JUDGMENT OF THE COURT
6 FEBRUARY 1973 [1]

Alfons Lütticke GmbH
v Hauptzollamt Passau
(preliminary ruling requested by Finanzgericht)

Case 42/72

Summary

Agriculture — Goods resulting from the processing of agricultural products — Imports — Charges — Fixing such charges — Criteria — Milkfat — Content — Determination

(Regulation of the Council No 83/67, Annex V)

In view of the purposes and flat-rate nature of the system established by Regulation No 160/66 of the Council, the validity of the provisions of Regulation No 83/67 of the Council, adopted in implementation of it, is not affected by the fact that the method of analysis provided for by that Regulation for the calculation of the milkfat content yields approximate values of such content.

In Case 42/72,

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

ALFONS LÜTTICKE GMBH, Cologne,

and

HAUPTZOLLAMT OF PASSAU,

on the validity of Article 7 (3) combined with Annex V of Regulation No 83/67/EEC of the Council of 18 April 1967 (OJ 1967, No 81), establishing tariff specifications relating to goods covered by Regulation No 160/66/EEC of the Council, and determining the fixed components applicable to such

1 — Language of the Case: German.

goods and the quantities of basic products to be taken as having been used in their manufacture,

THE COURT

composed of: R. Lecourt, President, R. Monaco (Rapporteur) and P. Pescatore, Presidents of Chambers, A. M. Donner and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

The facts and procedure may be summarized as follows:

1. On 21 August 1968, Alfons Lütticke GmbH (hereinafter called Lütticke) cleared through the Customs Office at Simbach-Innbrücke goods declared as 'cream milk chocolate in bulk', with a view to putting it on the market. The Customs Office classified the goods as 'a mixture of cocoa powder and milk powder'.

After analysis of a sample of the goods, in accordance with the method laid down by Article 7 (3) and Annex V of Regulation No 83 of the Council of 18 April 1967 (OJ 1967, p. 81), the Customs Technical Examination and Training Institute of Munich found, *inter alia*, a milk fat content of 26·9 %. By amending notice of assessment of 29 October 1968, the Customs Department then treated the goods as 'a food preparation containing cocoa and containing 26 % or more by weight of milkfats', and classified it under tariff heading *18.06-D-II-c-2*.

On entering objection to this ruling, Lütticke endeavoured at first to obtain classification under the tariff heading corresponding to the criteria originally applied. As the judgment given by the Court of Justice on 3 March 1971 in Case 51/70 had in the meantime been published, Lütticke abandoned their attempt to obtain this designation and requested that the goods be treated as an 'other food preparation containing cocoa and containing less than 26 % by weight of milkfats', and that they might therefore be classified under the tariff heading *18.06-D-II-b-2*. The analysis of a reserve sample still held by the Customs Office, carried out by the Customs Technical Examination and Training Institute (hereinafter called CETI) on 27 May 1971, in accordance with the above-mentioned method, produced the

result of 26·1 % in respect of the weight content of milkfat.

As the objection to the ruling was not upheld, Lütticke took the matter to the Munich Finanzgericht.

By Order dated 14 June 1972, that court decided to suspend proceedings and referred the following question to the Court of Justice:

'Is Article 7 (3) of Regulation No 83/67/EEC, combined with the method of analysis defined in Annex V, valid or not?'

2. The Order was received at the Court Registry on 6 July 1972.

Lütticke, represented by Peter Wendt, and the Commission of the European Communities, represented by its Legal Adviser Friedrich Wilhelm Albrecht, submitted their written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court.

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

The oral observations of Lütticke and the Commission were made at the hearing on 22 November 1972.

The Advocate-General presented his opinion at the hearing on 11 January 1973.

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

The observations submitted by the parties may be summarized as follows:

A — Observations submitted by Lütticke

Lütticke firstly points out that the Council does not possess unlimited legislative power, but must respect the fundamental principles of Community law, in addition to the limits expressly laid down by the Treaty. According to the jurisprudence of the Court, among these principles are those of 'proportionality' and of the 'protection of fundamental Rights', as well as the principles drawn from German writes and jurisprudence of the 'laws of logic', 'natural laws' and the 'results of scientific experiment'.

