fractionated butter oil in the manufacture of the product impairs its direct suitability for improving the flavour of certain foods. It is for the competent national court to decide whether this is the case.

2. The entry into force of Regulation No 950/68 of the Council has not affected the legal effects of verbindliche Zolltarifauskünfte issued under Article 23 of the German Zollgesetz.

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 24 November 1971.

A. Van Houtte
Registrar

R. Lecourt
President

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

Mr President,
Members of the Court,

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

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

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

1 — Translated from the German.

October 1966 (OJ L 14 p. 1) with its higher import duties, imposed a corresponding supplementary assessment. Since Messrs Siemers did not agree with this, they took the matter before the Finanzgericht München.

In their grounds of application, Messrs Siemers alleged that it is common knowledge that it is perfectly possible to produce mayonnaise from butter oil. It follows from the explanatory notes to the German Customs Tariff that mayonnaise comes within the concept 'mixed condiments and mixed seasonings' within the meaning of heading 21.04 and it makes no difference whether it is manufactured from milk or vegetable fat. The fact that the goods in question should be classified under heading 21.04 also follows from Regulation No 241/70 of the Commission of 9 February 1970 (OJ L 32/6) on the classification of goods under subheading 21.07 F of the Common Customs Tariff. Article 1 of this provides as follows: 'Food preparations based on milkfats, which contain various ingredients (egg yoke, vinegar, salt, for example) used also in the preparation of sauces, mixed condiments or mixed seasonings and which are clearly not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings shall fall within the Common Customs Tariff subheading: No 21.07 Food preparations not elsewhere specified or included: F other'. According to Siemers it is implicit in Article 2 of the regulation, which prescribes the day on which the regulation shall enter into force, that it effects an *amendment of the law*. Apart from this even *after* the entry into force of this regulation before there can be classification under heading 21.07 it must be established at the relevant date that the goods in question are clearly not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings. There is no such clarity in the plaintiff's case since it was not patently obvious to the customs officials that the imported mayonnaise was to be used otherwise than as described in Regulation No 241. Finally, the supplementary demand for customs duty also infringes the principle of good faith since the plaintiff had accurately stated the composition of the imported product when applying for clearance. The case-law of the Bundesfinanzhof whereby a person who has neglected to obtain a binding customs notice cannot rely on the principle of good faith is, properly understood, no longer applicable because, according to the principles of Community law, national authorities are no longer empowered to issue binding customs tariff notices.

On the other hand, the Hauptzollamt contends that a product can be described as mayonnaise and thus as a mixed condiment or seasoning under heading 21.04 only if it is ready for consumption. It maintains that the product in question did not in any event correspond in its composition and flavour to marketable mayonnaise. It argues that in this respect reference can also be made to Regulation No 241/70 which did not really make any change in the law. The product in question, which was made from milkfat and therefore covered by this regulation, was not in fact used in the trade either in the Federal Republic of Germany or abroad as a sauce, condiment or seasoning and in no case consumed in the unaltered state.

In view of this dispute the resolution of which necessitates a decision on various questions of European law, the court before which the matter was brought stayed the proceedings by order dated 25 May 1971 and referred the following questions for a preliminary ruling:

I (a) Does it make any difference for the classification of a product described as 'diet-mayonnaise' under heading 21.04 of the Common Customs Tariff whether the product has been manufactured by

using butter, butter fat or fractionated butter oil, and if so, what difference?

(b) Is trade usage ('Verkehrsauffassung') relevant for the classification of a product under heading 21.04 or 21.07? If so, is the trade usage in all the Member States decisive or can a trade usage prevailing solely in one Member State be taken into account if it diverges from the trade usage in other Member States?

(c) Was Regulation No 241/70, by virtue of its content, already applicable on 27 May and 9 July 1968, or not until 13 February 1970?

(d) In the event of an affirmative answer to question (c):

(1) Must the word 'clearly' in Regulation No 241/70 be understood as meaning that on the basis of the properties of the product at the relevant date it must be automatically discernible that the product is not intended for consumption in the unaltered state as a sauce, mixed condiment or mixed seasoning?

(2) By whom (the Customs Office or the appropriate trade circles) must this be discernible? In this connexion may reference be made to the trade usage in the importing country?

