JUDGMENT OF THE COURT
OF 3 MAY 1978 [1]

Firma Milac, Groß- und Außenhandel Arnold Nöll v Hauptzollamt Saarbrücken (preliminary ruling requested by the Finanzgericht des Saarlandes)

"Whey"

Case 131/77

1. *Agriculture — Monetary compensatory amounts — Application — Products affected — Products whose price depends on the price of products covered by intervention arrangements — Dependence of prices*
   (Regulation No 974/71 of the Council, Art. 1 (2) (b))

2. *Agriculture — Monetary compensatory amounts — Application to powdered whey — Article 1 of Regulation No 539/75 of the Commission— Invalidity*

1. The price of a product which is covered by the common organization of the markets depends within the meaning of Article 1 (2) (b) of Regulation No 974/71 on the price of a product covered by intervention arrangements under the common organization of agricultural markets if the former price fluctuates appreciably owing to the incidence of the variations in the latter price.

2. Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 is invalid in so far as it fixes compensatory amounts in respect of trade in powdered whey.

In Case 131/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht des Saarlandes (Finance Court of the Saarland) for a preliminary ruling in the action pending before that court between

FIRMA MILAC, GROSS- und AUSSENHANDEL ARNOLD NÖLL

and

HAUPTZOLLAMT (Principal Customs Office) SAARBRÜCKEN

1 — Language of the Case: German.

concerning the validity and the interpretation of Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 (Official Journal L 57 of 3 March 1975, p. 2),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities may be summarized as follows:

I — Facts and procedure

Between 10 March and 5 May 1975 the undertaking Milac, the plaintiff in the main action, imported from France into Germany a quantity amounting in all to 129 000 kg of powdered whey, a product coming under subheading 04.02 A I of the Common Customs Tariff. The relevant customs office charged on these imported goods monetary compensatory amounts totalling DM 6 927.30; the plaintiff in the main action contested the notice of assessment on the ground that Regulation (EEC) No 539/75 of the Commission of 28 February 1975 (Official Journal 1975 L 57, p. 2) fixing the monetary compensatory amounts to be applied from 3 March 1975 to powdered whey was at variance with Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257) on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States.

The Finanzgericht des Saarlandes, before which proceedings were instituted, also doubted whether the contested regulation of the Commission was valid and expressed those doubts as follows:

"The authorization given in Article 1 (1) (a) of the regulation to a Member

State the value of whose currency exceeds the margin permitted by international rules in force on 12 May 1971 to charge compensatory amounts applies, under Article 1 (2) of the regulation,

(a) to products covered by intervention arrangements under the common organization of agricultural markets;

(b) to products whose price depends on the price of the products referred to under (a) and which are governed by the common organization of the market or are the subject of a specific arrangement under Article 235 of the Treaty.

Powdered whey is a milk product, the nutritional value of which depends on the proportion of skimmed-milk powder. The Senate however considers that it is doubtful whether the price of powdered whey therefore also depends upon that of skimmed-milk powder. The price of powdered whey is subject to wide fluctuations in the individual Member States; the price of the amount of skimmed-milk powder which has gone into its composition does not however have a decisive influence on the market price of the powdered whey. It may be seen from the observations of the EEC Commission of 29 July 1976 submitted to the Court of Justice of the European Communities in Case 28/76, which have been produced by the plaintiff, that in the individual Member States the prices of powdered whey are determined by the production costs and by measures adopted by the individual Member States for the protection of the environment. Whey is a by-product of the processing of milk which was formerly discharged into running water as a waste product where there was overproduction. If national provisions prohibit such procedure for reasons concerning the protection of the environment the dairies are compelled either to set up special waste-water purification plants for the waste product, whey, or to turn the whey into powder. The Senate considers that the price of powdered whey is therefore not determined by the proportion of skimmed milk, in other words the nutritional value of the whey. The price obtained for the powdered whey merely reduces the expenses arising from the disposal of the whey, which is not required, and which results from the manufacture of the other milk products.

The Council has explained the reasons prompting it to introduce monetary compensatory amounts. The compensatory amounts should accordingly be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements. These considerations have been expressed in Article 1 (3) of Regulation No 974/71. That provision stipulates that the measures permitted under Article 1 (1), in other words the charging of compensatory amounts on imports, are to be applied only where application of the monetary measures referred to in that paragraph would lead to disturbances in trade. If these conditions are not fulfilled the Commission would not have been entitled to fix by means of Article 1 of Regulation No 539/75 monetary compensatory amounts for the importation of powdered whey. The decision of the Senate therefore depends upon the answer given to Question 2, if Question 1 is answered in the negative.