Lütticke goes on to examine the problem in question by giving a detailed analysis of the technical aspects, supported by offers of evidence and the documentation annexed to its statement of case. It points out in particular that, at the present stage of scientific knowledge there is no method of analysis enabling milkfat content to be isolated from total fat content contained in a sample and thereby directly to determine the content by weight of milkfat. The only possible method of analysis is an indirect method, which consists in determining whether, and to what extent, the total fat content reveals a characteristic element indicating the presence in the sample of milkfat content. This element is the butyric index of the total fat content, capable of being directly determined, either by the Grossfeld method, or by a more exact gas chromatographic procedure. From the butyric index, and taking into account the quantities of that element which, from experience, are found in milkfat, it is then possible to determine approximately the percentage by weight of milkfat contained in the sample.

The method of analysis chosen in this case by Annex V of Regulation No 83/67 is defective in several respects:

1. it is based on the Grossfeld method, which goes back to 1938 and has been for a long time outdated;

2. it indicates excessively high values. This is due in particular to the following reasons:

(a) In the first place, the quantity of total fat which, according to the

calculation formula set out in Annex V of Regulation No 73/67 (first formula), is used to determine the butyric index, is too high in relation to the factor 1·4 used in it. This factor takes into account a quantity of between 500 and 550 mg, while the factor 1·4 is only exact for 500 to 501 mg;

(b) In the second place, the method in question distorts or does not completely reproduce the Grossfeld method, on which it is based. The process of determining the butyric index of the total fat content (first formula), which is precisely the starting point in the calculation of the content by weight of milkfat, does not provide for blank tests ('Blindversuch'), so that it does not deduct from the titration values those resulting from these tests ('Blindwerte'). Because of this omission, the formula in question arrives at values between 0·84 % and 1·4 % too high.

That this is, in this case, a gross error, is further evidenced by the new method of analysis laid down in Annex III of Regulation No 1061 of the Commission of 6 June 1969 (OJ 1969, L 141). While retaining the formula of Annex V of Regulation No 83/67 (first formula) for determining the butyric index of the total fat content, this new method introduced a correction to it — which the legislatons themselves deemed 'necessary' in the Preamble to the Regulation — in deducting the flat-rate figure of 1·2 from the values obtained by this formula. In order to measure the effects of this correction, it is enough to reconsider, in the light of Annex III of Regulation No 1061/69, the calculation arrived at the second time by CETI on 27 May 1971. If the imports in question had taken place after, and not before, the entry into force of Regulation No 1061/69, CETI would in that case have recorded a content by weight of milkfat in any case less than 26 %, which would have involved a tariff classification under the heading 18.06-D-II-b-2.

(c) In the third place, the calculation formula for determining the percentage by weight of milkfat (second formula) laid down in Annex V of Regulation No 83/67 results in values which are too high, by taking into consideration a mean butyric index of 20. It does not take into account the fact that the butyric index of milkfat shows fluctuations from which it has been established, by means of analyses, that the margin of uncertainty in determining this factor is at least ± 10 %.

On the basis of these considerations, Lütticke submits that Article 7 (3) of Regulation No 83/67, together with Annex V, is invalid, because it is contrary to all the general principles of law mentioned above, and, in particular, to that — accepted in the jurisprudence of the Court — according to which the means chosen must be shown to be necessary and appropriate in relation to the end in view.

On this last point, Lütticke notes that Regulation Nos 160/66 and 83/67 pertain to *certain goods manufactured from agricultural products,* that is, goods which contain not only products falling under a common organization of agricultural markets, but others as well. Because of this double structure, these goods are subject to a complex charge, made up of a 'variable factor', representing the levy on products within the framework of the common organization of agricultural markets and used in manufacture, as well as a 'constant factor', corresponding to the entry duties imposed on products outside that organization. With regard particularly to products falling under the common organization of markets in the milk sector, it is evident from Regulation No 13/64 that their fat content is a determining factor in calculating the

amount of the tax applicable. The 'variable factor' of this tax increases progressively in proportion as the fat content of these products rises. Thus, the *precise* calculation of the milkfat content in the case of these goods is important, since an analysis yielding incorrect results has the effect of imposing on the importer an intolerable fiscal charge or forming a breach in the system of the common organization of agricultural markets which the legislature did not intend. On the other hand, the method described in Annex V of Regulation No 83/67 is altogether imprecise. It is useless to raise the objection that this imprecision concerns only products the milkfat content of which is at the dividing line between two tariff sub-headings, for it is precisely these products which, in most cases, cross frontiers.