(3) Is it sufficient for the word 'clearly',

(a) that the commercial documents show that the product is not intended *ab initio* for consumption in the unaltered state as a sauce, mixed condiment or mixed seasoning, or

(b) can this be deduced from the further treatment of the product after the relevant date? If so, what conditions must be fulfilled for this deduction?

II (a) Since the entry into force of Regulation No 950/68 are the Oberfinanzdirektionen still empowered to issue binding customs tariff notices (verbindliche Zolltarifauskünfte) under Article 23 of the German Zollgesetz?

(b) If (a) is answered in the negative: was this also the case before the entry into force of Regulation No 950/68 with regard to products that were subject to EEC commercial rules, in this case Regulation No 160/66 of the Council?

I should now like to give my opinion on these questions regarding which the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities have presented their views orally and in writing.

I shall begin with a brief *preliminary Observation* on the actual wording of the questions. As we have seen, the present case concerns the interpretation of heading 21.04. In this respect it should be borne in mind that products under this tariff heading were not made the subject of common tariff until 1 July 1968, that is, with the entry into force of the Common Customs Tariff of Regulation No 950/68 (OJ L 172/1). However, since the imports in question were partly effected in May 1968 it could be said that an interpretation of Community law has been incorrectly requested to this extent. Nevertheless, it might be possible to consider reframing the question. It is in fact evident that the court making the reference is obviously only considering a tariff classification under heading 21.04 or 21.07, that is, that it is also a question of the scope of the latter tariff heading. It is certainly possible to clarify this because the products covered by it already came within the scope of the common marketing system of Regulation No 160/66 of 27 October 1966 at the date of the first import (May 1968).

Nevertheless, like the Commission I believe that an amendment of this kind is unnecessary. In fact, at the date of the *second* import, the tariff law of the Community was exclusively applicable and thus to this extent the questions raised cannot be criticized. In addition there is really no substantial difference between the legal problems involved in the two cases, since the dispute mainly turns on the distinction between headings 21.04 and 21.07. In agreement with all those concerned in the proceedings I shall not therefore alter the questions raised but shall proceed to treat them uniformly.

1. The first question relates to the interpretation of heading 21.04 ('sauces; mixed condiments and mixed seasonings'). It may be understood as a general inquiry as to whether or not it is decisive for the classification under this heading that a product has been manufactured by using butter, butter fat or fractionated butter oil.

Seen in this light, the answer to the question obviously presents no difficulties. In fact, decisive indications are to be found in the Brussels Explanatory Notes, which according to the case-law (Cases 12-14/71 and Case 14/70, [1970] ECR) are 'an authoritative source' for the purposes of the interpretation of the Common Customs Tariff. The Brussels Explanatory Notes mention only oil expressly in the composition of the products covered by Tariff Heading 21.04. Since however this is obviously only an enumeration by way of *example* and it is not stated that butter etc. is excluded, this manufacturing element can certainly also be taken into consideration. The exemplary data in the fourth paragraph of the Brussels Notes to heading 21.04, in particular, support this. They include, in fact, products (such as sauce béarnaise) which are also often manufactured from butter or butter fat or for the production of which the use of milkfat is even absolutely necessary. The plaintiff in the main action has rightly pointed this out, and it was also readily admitted by the Government of the Federal Republic and the Commission.

Moreover, reference may also be made in support of this view to a proposal by the Commission of 23 December 1969 for a Council directive 'for the harmonization of the legal provisions of the Member States on mayonnaise, mayonnaise-based sauces and other emulsified sauces'. It is true that this relates only to food law; however, since the requirements in this field are on the whole stricter, it seems plainly permissible to draw corresponding conclusions for customs law from this proposal. It is accordingly important that in the view of an institution of the Community (which has also been approved by the Economic and Social Committee and Parliament) the use of milkfat in the manufacture of the products mentioned in the proposed directive is not excluded. This follows from Article 6 in which there is mention of sauces made from *butter*. Reference may also be made to Annex 1 and its authoritative definitions of the sauces in question where fats of animal origin and even milk products are expressly mentioned.