The Finanzgericht consequently referred the following questions to the Court of Justice by an order of 15 September 1977 which was received at the Court Registry on 28 October:

"1. Does Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 infringe Article 1 (2) (b) of Regulation (EEC) No 974/71 of the Council of 12 May

1971 in so far as it fixes compensatory amounts for the import of powdered whey, because the price of powdered whey does not depend upon the price of skimmed-milk powder?

If the answer to Question 1 is in the negative:

2. Does Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 infringe Article 1 (3) of Regulation (EEC) No 974/71 of the Council of 12 May 1971, according to which the provisions of Article 1 (1) (the charging and grant of compensatory amounts) are only to be applied where application of the monetary measures referred to in that provision would lead to disturbances in trade in agricultural products, or are compensatory amounts absolutely necessary:

   (a) in order to compensate the incidence of the monetary measures on the prices of basic products (in this case skimmed-milk powder) even if the market price of powdered whey falls to or below the production costs or

   (b) so as to avoid disturbances in trade caused by monetary measures, even if the market price for the product fluctuates over a period of time and in amount so that monetary measures do not have any effect?"

The Commission of the European Communities, represented by Dr Götz zur Hausen, acting as Agent, and the plaintiff in the main action, represented by Mr Ehle of the Cologne Bar, submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice. The Court dismissed a request by the plaintiff in the main action that the Council should be required to submit observations.

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

The *plaintiff in the main action* begins by describing the market in powdered whey, which is a by-product from the manufacture of cheese; it was previously discharged into the drainage system, a procedure subsequently prohibited in order to conserve the environment. The whey is processed into powder by evaporation of the water and then still contains between 10 and 12% albumen, between 70 and 75% lactose, 8% mineral salts and between 4 and 5% water. Approximately 90% of the powdered whey is used in the agricultural sector as animal feed.

The raw material is practically free and the cost price of the finished product, which may be taken by way of example as DM 55 to 65 per 100 kg, is made up of the manufacturing, storage and distribution costs. Such selling prices are the result of supply and demand on the market and divergences of 50 or indeed 100% sometimes occur. In 1976 Community production amounted almost to 600 000 tonnes whilst the rest of the world produced only 200 000. Community manufacturers received national export aids in 1975 and 1976. The profit margins for this period were approximately DM 1 per quintal whilst the monetary compensation was DM 5.37.

With regard to the first question submitted by the Finanzgericht the plaintiff in the main action states that Article 1 of Regulation No 539/75 is at variance with Article 1 (2) (b) of Regulation No 974/71 of the Council since the price of powdered whey does not depend on the price of skimmed-milk

powder in respect of which intervention measures were provided within the framework of the common organization of the agricultural markets. Account should also be taken of Article 2 (2) of Regulation No 974/71 which states "... the compensatory amounts shall be equal to the incidence, on the prices of the product concerned, of the application of the compensatory amount to the prices of the product referred to in paragraph (1), on which they depend". Since the "value of the milk" contained in the powdered whey is nil the price of the powdered whey does not depend on the price of the intervention product (skimmed-milk powder). The imposition of a countervailing charge thus amounts to the imposition of a charge having an effect equivalent to a customs duty.

The Commission itself, in the recitals in the preamble to Regulation (EEC) No 1824/77 (Official Journal L 203 of 9 August 1977, p. 7), pertinently stated that "for non-intervention products the calculation should, in principle, be based on the price of milk without taking account of specific processing costs"; whey should therefore not be subject to monetary compensation. In Case 28/76 *(Milac* v *Hauptzollamt Freiburg)* the Commission, in its own observations, maintained that powdered whey depends on powdered milk because of its use, that is to say as animal feed; the Commission states that this dependence is "purely economic" that is to say it depends on nutritional value. However, this does not constitute dependence on the price level within the meaning of the regulations. The plaintiff in the main action therefore concludes that Article 1 of Regulation No 539/75 is at variance with Article 1 (2) (b) of basic Regulation No 974/71 and with Articles 9, 12 and 13 of the EEC Treaty.