Further, the provisions in question conflict with the fundamental legal principle, recognized by all the Member States, of the *'protection of confidence'*, as they do not allow importers to foresee with sufficient certainty the tariff classification of the imported goods and to calculate in advance the amount of tax due. By the same token, these provisions militate against the requirement, already pointed out by the Court, of the *uniform application of Community law* in all the Member States, as well as the principle of *equality of treatment*. As in fact the level of the entry duties does not, in the system in question, depend on the precise calculation of the milkfat content, but is linked with a calculation the results of which are affected by several factors of uncertainty and can, because of this, vary from one analysis to another, products with the same milkfat content risk being subjected to different charges. One can even submit in this respect that Annex V of Regulation No 83/67 infringes Article 13 of Regulation No 160/66, which prohibits the levying of customs duties and charges having equivalent effect, since if the imported goods are subjected to a heavier charge than that due, they are subjected, in respect of the excess, to a charge having the effect of a supplementary customs duty.

Lütticke adds lastly that the Court can, in this case, verify the validity of Article 7 (3) of Regulation No 83/67, combined with Annex V, even of its own motion, by going on to examine other aspects of the problem in question which the parties have not expressly raised. Such verification is essential more especially as, on the one hand, the Council has always refused to communicate to the nationals of the Member States information relating to the process of drafting the rules of law (the national courts themselves up to now have not dared to refer questions to it as to this) while, on the other hand, the Court of Justice is the *only* institution able to establish all the factual points capable of settling a problem of validity. Lütticke therefore requests that, by virtue of Article 21 of the Statute of the Court, the Council and the Commission be ordered to produce all documents (minutes, drafts, etc . . .) connected with the drafting and validity of Annex V of Regulation No 83/67 and all documentation relating to Regulation No 1061/69.

After pointing out — by way of concrete examples — that the Regulations of the Council, more often than the Regulations of the Commission, contain errors capable of affecting the validity of an act and which, most probably, are due to the conditions of time and procedure under which this institution works, Lütticke excludes, in this case, the possibility of a partial annulment of Annex V, as it is not for the Court to establish a new method of analysis eliminating the errors contained in the method in question. But, if such a modification lies solely within the competence of the legislature, the Court could nevertheless indicate in its judgment which is *de lege ferenda* the correct method of analysis capable of being recognized as valid. If the Court prefers to allow a method of analysis

based on the Grossfeld method, not comprising blank tests ('Blindversuch'), it must recognize, from all the factors of uncertainty inherent in this method, the consequences which manifest themselves. One must, on the one hand, rely on the fundamental principle, recognized at all events by German law, according to which the onus of proving whether the composition of goods justifies a higher or lower charge falls on the claimant of the fiscal charge, and, on the other hand, provide for a flat-rate corrective coefficient capable of compensating for the error arising from the above-mentioned factors of uncertainty. After establishing, on the basis of a detailed example, that this error is 7·4 % too much in weight, Lütticke concludes as follows:

'1. Article 7 (3) of Regulation No 83/67, combined with the method of analysis described in Annex V, is void.

2. A method of analysis based on the Grossfeld process, which is affected by factors of uncertainty and does not comprise blank tests ("Blindversuch"), is valid according to Community law insofar as it provides for a deduction in weight of 7·4 % in respect of milkfat content, when the determination of a milkfat content higher than the actual content would be prejudicial to the subjects of the Community.'

B — Observations of the Commission

The *Commission* firstly sets out the legal background of the problem in question, making the following remarks in particular:

— Regulation No 160 of the Council of 27 October 1966, establishing trade arrangements applicable to certain goods resulting from the processing of agricultural products (OJ 1966, No 195), provides, on the import of those goods, for a charge consisting of two factors, the one 'constant', corresponding to a customs duty and intended to protect the food industry, and the other 'variable', taking into account the difference between world prices and the prices ruling in the importing Member State for the said goods.

— In order to implement this system, the Council, on 18 April 1967, adopted Regulation No 83 (OJ 1967, No 81) which, in Annex I, established the tariff specifications relating to the goods to which Regulation No 160/66 applies (as well as the 'constant' factors applicable to them) and, in Annex II, fixed the quantities of basic products to be taken as having been used in their manufacture (on the basis of which the Commission fixed the 'variable' factor in every quarter).

— Further, this Regulation established methods of analysis allowing for the calculation of the content of certain constituents in certain products. For goods containing milkfat, one is referred specifically to the method of analysis described in Annex V.