Finally, confirmation of this view is also found in Regulation No 241/70 of the Commission on the classification of goods under subheading No 21.07 F of the Common Customs Tariff, with which I shall deal in greater detail later. When this regulation states that food preparations based on *milkfats*, which contain various ingredients used also in the preparation of sauces, mixed condiments or mixed seasonings come under heading 21.07 (food preparations not elsewhere specified or included) only on certain conditions (namely in so far as they are clearly not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings), it must be inferred that such goods can otherwise be classified under heading 21.04. Consequently, the first question raised by the Finanzgericht should be answered to the effect that it makes no

difference for the classification of a product under heading 21.04 that butter, butter fat or fractionated butter oil has been used in its manufacture.

If the question, however, was intended in a *narrower sense* a few further remarks are necessary. In fact, the order for a reference does indeed mention a 'product described as diet-mayonnaise', and the grounds of the decision may give the impression that the court is merely concerned with the conditions under which a product is *mayonnaise*, that is, a quite specific product mentioned in paragraph 4 of the Brussels Explanatory Notes. Thus, seen in this way, the question to be answered would be whether it makes any difference for the definition of a product as *mayonnaise* that butter, butter fat or fractionated butter oil has been used in its manufacture.

When the question is understood in this way, what has been submitted by the Government of the Federal Republic (citing the relevant literature and other documents) and the Commission seems particularly significant. According to this mayonnaise is traditionally understood to be a cream-like emulsion which is, as a rule—in the Community apparently exclusively—produced by using *vegetable oil*. Vegetable oil is used because it has very little flavour of its own, that is, because of its capacity not to detract from the properties of added condiments and seasonings, and also because of the fact that vegetable oils do not solidify at low temperatures. On the other hand the same result could not be obtained with butter or butter fat, at least if used in proportion similar to those which are said to have been used in the manufacture of the goods in question; with a fall in temperature, the stabilization (destruction of the emulsion) and solidification would occur. For this reason, milkfat is apparently mainly used in the manufacture of *hot* sauces, such as sauce béarnaise, as can also be deduced from the documents submitted by the plaintiff. Nevertheless, butter oil which has been obtained through the fractionated decomposition of milkfat could also be used in the manufacture of mayonnaise, as the effect just mentioned does not then occur. However, since the extraction of butter oil is disproportionately expensive its use in the production of mayonnaise is not usual; there is apparently no mayonnaise produced in this way on the market. This accords in turn with the Commission's proposal for a directive that I have already mentioned, which in Annex I, Chapter 2, foresees the use of *vegetable oil* only in the manufacture of mayonnaise, whereas the use of milkfat is however mentioned in relation to so-called 'mayonnaise sauce'. Similarly, it is significant that the product described as 'diet-mayonnaise' imported by the plaintiff has never, or, in any event, never to any appreciable extent, reached consumers, but has apparently always been further processed.

Thus, if the first question is understood in this special sense it should also be answered to the effect that mayonnaise is apparently not traditionally manufactured by using butter, butter fat or butter oil in the proportions specified by the plaintiff. However, further research would be necessary on the part of the court making the reference to support this finding, if this is relevant at all—and *inter alia* the answer to the second question will reveal this.

2. With the second question the Finanzgericht asks what importance trade usage has for the classification of a product under heading 21.04 or 21.07. If trade usage is important the Finanzgericht would like to know in addition whether the trade usage of one Member State can be taken into consideration or whether the uniform trade usage existing in all Member States must be considered.

It seems to me that valuable guidance may be obtained from the Brussels Explanatory Notes to heading 21.04 for the answer to this question also, whereas Regulation No 950/68 or the general

principles of tariff classification are of no assistance here. According to the Brussels Notes 'Preparations ... which are intended to improve the flavour of certain foods' come under heading 21.04. It is undoubtedly in accordance with the purpose of the customs tariff to ascertain this intended purpose as much as possible on the basis of *objective* criteria. In any event it cannot be deduced from the wording and the general scheme of the Customs Tariff that the classification depends solely on the intended purpose chosen by the importer. However, if this is so, if according to the relevant Brussels Notes the typical purpose usual in the trade is of importance, the in this context also the authoritativeness of the trade usage which lies behind the traditional intended purpose, cannot be denied. In this respect, moreover, mention may also be made of the judgment in Case 40/69 ([1970] ECR) where the purpose of a product was similarly of decisive importance (while, as the plaintiff has rightly stressed, the judgments in Cases 12–14/71 are less relevant in the present context because they merely emphasize the importance of the trade usage in the formulation of the Explanatory Notes by the *Brussels Customs Council*).