With regard to the first part of the second question submitted by the Finanzgericht the plaintiff in the main action recalls that the sole factor constituting the market price of powdered whey is the processing cost since the value of the raw material does not affect the composition of prices. The Commission itself adopted this point of view, albeit belatedly, when it enacted Regulation No 1824/77 (Official Journal L 203 of 9 August 1977, p. 7) by abolishing compensation at the frontier for powdered whey. This latter view is in accordance with the case-law of the Court of Justice since the Court stated in its judgment of 12 November 1974 (Case 34/74 [1974] ECR 1217) that with regard to derived products, compensation for fluctuations of currencies should be in proportion to the incidence on the prices of the said derived products of the application of the compensatory amount to the basic product to the exclusion of the fixed component of the levy which was established in order to protect the processing industry. The Court, in its judgment of 17 June 1975 (Case 93/74 [1975] ECR 661) stated that when the levy on the basic product is zero, no compensatory amount may be charged on derived products. Finally in its judgment of 17 March 1976 (Joined Cases 67 to 85/75 [1976] ECR at p. 408) the Court, in view of the fact that the object in establishing the system of monetary compensatory amounts was the maintenance of single prices, emphasized that the granting or levying of such amounts was acceptable only if trade in the product in question would be disturbed in their absence. In the present case the levying of such amounts is the sole cause of the disturbance adversely affecting exporting manufacturers and importers.

The Commission itself recognized that this view is correct by abolishing compensatory amounts on agricultural products whose price was principally determined by the processing costs (Regulation No 722/75, Official Journal L 71 of 20 March 1975).

Powdered whey must *a fortiori* qualify for such treatment since the value of the end product is determined solely by the processing costs. From a purely legal point of view this conclusion is unavoidable and cannot be affected by appraisals at the discretion of the administration.

The reply to Question 2 (a) submitted by the Finanzgericht des Saarlandes should thus be that the fixing of monetary compensatory amounts is contrary to the provisions of Article 1 (3) of Regulation (EEC) No 974/71 if the market price of the product in question, in this case powdered whey, is determined solely by manufacturing costs and it is unnecessary to consider in this connexion whether the market price falls in the present case to a level equal to or less than the level of production costs.

With regard to the second part of the second question submitted by the Finanzgericht the plaintiff in the main action emphasizes that a reply serves no purpose, in view of the replies which have already been suggested. Nevertheless it adds that the Commission cannot rely in this case on the wide discretionary power which the Court acknowledged the Commission to possess in its judgment of 22 January 1976 (Case 55/75 [1976] ECR 30, paragraphs 7 and 8); no "complex economic situation" is involved with regard to powdered whey, a product whose price fluctuates in terms of supply and demand. The Commission itself has through its behaviour, in certain situations, recognized that in such cases monetary compensatory amounts give rise to disturbances. Mr Gundelach, the Commissioner responsible for agricultural matters, has admitted that the system constitutes "the worst error" committed in the Common Agricultural Policy. In the present case this is clear.

Furthermore compensation for powdered whey at the frontier is, like that for other milk products, the result of political pressure. This is shown by the fact that the Commission and the national experts on the Management Committee decided to abolish compensation despite a sharp reaction from the Government of the Federal Republic. The plaintiff in the main action accordingly hopes that the Court, concurring with the endeavours of the Commission, will declare compensation at the frontier unlawful and in breach of Article 1 (3) of Regulation No 974/71 with regard to products for which the price fluctuates and is determined freely on the market without the influence of monetary measures.

The Commission considers that the two questions submitted by the Finanzgericht in fact concern the validity of Regulation No 539/75 and it suggests that the questions should be considered together with regard to basic Regulation No 974/71.

The Commission describes the manufacturing process for powdered whey, which is produced because it became impossible to discharge it any longer as effluent and because of the parallel development of a profitable market in animal feed where it has partially replaced powdered milk. Comparison of the protein and fat content of those two products shows that it is profitable to use powdered whey instead of skimmed-milk powder whilst the relationship between the prices of the two products corresponds to that between their respective protein contents. Since the price of skimmed-milk powder is determined by the intervention price this price must be multiplied, after taking account of the aid granted for animal feed, by the coefficient 0.389105 which expresses the relationship between the respective protein contents, in order to obtain the maximum price at which powdered whey may properly be preferred to

skimmed-milk powder. It is clear from a comparative table of the prices of the two products that powdered whey has been able to compete effectively with skimmed-milk powder. Although the market price of powdered whey is considerably influenced by the manufacturing costs it has remained from 1971 to 1977 at a level justified by its protein content.