— Annexes I and II of Regulation No 83/67 were replaced, from 1 July 1968, by Annexes A and B of Regulation No. 735 of the Council of 18 June 1968 (OJ 1968, L 138), where goods containing milkfat and whose packing does not comply with certain conditions, are classified, within tariff heading 18·06, under the sub-headings *D-II-b-2* and *D-II-c-2*, according to whether their milkfat content is 'more than 6·5 % and less than 26 %' or '26 % or more' respectively. Further, in indicating the 'quantities of basic products to be taken as having been used in the manufacture of 100 kg (net) of goods', Annex B lays down, in respect of goods under sub-heading 18.06-D-II-c-2, '10 kg of sugar' and '85 kg of whole milk powder', and refers to the system of sub-headings

21.07-F-VI to IX for goods under sub-heading 18.06-D-II-c-2. Both sub-headings are, in Annex A, allotted a customs duty and a variable charge.

— The system established by Regulation No 160/66, in respect of imports from third countires, was replaced, from 1 July 1969, by that of Regulation No 1059 of the Council of 28 May 1969 (OJ 1969, L 141). In order to establish the methods of analysis necessary for this latter Regulation to be applied, the Commission, on 6 June 1969, adopted Regulation No 1061 (OJ 1969, L 141), in which Annex III fulfils, with regard to Regulation No 1059/69, the same functions as Regulation No 83/67 with regard to Regulation No 160/66.

— The method of analysis described in Annex III of Regulation No 1061/69 is that which appears in Annex V of Regulation No 83/67, save in one detail. The calculation formula for determining the butyric index of total fat (first formula) is identical in both Annexes, but Regulation No 1061/69 applies a flat-rate deduction of '1·2' to the values resulting from that formula, which has the effect of setting the butyric index at a lower level than in Regulation No 83/67. This lowering of the butyric index leads in turn to the calculation of a lower percentage of milkfat.

After this statement, the Commission examines the validity of the various criticisms raised by Lütticke of the method in question and, more particularly, whether an 'abuse of power' exists in this case. Firstly, it wholly denies that the Grossfeld method followed in this case is 'outdated'. Apart from the consideration that Lütticke itself does not appear to attach too much importance to this argument, seeing that the method in question is, in its opinion, 'applicable' subject to the correction introduced by Regulation No 1061/69, the Grossfeld method is still today a widely applied process of analysis.

Secondly, with regard to the criticisms concerning the allegedly too high values resulting from the method in question, the Commission primarily emphasizes the following points:

1. The relation between the quantity of total fat used for calculating the butyric index of that fat (500-550 mg) and the factor applied (1·4) (first formula) does not lead to erroneous or too high results, since the factor 1·4 is not merely introduced but is multiplied by 500 and then divided by the quantity of total fat used.

2. As to the value of the mean butyric index, chosen for the calculation of the percentage by weight of milkfat (second formula), whilst it is true that it shows fluctuations, the value 20 nevertheless represents the average of these fluctuations. In any case, the reasons for this choice must also be appraised in relation to the problem of the absence of blank tests ('Blindversuch').

3. With regard to this problem, that is the fact that the method in question does not take into consideration the results of blank tests in calculating the butyric index of total fat, the Commission relies on certain considerations arising particularly from the purposes of the system established by Regulations Nos 160/66 and 83/67. After recalling the object of the 'variable' factor of the charge provided for by Regulation No 160/66, the Commission observes that in order to succeed in imposing on *processed* basic products a charge exactly equivalent to that (levy) applied to the basic products themselves, it would have been necessary to require proof of the nature and quantity of the processed basic products on the import of all products resulting from such processing. This solution, practicable only in theory, was not follwed by

the legislature, which on the contrary opted for a system of a *flat-rate nature*. Firstly, the products resulting from such processing were placed in *groups* (tariff headings), and then the quantities of the various basic products 'taken as having been used in their manufacture' were fixed on a flat-rate basis for each group. Finally, the amount of the 'variable' factor of the charge was fixed, not day by day, on the basis of free-at-frontier prices, but quarterly, on the basis (for example for milk products) of the threshold price for the same quarter and the average c. i. f. prices for the first 2½ months of the preceding quarter (Article 12 (1) of Regulation No 160/66).