However, the finding that in principle the trade usage has authoritative value for the solution of problems of tariff classification requires some qualification, particularly in view of the difficulties involved in its ascertainment and the frequent absence of certainty. Thus I must agree with the Commission when it says that the trade usage can only be of importance if neither the wording of the customs tariff nor of the explanatory provisions contain more detailed specifications. Moreover, trade usage must be ascertained with clarity and certainty. Furthermore, and this relates to another part of the question raised, classification cannot depend on the trade usage prevailing solely in *one* Member State, but, as I have already indicated in my opinion in Case 40/69, solely on trade usage prevailing in *all* the Member States, precisely because the tariff nomenclature applies uniformly throughout the Community. It is by no means obvious that such uniform trade usage scarcely ever exists and that therefore trade usage, as the plaintiff contends, is unsuitable as a criterion of tariff classification. If indeed the necessary uniformity does not exist (which must not be confused with a case where goods, and thus relevant trade usage, are *known* only in one Member State), that is, if in the Member State divergent trade usages exist which conflict with one another and would lead to divergent tariff classifications, this aid to interpretation is certainly ruled out and there remains solely recourse to the general provisions of tariff classification of the Common Customs Tariff.

In my opinion the second group of questions should be answered in this way, which, although certainly restrictive, does not exclude trade usage in principle.

3. The third question relates to Regulation No 241/70 of the Commission of 9 February 1970 'on the classification of goods under subheading No 21.07 F of the Common Customs Tariff'. The objective of this regulation as appears from its recitals and Article 1, is by negative definition to clarify the distinction between headings 21.04 and 21.07. Since the imports in question in the main action took place in May and July 1968 and the regulation (according to Article 2 thereof) entered into force only on 13 February 1970, the Finanzgericht would like to know whether the regulation was 'by virtue of its content, already applicable on 27 May and 9 July 1968' or whether it only applies to imports which take place after its entry into force.

In this connexion it must be observed, first of all, that Regulation No 241/70 of the Commission is based on Regulation No 97/69 of the Council of 16 January 1969 (OJ L 14, 1) 'on measures to be taken for uniform application of

the nomenclature of the Common Customs Tariff'. This regulation of the Council concerns in particular 'measures which may be necessary for classifying certain goods' in the Common Customs Tariff. As appears from its recitals it is intended to make it possible for provisions to be adopted to 'specify the content of the headings or subheadings of the Common Customs Tariff' without, however, amending the subheadings of the Common Customs Tariff' without, however, amending the text thereof. For this purpose (Article 1 of Regulation No 97/69 so provides) a Committee on Common Customs Tariff Nomenclature is set up in which a representative of the Commission shall be the chairman. The representative of the Commission shall submit to the Committee a draft of the provisions to be adopted and the Committee shall deliver its opinion on the draft. Opinions shall be delivered by a majority of 12 votes, the votes of the Member States being weighted as provided in Article 148 (2) of the EEC Treaty. The Commission shall adopt the provisions envisaged where they are in accordance with the opinion of the Committee. Where there is no such accord, the Commission shall propose to the Council the provisions to be adopted and the Council shall act by a qualified majority. Since in the present case the provisions of the Commission were in accordance with the opinion of the Committee, Regulation No 241/70 of the Commission could be issued.

