch-all', another example of which is to be found in heading 21.07: preparations based on milkfats fall within heading 21.07, whereas those based on other fats are covered by heading 15.13. Doubtless milkfats added to another fat can be found in the mixtures under heading 15.13, but such milkfats are added only in very small quantities and must in no case be the only or principal fat constituent. These considerations are in accordance with the Explanatory Notes to the Brussels Nomenclature, which specify that heading 15.13 covers 'solid edible preparations', generally consisting of mixtures of

— different animal fats and oils,
— different vegetable fats and oils, or
— animal and vegetable fats and oils,

which may have been previously hydrogenated. Even if it is admitted that the products in dispute may be considered as mixtures of fats, they cannot however constitute mixtures of 'different animal fats'. If indeed, according to current usage, milkfat may be regarded as an 'animal fat', it cannot

however be considered as such in the terminology of the Common Customs Tariff and in particular of Chapter 15 thereof, since under heading 04.03 it comes within the 'dairy produce' of Chapter 4. There are no grounds for thinking that the Brussels Explanatory Notes intended to give the expression 'animal fats' a meaning other than that which it has in the nomenclature.

Furthermore, the general considerations placed at the head of Chapter 15 expressly exclude from that chapter butter within the meaning of heading 04.03. Certainly, the Explanatory Notes to the Brussels Nomenclature do not exclude *a priori* the presence of milkfats in products under heading 15.13, but it follows from the very wording of those Notes that in such cases it is a question of mixtures in which the aforesaid milkfats may be detected but must not be the only or principal fat constituent. Moreover, the practice followed by the Customs Cooperation Council and its relevant departments in relation to those Notes is inspired by the same principles: there was never any intention to classify mixtures composed largely or mostly of milkfats under the description 'other prepared edible fats' in heading 15.13; they were to be classified as food preparations under heading 21.07. This interpretation underlies the practice followed by the Commission and the Committee on the Common Customs Tariff Nomenclature.

The Commission contends that if, in the light of the foregoing considerations, classification of the product which the national court designated by the letter (a) cannot be allowed under heading 15.13, then *a fortiori* that classification cannot be allowed in respect of the other product designated by the letter (b). Indeed, by virtue of its very composition, a mixture of milkfats with curd, milk powder and suet of bovine animals is a 'food preparations not elsewhere specified or included' within the meaning of heading 21.07.

(b) Classification considered from the point of view of the common organization of the markets

The Commission points out that Regulation No 13/64 for the first time made milk and the milk products referred to in Chapter 4 of the Common Customs Tariff subject to a common organization of the market, the operation of which is currently governed by Regulation No 804/68 (OJ English Special Edition 1968 (I), p. 176). It soon became clear that the definition of the ambit of those regulations, as it results from the nomenclature of Chapter 4, was an obstacle, because it allowed a certain number of the principal products resulting from the processing of milk and milkfats to escape the measures laid down within the framework of the common organization. Regulation No 160/66 was enacted in order to ease these difficulties (JO 1966, L 195, p. 3361). The customs specifications relating to the products referred to in that regulation were prescribed in Regulation No 83/67 (JO 1967, L 81, p. 1597).

Preparations and mixtures of milkfats were on that occasion considered without exception as products falling within heading 21.07, not heading 15.13. The import charges aligned upon the levies applied to butter which were laid down by Regulation No 160/66 were applied only to goods falling within heading 21.07, heading F of which was for that purpose divided up into numerous subheadings, corresponding to different milkfat contents.

At the same time, all the products under heading 15.13 were made subject to the common organization of the market in oils and fats which was set up by Regulation No 136/66 (OJ, English Special Edition 1965-1966, p. 221) and which provided solely for the levying of the (consolidated) import charge laid down by the Common Customs Tariff, in addition to which a compensatory amount could be levied in the event of dumping.

In 1966, all uncertainty as to the fundamental definition of headings 21.07 and 15.13 within the framework of the Common Customs Tariff nomenclature had been eliminated. This definition of the ambit of Regulations Nos 160/66 and 136/66 proceeds clearly from the aforesaid interpretation of the Common Customs Tariff. It is only in this way that the existing difference between the import system applied to products under heading 21.07 and that applied to products under heading 15.13 can be understood. That difference would be rendered meaningless if preparations based on butter, in particular those containing 85 % or more of milkfats, fell in principle within heading 15.13.

Moreover, that heading was bound under the General Agreement on Tariffs and Trade (GATT) during the years 1960-1961, and in the course of the negotiations which then took place it was never contemplated that preparations based on milkfats could be added to margarine and imitation lard.