To the extent that the tariff specification of goods is connected with the quantities of certain components in those goods, the tariff classification depends on the method of analysis used for determining these quantities. If, in this case, each Member State had reserved the right to establish that method, the uniform application in the Community of Regulation No 160/66 would be put in jeopardy. From this there arises the necessity, in order to avoid this danger, of establishing a method, as precise as possible in every detail, *at Community level by Community law*. The Council was aware of this precise necessity, as evidenced by the 17th recital in the Preamble to Regulation No 83/67. Taking into account the legitimate aim in view and the new task which, owing to the system of Regulation No 160/66, fell to it, the Council was not able to keep strictly to methods then known and with other ends in view, but could either introduce an entirely new method, or adapt one of the known methods to its own objectives. In order to lay down a usable system for customs purposes, it was necessary at all events, even in the interests of the importer, to have recourse to a method of analysis both simple and quick to put into practice. Further, the method chosen had to be immediately applicable, from the date of entry into force of the system, so that there was no possibility of testing in depth, by prolonged experiment, several methods of analysis. The legislature was at once able to define a method which seemed appropriate, with the possibility thereafter of perfecting it or substituting a new method.

This being so, even if the method described in Annex V of Regulation No 83/67 only leads to results which, by reason of the factors of uncertainty which, according to Lütticke, affect it, are not absolutely correct, but are by way of being approximate values, there is no legal defect in this.

The Community legislature could restrict itself to adopting such approximate values for customs purposes, just as it has defined the different tariff headings for certain standard products and then, in order to differentiate between them, has, in numerous cases, fixed percentages, which, by their nature, contain some flat-rate factors. It is true, certainly, that the tariff specification and the determination of the quantities of basic products to be taken as having been used in their manufacture are based on average values, while the methods of analysis deal with results made up of approximate values. But in a flat-rate system this makes no difference. However, it is of the very essence of such a system of approximate values that a classification either too high or too low cannot be avoided in individual cases, particularly in respect of products having a milkfat content close to the limit between two tariff sub-headings.

In view of this, therefore, the choice of approximate values cannot be criticized in law.

In these circumstances, the particular fact that the method in question did not provide for blank tests does not constitute an irregularity in law. That the legislature was not obliged to provide for the deduction of values derived from blank tests (from the titration values) in the method laid down follows from the flat-rate nature of the

system in question. Where the legislature opts for a flat-rate system, it has no further need to guarantee that the charge on basic products will never exceed the limits of protection which are absolutely indispensable for safeguarding the common organization of the agricultural markets. In order to avoid the adoption of flat-rate criteria prejudicing that organization, one can even acknowledge the right of the Community legislature to grant somewhat greater rather than less protection. The fact of ignoring the results of blank tests does not infringe the principle of 'proportionality' between means and objectives, and does not constitute an 'abuse of power' on the part of the Council. In its capacity as the Community legislature, this institution on the contrary acted within the limits of the powers granted to it by Articles 28, 111 et seq. of the Treaty.

Certainly, the method in question has been modified by Annex III of Regulation No 1061/69, as that Regulation provides that a flat-rate amount reflecting the average values obtained from blank tests must be deducted from the butyric index. The experience acquired in applying Regulation No 83/67 had led the Commission to consider that the protective aim of Regulation No 160/66 is not compromised by accepting, in limited cases, a lower classification of the processed products concerned, and that it was therefore opportune thus to modify the method previously applied.

But the amendment of a provision by the legislature in no way constitutes an 'admission' of a legal irregularity in the previous legislation, nor an indication of an error of law. The legislature can always develop existing legislation on the basis of experience acquired. Particularly in the case of technical processes imposed by legislation, scientific progress and experience can always call for them to be improved, taking into account the end in view. One cannot infer from such improvement that the method previously applied was invalid.

Finally, the Commission rebuts Lütticke's contention that Article 7 (3) of Regulation No. 83/67, combined with Annex V, could, if it is not to be held void, be applied 'subject to a correction of the butyric index'. The effect of this argument is to apply Regulation No 1061/69 retroactively to imports occurring before its entry into force (1 June 1969). Apart from the fact that no retroactive effect was provided for in the matter, Regulation No 83/67 must also be considered as having a legislative character, so that it is impossible, even by way of interpretation, to read the perfectly clear terms of Annex V as providing for the correction in question. The Commission refers lastly, on the question of retroactive effect, to the judgment of the Court in Case 30/71 'Siemers' (Rec. L 1971, p. 919).

It considers therefore that the question posed should be answered in the affirmative.

Grounds of judgment

1 By Order dated 14 June 1972, received at the Court on 6 July 1972, the Munich Finanzgericht applied to the Court, under Article 177 of the EEC Treaty, for a ruling on the validity of Article 7 (3) of Regulation No 83/67/EEC of the Council of 18 April 1967, combined with Annex V of the same Regulation (OJ 1967, No 81).