As regards the applicability of this regulation (there is no question as to its *validity* and contrary to the plaintiff's opinion there is nothing which could be said to invalidate it) the answer to the question raised in my view requires no comprehensive investigation of the problem of the date from which such regulations relating to classification and interpretation can be applied in general and whether in certain circumstances they apply only to imports which have been made after they come into force. In the present case, and this facilitates our examination, it seems to be established that we are not concerned with a rule which could be applied only to imports made after it came into force. In fact, the Brussels Explanatory Notes, that is an authoritative source of information in the absence of explanatory provisions in Community law, show, in relation to heading 21.04, that it covers preparations which are intended for the improvement of flavour of foods. Thus it depends, and the examples given in the Brussels Notes also support this, on whether the preparations are suitable and intended for consumption in the unaltered state. Nor does Regulation No 241/70 provide anything to the contrary and its recitals expressly refer to the requirements relating to the use of 'products falling within heading 21.04 of the Common Customs Tariff, as appears from the Explanatory Notes to the Brussels Nomenclature'. Accordingly it lays down that preparations of a specifically defined composition, which are clearly *not* intended for consumption in the unaltered state, are to come under heading 21.07 and not heading 21.04. We are thus really faced with the *clarification* of a legal situation already in existence by virtue of Regulation No 950/68 and ascertainable with the aid of the Brussels Explanatory Notes. On the other hand, it is erroneous to speak, as the plaintiff has done in the proceedings, of a *change in the substance of the legal situation,* in the substantive tariff law, a change in the tariff classification and a transfer from one heading to another heading with the different rate of duty. However, although Regulation No 241/70 is merely of a confirmatory or declaratory nature and although it has merely elucidatory effect, in this capacity it may certainly be used as an aid in ascertaining the original meaning of the text of the tariff (cf. Case 14/70, [1970] ECR)—in other words—there can be no objection to applying it to imports which took place under the system of Regulation No 950/68 and

for which the definitive charge had not yet been decided at the date of the entry into force of Regulation No 241/70. This does not mean any real, legislative, retroactive effect, but merely a kind of retroactive effect which legal interpretations of this type may possess quite properly. The only, in the Commission's view, legislative factor in Regulation No 241/70, the concept 'clearly' does not make any difference, for in truth it has a restrictive effect, that is *favourable* for the businesses concerned.

Furthermore, there is nothing in the regulatory nature of the provision in question, in its *legal basis* or in the fact that it specifies a *date for its entry into force* which was not a date preceding its date of enactment to vitiate this conclusion which is supported both by the Government of the Federal Republic and the Commission. In the judgment in Case 74/69 ([1970] ECR), it was stated, as is known, 'the uniform application of Community law is only guaranteed if it is the subject of *formal* measures taken in the context of the Treaty', 'an official interpretation of a regulation by an informal document of the Commission is not enough to confer on that interpretation an authentic Community character'. Thus in order to establish the binding force mentioned in that judgment the form of a regulation had to be chosen; according to Community law there was no other means available. Such an explanatory provision, however, does not necessarily thereby have a legislative character. Moreover, according to Article 191 of the EEC Treaty, regulations must come into force on a specific date. However, in the present case, precisely in view of the function of the explanatory provision, the stipulation of a date for entry into force cannot preclude the possibility of retroactive effect. On the contrary, the provision must be understood to the effect that from the date of the entry into force it binds courts and authorities, in relation to all cases which have not yet been decided, that is, those for which an application of the regulation is still being considered. Moreover, I would also point out that according to Community law binding explanatory provisions are not the prerogative of the *Council,* which drafted the Common Customs Tariff and its classification of goods, but that on the contrary the Commission may be delegated to do so. In any event, this view may be advocated because the procedure prescribed is so designed that an appropriate participation of the representatives of the Member States seems to be assured. In fact, it may be said to resemble the management committee procedure of the agricultural market regulations, that is, a procedure that you have already held to be compatible with Community law (Case 25/70, [1970] ECR; Case 26/70, [1970] ECR; Case 30/70, [1970] ECR). Finally, nothing can be derived from the plaintiff's reference to Article 28 of the EEC Treaty, the legal basis for Regulation No 97/69 of the Council. Even though Article 28 mentions alterations of duties in the Common Customs Tariff, this does not at all necessarily mean that everything that is done on the basis of this provision must be designed to effect a change in substantive tariff law. Properly understood, this article is not infringed even on the assumption that it covers all measures of the Council within the scope of its sovereignty in tariff matters, in so far as binding force is intended to be attributed to them, that is, including the issue of explanatory notes and the authorization of the Commission to issue them.

Consequently, the third question must be answered, as suggested by the Commission and the Government of the Federal Republic, to the effect that Regulation No 241/70 of the Commission, as a valid explanatory provison binding on the authorities and the

courts, must be applied when considering all import matters not yet concluded at the date of its entry into force.

4. A fourth group of questions relates to the interpretation of Regulation No 241/70 just mentioned, that is, the interpretation of the word 'clearly' and the problems related thereto.