With regard to the fixing of the monetary compensatory amounts applicable to powdered whey the Commission recalls that this constitutes a power in matters of economic policy which may be exercised within the limits established by Regulation No 974/71 and in the interest of the proper functioning of the organization of the market. The exercise of such a power presupposes a wide margin of discretion and its exercise does not cease to be lawful except in the case of manifest error in using the margin of discretion (judgments in Cases 97/76 [1977] ECR 1063; 74/74 [1975] ECR 533; 55/75 [1976] ECR 19; 29/77 [1977] ECR 1835). The compensatory amount applicable to powdered whey was derived from the relationship between the price of that product and the price of skimmed-milk powder with corrections whenever there was a variation of approximately 10 % from the intervention price for skimmed-milk powder, which in practice correspond to the market price owing to the surplus production of the latter product.

The Commission recognizes that the application and the calculation of the compensatory amounts relating to powdered whey constitute a borderline case. It nevertheless observes that:

— On the one hand it is possible in many cases to substitute powdered whey for skimmed-milk powder; the price of the former depends on the latter to a certain extent although it is not so closely related that the two prices automatically register a proportionate increase. In fact powdered whey is also a surplus product but since, unlike skimmed-milk powder, it is not covered by intervention, its price is influenced largely by supply and demand.

— On the other hand the manufacturing costs have a considerable effect in the composition of the price of powdered whey: it sometimes has to be sold at a loss, which is taken into account in calculating the price of cheese.

It was thus in order to avoid a disturbance of trade, which would ultimately have disrupted the working of the intervention system for skimmed-milk powder, that the Commission decided to apply in 1971 the system of compensatory amounts to powdered whey.

The subsequent abolition from 5 September 1977, by Regulation No 1824/77, of the compensatory amounts applied to powdered whey is to be explained in a wider context. The Commission tries to keep the number of products covered by this system very low and is taking progressively less account of the processing costs in calculating compensatory amounts. In view of the importance of such items in the cost of manufacturing powdered whey the Commission, complying with requests from traders, including the plaintiff in the main action, considered that in the circumstances then prevailing, perhaps only temporarily, the absence of compensatory amounts for that product would not disturb trade. However, a decision in this sphere must also take into account possible effects on the profitability of the cheese industry.

The Commission finally emphasizes that the method of calculating the monetary compensatory amounts applied to powdered whey was not the usual method of derivation, which consisted

in taking account only of the protein content, but took into consideration the relationship between the market prices of powdered whey and of skimmed-milk powder. This method of calculation involved the fixing of monetary compensatory amounts which were clearly lower than those which would have been produced by the usual method and traders like the plaintiff in the main action have no ground for complaint, since the result is reasonable from an economic point of view.

In conclusion the Commission suggests that the reply to the questions submitted by the Finanzgericht des Saarlandes should be as follows:

"Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 in so far as it provides monetary compensatory amounts applicable on the importation of powdered whey."

III — Oral procedure

The representatives of the plaintiff in the main action and of the Commission appeared at the hearing on 8 March 1978. They expanded the arguments set out in the written procedure.

The *plaintiff in the main action* criticized in particular the present working of the system of compensatory amounts, the unfortunate effects of which have been conceded by the Commission itself. There is even less justification for the application of the system to powdered whey since it is not concerned to effect monetary compensation to avoid disturbances in the trade in this product but merely to take account of a certain relationship between powdered whey and skimmed- milk powder. The outcome is at variance with the objectives of Article 39 of the Treaty and with the provisions prohibiting charges having an effect equivalent to customs duties.

The *Commission* emphasized the fact that the common organizations of the market cannot operate in the absence of the arrangements for compensatory amounts. Powdered whey, a milk product, provides a part of the income from the price paid for the basic product, milk. Since the system of compensatory amounts makes it possible to maintain a uniform price in the Community it must also include, if it is to be effective, processed products which include a part of the price of the basic product. Powdered whey is especially useful in that through processing it can be used to an increasing extent in animal feeding-stuffs.

The Advocate General delivered his opinion at the hearing on 11 April 1978.

Decision

1 The Finanzgericht des Saarlandes by an order of 15 September 1977 which was received at the Court Registry on 28 October 1977, submitted, under Article 177 of the EEC Treaty, two preliminary questions on the validity of Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 fixing the monetary compensatory amounts and certain rates for their application (Official Journal L 57 of 3 March 1975, p. 2) and

on the interpretation of the provisions of Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257), read together with Article 1 of Regulation No 539/75.

2 Those questions were raised in the context of a dispute concerning a request for the cancellation of notices of assessment which are reproduced in the decision on the objection delivered on 20 August 1975 and which fixed monetary compensatory amounts at a total sum of DM 6 927.30 as charges imposed under the common organization of the agricultural markets pursuant to Regulations Nos 974/71 and 539/75 on the occasion of the importation from France into Germany of 129 000 kg of powdered whey having a water content not exceeding 33 % and coming under heading 04.02 of the Common Customs Tariff.