(c) The measures taken within the framework of an organization of the market

The measures taken within the framework of the common organization of the market in milk and milk products confirm that this analysis is well founded. Within the framework of the intervention systems provided for by that organization, products of the type in issue in the present case have always been treated as resolidified butter within the meaning of heading 04.03 or as food preparations within the meaning of heading 21.07. On several occasions the Community attempted, by means of considerable price reductions, to dispose of surplus quantities of butter from the intervention stocks, while demanding an undertaking from the buyers that they would use that butter for precise purposes. During the period in which the imports in dispute were effected, the Commission authorized on 26 July 1968 the disposal from stock of certain quantities of 'concentrated butter for use in cooking', to which the product designated by the national court by the letter (a) is by its nature very close.

On the other hand, Regulation No 1354/68 (JO 1968, L 217, p. 6) authorized the disposal of stocks of butter provided that the buyer gave an undertaking to export that butter after processing it into semi-finished products falling within subheadings 18.06 D II (c) and 21.07 F II to 21.07 F IX. The addition of amounts of curd and milk powder to the product designated by the national court by the letter (b) is sufficient for the mixture thus obtained to be considered as a food preparation within the meaning of heading 21.07.

In the light of these observations, the Commission proposes that the first question should be answered as follows:

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

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

or

(b) 85 % butyric fat
5 % curd
5 % skimmed milk powder
5 % refined suet of bovine animals

did not fall within that tariff heading.'

2. The second question

The Commission takes the view that the foregoing considerations as to the way in which tariff headings 04.03, 15.13 and 21.07 should be interpreted and defined in regard to the products in dispute already provide an answer to the question referred. Regulation No 496/69 merely drew the logical consequences from those headings and made them mandatory with regard to classification.

Moreover, the Commission considers it apposite in the present case to recall certain principles which it has already put forward in Case 37/75, *Bagusat* [1975] ECR 1339:

- The fact that a classification different from that laid down is conceivable according to the wording of the tariff is not sufficient for it to be considered as an unacceptable amendment to the tariff not justified by Regulation No 97/69.
- In order to fulfil their function and safeguard the principle of legal certainty, regulations on tariff classification cannot be declared void unless the decision which they contain is clearly contrary to the letter, the structure and the rules of tariff classification, is clearly arbitrary and wrong and can no longer be justified by means of substantive arguments.
- Legal certainty is not the only purpose of the regulations concerning classification: they are also intended to ensure a uniform interpretation and application of the Common Customs Tariff in all the Member States. For this reason, those regulations are applicable principally in those cases in which the competent authorities of the Member States adopt divergent positions with regard to tariff classification and in which uniformity of interpretation can be ensured only by a rule of Community law binding upon all those authorities; when there are no divergences between the national administrative authorities, the adoption of explanatory notes and of tariff classification opinions suffice to guarantee a uniform application of the tariff.
- The fact that a regulation concerning tariff classification does not correspond to the interpretation given to the tariff in certain Member States cannot justify the conclusion that such a regulation is void: in that case the regulation should not be annulled, but the tariff classification as applied by the Member States in question should be revised.

Taking these observations into account, the Commission contends that 'Regulation No 496/69 is valid'.

III — Oral procedure

Gervais-Danone and the Commission of the European Communities presented oral observations at the hearing on 10 February 1977.

In reply to the assertion by the Commission in its written observations that it is not possible to detect with sufficient certainty by means of analysis the presence in the mixture of the small quantities of suet referred to in this case, Gervais-Danone produced an expert's report establishing that the presence in the mixture of a suet content of 10 % or 5 % can be detected by analysis with a sufficient degree of certainty.

The Advocate-General delivered his opinion at the hearing on 9 March 1977.

Law

1 By an order of 27 July 1976, which was received at the Court on 13 September 1976, the Bundesfinanzhof referred two questions under Article 177 of the EEC Treaty, the first concerning the applicability of heading 15.13 of the Common Customs Tariff to certain mixtures of fats, and the second, in

the event of the first question's being answered in the affirmative, concerning the validity of Regulation No 496/69 of the Commission of 18 March 1969 (OJ, English Special Edition 1969 (I), p. 109) on the classification of goods under subheadings 21.07 F VIII and IX of the same tariff.

2 These questions have been raised in the context of an action concerning the tariff classification of a product imported in several consignments into the Federal Republic of Germany from a non-member country between 20 December 1968 and 22 March 1969, described by the importer as 'imitation lard' within the meaning of heading 15.13 of the Common Customs Tariff.

In the light of the aforesaid Regulation No 496/69, the customs authorities classified these goods under subheading 21.07 F IX ('Food preparations not elsewhere specified or included ... Other: Containing 85 % or more by weight of milkfats'), since they had proved to contain more than 85 % by weight of milkfats (butyric fat).

3 The importer of the goods challenges this classification on the grounds that Regulation No 496/69 (which entered into force before the customs formalities pertaining to the last consignment imported were completed) amends, moreover with retroactive effect, the ambit of tariff headings 15.13 and 21.07, is therefore contrary to the letter and the spirit of those headings, and hence exceeds the authority conferred upon the Commission by the basic Regulation No 97/69 of the Council of 16 January 1969 (OJ, English Special Edition 1969 (I), p. 12).