On this the plaintiff in the main action has taken the view that by virtue of the properties of a product at the date of its clearance it must be automatically, that is, without further investigations, discernible to the customs office that it is not intended for consumption in the unaltered state as sauces, mixed condiments or mixed seasonings. The Government of the Federal Republic and the Commission on the other hand take the view that the word 'clearly' must be understood in the sense of 'established beyond all doubt'; further investigations to establish this result after the date of clearance, however, are in their view not excluded.

When an attempt is made to decide this question regarding the meaning of an undoubtedly important word in Regulation No 241/70 it immediately becomes apparent that not much can be gained by resorting to the mere meaning of the word itself, since the word 'clearly' lacks the necessary precision in both German annd French. Moreover this also applies to legal terminology. Therefore the answer to the question must be based on other considerations.

Thus, in the first place, it seems important that both Regulation No 241/70 and the Brussels Explanatory Notes relate to the *intended use* of a product. As we have seen, this cannot be the use chosen in the particular case but solely the use typical of the product, the purpose usual in the trade, which must be ascertained in principle on the basis of the properties which a product possesses at the date of its clearance. As has similarly been mentioned already, from this follows the authoritativeness of the trade usage, and not the trade usage in one Member State but that prevailing in the Community. However, when the qualifying factor 'clearly' appears in this context, a tariff classification under heading 21.07 can only be considered if clearly the intended use which determines classification under heading 21.04 is ruled out; thus it can scarcely be assumed in fact, certainly not from the nature of the terms used in this explanatory text, that 'clearly' is the same as 'immediately ascertainable', that the term categorically excludes further investigations. Moreover, this assumption is also difficult to make because the term to be interpreted is used in an explanatory provision and because, as the Commission, as the author of the regulation, has convincingly shown, explanatory provisions are often issued in relation to *new kinds* of products. However, it can scarcely be regarded as the intention of the author of the regulation that new kinds of products should be restricted with regard to investigations and examinations. Finally, the Commission evidently did not intend to alter the national law of customs procedure. In this respect it should be observed that, according to the German Customs Law,[1] the administration has power until the expiration of one year after clearance to amend the tariff classification, for example if industrial examinations give reason to do so. They would certainly be deprived of this power if the classification depended solely on the results that the customs offices are able to obtain at the time of clearance.

Moreover, since 'clearly' is not synonymous with 'notorious' and because in certain legal contexts this term may also have the meaning of 'certain' 'certainly established', 'beyond any reasonable doubt' (French: 'certain', 'indisputable'), in my opinion it should, after all

1 — Paragraph 94 in conjunction with Paragraph 144 of the Abgabenordnung.

that has been said regarding the peculiarities of the explanatory provision now in issue, only be understood thus in this provision, that is, the intended use decisive for the classification of a product in the customs tariff must be very carefully scrutinized by the customs offices or courts or authorities deciding subsequently on the classification and must be ascertainable with certainty. If the term is understood in this way without laying down strict provisions as to the time of the examination, that is, if no objection can be made to further investigations, then there can be no objection to holding that reference to commercial documents is permissible in relation to Regulation No 241/70, and not only those which are available at the time of clearance and in general provide little information with regard to the purpose, but also, for example, commercial documents from a subsequent purchaser and processor of the product. Similarly, with this interpretation of the term 'clearly' there can be nothing in principle against drawing retroactively from the normal subsequent processing of the product, especially where it is done on a large scale, conclusions as to the intended use and confirming the findings in this respect up to the point of certainty.

As suggested by the Government of the Federal Republic and the Commission, the question regarding the interpretation of Regulation No 241/70 and the term 'clearly' used in it must be correctly answered in this way.

5. Finally, the last question concerns the 'binding customs tariff notices' ('verbindliche Zolltarifauskünfte') found in German law. In this respect the Finanzgericht would like to know whether they can still be issued after the entry into force of Regulation No 950 or, with regard to products which are covered by the marketing system of Regulation No 160/66, after its entry into force, or whether they conflict with the concept of the uniform application of Community customs law.