This question has arisen from an action on the determination of the quantities of milkfat contained in imported 'cream milk chocolate in bulk' required for the purposes of its tariff classification.

The method applied for this purpose by the national authorities is that laid down by Article 7 (3) of Regulation No 83/67 and described in Annex V thereto.

2 Article 7 (3) of the said Regulation lays down that the percentage by weight of milkfat contained in a product shall be determined according to the method described in Annex V thereto.

The method described in Annex V is an indirect method of analysis, based on the principle according to which the percentage of milkfat is calculated from the butyric index of the total fat and on an average butyric index contained in milkfat.

3 According to Lütticke, this method contains several uncertain factors leading to erroneous results and having the effect of imposing on the importer an unjustified fiscal charge analogous to a tax having equivalent effect to a customs duty.

These factors of uncertainty are due not only to the incorrect relationship between the total fat content taken as the basis of calculation and the factor applied, but also and above all to the fact that the said method takes into account neither blank tests nor fluctuations of the butyric index of milkfat, nor, lastly, the margin of error from one experimenter to another.

By not providing for a corrective flat-rate coefficient to compensate for the errors arising from these factors of uncertainty, the method in dispute gives values of the content of milkfat in the imported goods which are both approximate and too high.

4 In defining in Annex V the method of analysis for determining the milkfat content, Regulation No 83/67 establishes a material condition which is indispensable to the implementation of Regulation No 160/66/EEC of the Council of 27 October 1966 on the trade arrangements applicable to certain goods.

By virtue of this Regulation, and in particular Article 10, imports into a Member State from a third country are subject to a charge taking the place of

customs duties and consisting of two elements, one fixed, constituting and *ad valorem* customs duty, and the other variable.

This latter element is intended to cover, in respect of the quantities of basic products to be taken as having been used in manufacture, the incidence of the difference between the prices of the said products in the importing Member State on the one hand, and those of imports coming from third countries on the other hand.

The reason for this system is the necessity, expressed by Regulation No 160/66, to adapt the protection accorded to the goods in question to that enjoyed by basic agricultural products.

5 To achieve this end as effectively as possible, Regulation No 160/66 waived the requirement of proving, on the import of any goods resulting from processing, the nature and quantity of processed basic products they contain, and opted for a flat-rate system of classification and charge.

For the purposes of their tariff classification, the goods concerned were grouped under tariff specifications defined by various bands of composition, allowing for classification, according to the quantities of basic products they contain, of the most representative commercial varieties.

For each specification, the said Regulation, as well as Regulation No 83/67, adopted in implementation of it, fixed on a flat-rate basis the quantities of the different basic products to be taken as having been used in the manufacture of the taxable goods.

The variable factor to be charged on these goods was, under the terms of Article 12 of the said Regulation, fixed quarterly on the basis of the average of the threshold prices and the c.i.f. prices established for each period in question.

6 Within the framework of the system thus established, the calculation of the quantities of basic products in the goods must above all depend on the necessity of having recourse to a uniform method of analysis throughout the Community and at the same time of avoiding frustrating the protective purposes of the system.

It is impossible to find a ground of illegality in the fact that the method of analysis employed does not take into account all factors capable of arriving at exact values.

7 Having regard, therefore, to the flat-rate structure and the purposes of the system established by Regulation No 160/66, the fact that the method of analysis described in Annex V of Regulation No 83/67 is affected by factors of uncertainty and, because of this, results in approximate values of the milkfat content, is not sufficient to constitute a defect affecting the validity of the provisions of Regulation No 83/67 on which it is based.

Costs

8 The costs incured by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before a national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of Alfons Lütticke GmbH and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 160/66/EEC of the Council of 27 October 1966 (OJ 1966, No 195);
Having regard to Regulation No 83/67/EEC of the Council of 18 April 1967 (OJ 1967, No 81);
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the Munich Finanzgericht by decision of that court dated 14 June 1972, hereby rules:

Article 7 (3) of Regulation No 83/67 of the Council of 18 April 1967, combined with Annex V of the same Regulation, is not invalid by reason

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

Lecourt Monaco Pescatore

Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 6 February 1973.

A. Van Houtte
Registrar

R. Lecourt
President

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

Mr President,
Members of the Court,

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

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

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

1 — Translated from the German.