The Commission maintains that Regulation No 496/69 merely interprets the tariff heading in question with binding effect, by clarifying the content and scope which that heading had even before the regulation entered into force.

4 In its first question, the national court asks whether, before the entry into force of Regulation No 496/69, tariff heading 15.13 of the Common Customs Tariff was to be interpreted as applying to food preparations consisting of the following:

— for the first two consignments:
  85 % pure butyric fat (99·5 %)
  10 % refined suet
  5 % sesame oil

— and for the other consignments:

85 % butyric fat

5 % curd

5 % skimmed milk powder

5 % refined suet of bovine animals.

In its second question, the national court asks, in the event of an affirmative answer to Question 1, whether Regulation No 496/69 of 18 March 1969 is valid or invalid, in that it does not specify the content of tariff headings 15.13 and 21.07 but amends them and consequently is not covered by Regulation No 97/69 of 16 January 1969.

5 Heading 15.13 of the Common Customs Tariff applies to goods described as 'margarine, imitation lard and other prepared edible fats'.

It appears from the question referred that the principal fat ingredient of the products described by the national court is butyric fat, to which small percentages of animal and vegetable fats are added.

6 The Explanatory Notes to the Brussels Nomenclature and the *Notes Explicatives du Tarif Douanier Commun* consider 'butyric fat' to be one of the products covered by the concept of 'butter', within the meaning of tariff heading 04.03 of the chapter concerning, *inter alia,* 'dairy produce'.

Furthermore, the text of the *Notes Explicatives du Tarif Douanier Commun* relating to that heading specifies that food preparations based on 'butterfat' come under heading 21.07.

In listing the products included in heading 21.07, those *Notes* confirm, in particular under letter D II, that the fats of which the food preparations referred to in that heading consist are 'milkfats'.

7 In view of this information the products referred to in the question, however the importer may describe them, cannot, by virtue of the fat of which they mainly consist, be considered as food preparations coming under heading 15.13, which covers other fats, either vegetable or animal, such as margarine or imitation lard.

Although the Explanatory Notes to the Brussels Nomenclature do not preclude the inclusion of mixtures of animal fats under heading 15.13, it

follows from the very wording of those Notes that this can only be so in the case of mixtures of which milkfat, in particular butyric fat, does not constitute the main ingredient.

Food preparations containing 85 % of butyric fat must be considered as mixtures consisting mainly of milkfats.

Any addition to such preparations of vegetable oils or refined suet, whether of bovine animals or not, is not enough to justify their classification under heading 15.13, since that addition of a very small percentage does not have the effect of substantially altering the milkfat content of the product.

Moreover, the addition of skimmed milk powder or curd is all the more lacking in such an effect as those additives are themselves products derived from milk.

8 Furthermore, this conclusion is in accordance with the structure of tariff heading 21.07 and its function within the framework of the provisions of the common agricultural policy concerning dairy produce and animal oils and fats.

Indeed, since the adoption of Regulation No 13/64 of the Council of 5 February 1964, the dairy produce referred to in Chapter 4 of the Common Customs Tariff has been covered by a common organization of the market.

Within the framework of that organization, the Annex to Regulation No 160/66 of the Council of 27 October 1966 (JO 1966, L 195/3361), establishing trade arrangements for certain goods resulting from the processing of agricultural products, included 'food preparations ... containing dairy produce' among the goods coming under heading 21.07 of the Common Customs Tariff.

On the other hand, Article 2 of Regulation No 136/66 of the Council of 22 September 1966 (Official Journal, English Special Edition 1965-1966, p. 221), which established a common organization of the market in oils and fats other than those obtained from milk, extends the ambit of that organization to the prepared edible fats of tariff heading 15.13.

This delimitation of the respective ambits of the aforesaid Regulations Nos 136/66 and 160/66 confirms that, within the framework of the Common Customs Tariff, food preparations consisting mainly of milkfats are covered by tariff heading 21.07 and therefore cannot come under heading 15.13.

9 For these reasons, the answer to the first question must be that even before the entry into force of Regulation No 496/69 of the Commission of 18 March 1969, tariff heading 15.13 of the Common Customs Tariff was to be interpreted as not applying to mixtures of fats consisting of:

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.

10 Since Question 2 was to be considered only if Question 1 was answered in the affirmative, it does not require an anser.

Costs

11 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Bundesfinanzhof by order of 27 July 1976, hereby rules:

Even before the entry into force of Regulation No 496/69 of the Commission of 18 March 1969, tariff heading 15.13 of the Common Customs Tariff was to be interpreted as not applying to mixtures of fats consisting of:

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