As we heard in the proceedings, this institution is governed by Paragraph 23 of the German Zollgesetz and in Paragraphs 28–31 of the Allgemeinenzollordnung. In accordance with these provisions the Oberfinanzdirektionen (one for each group of products)[1] at the request of individuals issue binding notices regarding the tariff heading of the customs tariff to which a product belongs. If this has occured the applicant can demand that the customs offices which are bound by the notice (there can be either one or several such offices to which samples of the product in question are sent) should classify the same product, as far as the tariff is concerned, in accordance with the notice. If the notice is amended or rescinded the applicant can still demand its application for three months thereafter. However, the notice lapses immediately if the legal provisions applied in it are changed. Thus it amounts to a voluntary binding undertaking on the part of the administration governed by statute, as it is also practised, for example, in tax law without any express provision. According to the principle of good faith, in view of the protection of the confidence of the persons concerned, it applies for a time even in the case of an incorrect tariff classification, and from this the doubts arise in relation to Community law which has been given precedence.

It must be said right away that no-one denies that the binding customs tariff notices are of great value for the import trade, satisfy an urgent need[2], provide security regarding tariff classification before the conclusion of import transactions, that is, the amount of customs duty, and thus facilitate calculations. Their expediency is also expressly recognized in Article 5 (4) of the Geneva Customs Agreement of 1923 to

1 — Paragraph 28 of the Allgemeine Zollordnung.
2 — Cf. Bail-Schädel-Hutter, Kommentar zum Zollgesetz, note to Article 23.

which all the Member States of the European Economic Community are signatories. Similarly, the Brussels Customs Council has prepared recommendations for the introduction of this legal concept in all the signatory States (Conseil de coopération dounière, normes dounières internationales, No T 4-322).

Thus in considering customs tariff notices in the light of the principles of Community law it must be stressed that, even when they apply not merely to one transaction but to a number of transactions without restrictions as to quantity, they are, by their very nature, issued in *application* of the law to a particular individual and a particular product and have no *legislative* function. It is therefore clear that, contrary to the view of the plaintiff, nothing can be derived directly from the previous decisions of the Court against the validity of tariff notices. The whole context of this case-law clearly shows that these decisions in fact dealt solely with binding national explanatory provisions in the form of general legislative measures and merely denied their admissibility (Cases 40/69, [1970] ECR; 74/69, [1970] ECR; 14/70, [1970] ECR). The Court has even declared, *obiter,* that even national measures implementing the customs tariff, that is general explanatory measures, to be admissible, although with the qualification that they may not be *binding* measures (a fact, moreover, which precludes reliance on this particular decision of the Court to justify customs tariff notices).

Thus if it is established that binding customs tariff notices constitute an activity of the administration, that is, the application of law, and in view of the fact that national administrative action is indispensable in the application of the Common Customs Tariff, the following considerations emerge for the treatment of these notices in the present context. In the absence of customs tariff notices, questions of tariff classification would have to be solved by the customs offices which undertake clearance. As the Government of the Federal Republic has stressed, the danger of erroneous classification in particular complicated cases is therefore relatively large, since the customs offices do not have the same opportunities for thorough examination and the same expert knowledge as the Oberfinanzdirektionen which issue the notices. Such erroneous classifications may be prejudicial to the development of the common market because they cannot always be corrected. If they ensue with a certain regularity the customs offices concerned are obliged to a certain extent to act in accordance with a general constitutional principle of good faith, since, at least according to the case-law of the Bundesfinanzhof, reliance on the principle of good faith is only precluded if a party has neglected to obtain a binding customs tariff notice.[1] On the other hand, according to the submissions of the Government of the Federal Republic, the danger that incorrect tariff notices are issued is obviously very small, since they are issued by specialized central offices, the Oberfinanzdirektionen, which can easily contact the appropriate offices of the Commission. Moreover, market disturbances which may arise by virtue of incorrect tariff notices applied over a period can easily be kept within narrow limits. Thus the opportunity exists to effect a rapid correction of erroneous national customs practices by means of the Community procedure laid down in Regulation No 97/69, already described, which permits short periods to be fixed for the customs committee to reach its decisions. If the tariff classification regulation is issued under this procedure any national customs tariff notices diverging from it immediately lose their effect.[2] According to the statements of the Government of the Federal Republic, which was able

1 — Cf. Bail-Schädel-Hutter op. cit., p. 266.
2 — Cf., ibid., note to Article 23.

to refer to a number of such cases, this seems to be the current interpretation of the provisions of Article 23 of the German Zollgesetz. In such a case, binding customs tariff notices cannot still be applied during the three months after they have been amended or revoked. Moreover, it may be argued—and I must agree with the Commission in this respect—that in each case the principle of good faith must be *strictly* applied. Accordingly, in the event of an amendment to a customs tariff notice after its incorrectness had been established, before it could continue to have transitional application it would have to be proved that certain arrangements had already been made in reliance on its correctness. If it is held that on this basis also the notice does not automatically continue to apply for a period of three months, as the German Zollgesetz now provides, it may, in fact, be regarded as certain that large market disturbances will not occur.