The plaintiff in the main action maintains that the charging of monetary compensatory amounts for powdered whey is contrary to Article 1 (2) (b) of Regulation No 974/71 since that provision authorizes the charging or granting of compensatory amounts only in respect of products whose price depends on the price of products covered by intervention arrangements under the common organization of agricultural markets and which are governed by the common organization whilst the price of powdered whey is in no way dependent either on the price of milk or on the price of skimmed- milk powder, the only products to which powdered whey may be related in order to compare prices pursuant to the provisions in force.

The price of powdered whey, it is alleged, cannot be related either to the price of milk or to the price of skimmed-milk powder since the value of the milk in powdered whey, a by-product of the manufacture of cheese and considered as waste before the enactment of the legislation of Member States on the conservation of the environment, is considered as nil or at the most amounting at times to DM 0.05 per litre.

It follows, according to the plaintiff, that the prices of powdered whey are determined exclusively on the market and that they depend wholly on supply and demand.

Consequently it is artificial to classify powdered whey amongst the products coming under the milk or milk products sector and to apply to it monetary compensatory amounts pursuant to Regulation No 539/75.

3 The national court, which is charged with appraising the facts, has for its part found that whey is a derived product of the processing of milk which until recently was discharged as waste into running water.

The national court concluded on the basis of those findings that the price of skimmed-milk powder in no way exercised a decisive influence on the market price of powdered whey and that the price of powdered whey accordingly does not depend on the price of skimmed-milk powder.

In those circumstances the national court felt doubt whether Regulation No 534/75 was valid, and referred this first preliminary question to the Court:

"Does Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 infringe Article 1 (2) (b) of Regulation (EEC) No 974/71 of the Council of 12 May 1971 in so far as it fixes compensatory amounts for the import of powdered whey, because the price of powdered whey does not depend upon the price of skimmed-milk powder?"

4 The problem in the present case turns on whether the price of powdered whey depends on the price of skimmed-milk powder.

5 The price of a product depends within the meaning of Article 1 (2) (b) of Regulation No 974/71 on the price of a product covered by intervention arrangements under the common organization of agricultural markets and which is governed by the common organization of the markets if the former price fluctuates appreciably owing to the incidence of variations in the latter price.

6 According to a table drawn up by the Commission the curves representing the variations in the intervention prices for skimmed-milk powder and the market prices in Germany for powdered whey clearly diverge.

In fact when the intervention price for skimmed-milk powder was 66 units of account per quintal in 1974 the market price in Germany for powdered whey was 20.68 units of account per quintal, whilst in 1975 the intervention price for the former product increased appreciably to 88.70 units of account as compared with the appreciable fall, to 15 units of account, in the price of the latter product.

In 1971 the price of powdered whey on the German market amounted to one third of the intervention price of skimmed-milk powder whilst in 1977 the relationship had diminished to a little less than one fifth.

These figures confirm the analysis of the national court and it must be regarded as a fact that the price of powdered whey does not depend on the price of skimmed-milk powder.

7 According to the sixth recital in the preamble to Regulation No 974/71 monetary compensatory amounts should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements and it is appropriate to apply them only in cases where this incidence would lead to difficulties.

This objective is embodied in particular in Article 1 (2) and (3) of the said regulation.

According to the wording of Article 1 (2) (b) the charging or granting of compensatory amounts is authorized only for products which fulfil two conditions:

(a) their price must depend on the price of products covered by intervention arrangements under the common organization of agricultural markets, and

(b) the products must in addition be governed by a common organization of the markets.

It is clear that powdered whey does not fulfil the first of those conditions.

Consequently the monetary compensatory amounts provided for in Article 1 of Regulation No 974/71 could not apply to powdered whey.

8 It is therefore necessary to declare that Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 is invalid in so far as it fixes compensatory amounts in respect of trade in powdered whey.

9 It is accordingly unnecessary to answer the second question submitted by the national court.

Costs

10 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, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Finanzgericht des Saarlandes by an order of 15 September 1977, hereby rules:

Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 is invalid in so far as it fixes compensatory amounts in respect of trade in powdered whey.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 3 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 11 APRIL 1978 [1]

Mr President,
Members of the Court,

1. The present case turns on the question whether it is lawful to apply monetary compensatory amounts to imports into a Member State of powdered whey coming from another Member State.

It should be explained that whey, in its liquid state, is a by-product of the manu-

1 — Translated from the Italian.