When all this is considered and when one bears in mind that similar practices exist in other Member States with divergent customs procedure in comparable situations (in any event the Government of the Federal Republic has so submitted without being contradicted), there remains only one conclusion: it cannot be doubted that customs tariff notices issued and applied by national authorities in accordance with the strict principles just described, so long as customs tariff notices do not exist at the Community level, jeopardize the uniform development of the common market less than their absence would do. Regarded in this light, that is in a situation which necessarily displays inadequacies and in which it can solely be a question of finding the best solution from the point of view of the Community, nothing is revealed that would in principle exclude the admissibility of national customs tariff notices under Community law. Moreover this applies both to Regulation No 950 and to the market system already previously in force under Regulation No 160/66.

Nor is this conclusion—let me say this for the sake of completeness—shaken by the plaintiff's reference to Article 177 of the EEC Treaty and the jurisdiction of the Court of Justice contained therein in matters of interpretation. In my view, it cannot be said that to permit national customs tariff notices would in general undermine the monopoly of interpretation assigned to the Court, for there is still the possibility of lodging an appeal against a customs tariff notice and having its correctness scrutinized by the Bundesfinanzhof[1] which might then be obliged to make a reference for a preliminary ruling under Article 177 of the EEC Treaty.

However, if the correctness of a customs tariff notice is not disputed, that is, if a judicial review does not arise, one is faced with a situation, as always occurs, where a party is satisfied with the conduct of the administration, that is, there is no dispute or need for clarification.

Thus, in my opinion, everything has been said that needs to be said with regard to the answer to the last question in this case, which, in view of the question of prinicple involved, is probably the most important.

6. Accordingly, to summarize, I can propose the following answers to the questions raised:

(a) For the classification of a product under heading 21.04 of the Common Customs Tariff it makes no difference whether the product has been

1 — Cf. Bail-Schädel-Hutter, op. cit., note to Article 23.

manufactured by using butter, butter fat or fractionated butter oil. Although the product in question may possibly be regarded as mayonnaise, it must also be observed that a product which is manufactured from butter, butter fat or butter oil, used in the proportions as stated in the national proceedings, is apparently not usually considered by the trade to be mayonnaise.

(b) Since products of heading 21.04 must certainly be intended for the improvement of flavour according to the Brussels Explanatory Notes, the classification of a product under heading 21.04 or heading 21.07 depends on the trade usage, that is, on whether the product is a preparation which is ready for consumption in its unaltered state, and the intended purpose of which, according to the custom of the trade and typical of the product, is the improvement of flavour. To the extent that recourse may be had to trade usage as an aid in the interpretation of the Common Customs Tariff Nomenclature, the uniform trade usage prevailing in all the Member States is in principle authoritative. The trade usage prevailing in particular Member States may suffice as a basis of interpretation, provided that the product in question is found and used only in particular Member States.

(c) The customs tariff classification of a 'diet-mayonnaise' manufactured from 'butter oil', egg yoke, salt and vinegar, is governed by Regulation No 241/70, even if the import took place before the entry into force of this regulation, when the final decision regarding the appropriate classification is not made until after this date.

(d) The term 'clearly' contained in Regulation No 241/70 obliges the offices which have to decide on the tariff classification of one of the preparations described to examine thoroughly its typical use, customary in the trade, in principle according to its properties existing at the date of import and to proceed to classify it under heading 21.04 solely if it is clearly established that the preparation in question is intended for consumption in the unaltered state as sauce. In this examination, the available commercial documents or the circumstances of the subsequent use of the preparations, *inter alia*, may also be taken into consideration.

(e) Binding customs tariff notices issued under Article 23 of the German Zollgesetz are compatible with Community law if when their incorrectness has been established their application is restricted to import transactions which have been concluded by the addressee of the notice in reliance on its correctness. In this respect there is no difference between the application of Regulation No 160/66 and that of the Common Customs Tariff.