maintenance in force by that Member State of the provisions of the Weights and Measures Act 1963 was not, at the date of the imports in question, prohibited by the rules of Community law and could therefore at that date be applied to the marketing in England of pre-packaged milk from another Member State, made up in containers of a capacity of one litre.

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 12 July 1979.

A. Van Houtte
Registrar

H.Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 14 JUNE 1979 [1]

Mr President,
Members of the Court,

I — It may be useful to recall the facts at the origin of this reference for a preliminary ruling by the Tribunal de Commerce, Paris.

On 12 June 1978 the Union Laitière Normande, the plaintiff in the main action, dispatched to the United Kingdom by lorry a pallet of 72 cartons (each carton containing 12 brick-shaped packs of one litre, that is to say, one and three quarter pints) of ultra-heat treated standardized whole milk within the meaning of Article 2 (6) of Council Regulation No 566/76, consigned to its London subsidiary, French Dairy Farmers. The consignment was turned back on the same day on the ground that no *import licence* had been issued by the United Kingdom Ministry of Agriculture.

Later the plaintiff sought and was granted, on 1 August 1978, such an import licence, which was valid until 31 August. It was emphasized, however,

1 — Translated from the French.

that this document was not an "import licence" from the British Department of Trade and Industry.

The Union Laitière Normande then sent a new consignment of ultra-heat treated milk to its British subsidiary: this time it was told that a dealer's licence from the Department of Trade and Industry was also required; such licences are only granted to undertakings situated in the United Kingdom and authorized under the provisions of the Milk and Dairies (General) Regulations, 1959, as amended in 1977. Moreover under the Weights and Measures legislation then in force in the United Kingdom, the milk could only be pre-packed in quantities of one third of a pint, half a pint or a multiple of half a pint.

On the basis of these facts the Tribunal de Commerce, Paris, in which the plaintiff had brought an action for non-performance of contract against its English subsidiary, has referred to the Court five questions which in substance raise the problem of health regulations for heat-treated milk and that of units of measurement for packing such milk.

I will take the last question first.

II. A — It is only too well known that the achievement of free movement of agricultural products is hindered by the national provisions on units of measurement. In most Member States the pre-conditions for marketing liquids in containers which have been prepared and closed in advance are laid down in mandatory regulations which vary from one Member State to another and thus make trading difficult.

With effect from 26 July 1971 the Council, under Article 100 of the EEC Treaty, adopted Directive No 71/316 on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control.

On the following 18 October the Council, again under Article 100, adopted Directive No 71/354 on the approximation of the laws of the Member States relating to units of measurement.

The situation was complicated by the accession in 1973 of new Member States where other units of measurement were in use. As a result these two directives were amended by the Act of Accession (Annexes I, II and XI).

On 19 December 1974 the Council, under Article 100, adopted a new directive No 75/106 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids; Annex III thereto made the provisions of that directive applicable *inter alia* to milk "sold by volume".

Finally, the original directive on the approximation of the laws of the Member States relating to units of measurement was amended by Council Directive No 76/770 of 27 July 1976.

B — The establishment of a single market in the veterinary sphere also requires that national measures designed to safeguard the health of humans and animals be harmonized and co-ordinated.

As with units of measurement, harmonization in veterinary matters can only

be achieved by adopting and uniformly applying Community measures. The main purpose of the relevant Community rules is to enable the controls exercised on trade between Member States to be progressively relaxed.

To that end the Council adopted with effect from 12 March 1968 a resolution that the Commission should draw up "as soon as possible" proposals concerning "hygiene in farm milk production" and, "as a matter of priority, animal health measures to combat the following contagious and infectious diseases: foot and mouth disease, classical swine fever, tuberculosis, brucellosis" and should submit these proposals to the Council.

On 24 February 1971 the Commission presented to the Council a proposal for a regulation on the basis of Article 43 "on hygiene and animal health provisions to be complied with for raw whole milk when used to prepare heat-treated milk and its products," and a proposal for a regulation also based on Article 43 "on hygiene problems in the production and marketing of heat-treated milk".

The Assembly gave a favourable opinion on these proposals on 13 March 1972. In accordance with the views expressed by the Assembly, the Commission modified certain points in the text before presenting it to the Council once more on 1 August 1972.

It is important to note that these latter proposals allowed Member States to defer *until 31 December 1978* the application in their territory of the provisions in point 1 (a) of Chapter I of the annex to the first of those regulations as far as brucellosis was concerned (provided, however, that from 1 January 1976 up to that date animals used for producing milk must come from herds immunized against brucellosis) and that *from 31 December 1978* heat-treated milk sent to the territory of another Member State must be accompanied during transportation to the importing country by an official certificate as prescribed in Chapter IX of Annex I to the second of these texts.

However, it transpired that the timetable laid down in 1968 could not be adhered to. That is why the Council undertook in its resolution of 22 July 1974 on the veterinary, plant health and animal feedingstuffs sectors "to make every effort to act" before 1 January 1975 on "health and health inspection requirements for raw whole milk and heat-processed milk".

It must be admitted that, more than ten years after the creation of the common organization of the market in milk and milk products (29 July 1968) and more than six years after the accession of the new Member States certain national laws are still much in evidence, even where they include a ban in principle on imports.

Progress in examining the Commission's latest proposals (1 August 1972) is not sufficient to enable us to see how much time will be needed for their adoption. But one can guess that, if they do emerge, they will be cast in the form of directives and will be based on not only Article 43 but also Article 100.

In the related field of the manufacture and trade in preserved milk intended for human consumption the Commission, after first opting for the form of a regulation, changed later to a directive and it was in that form that its proposals were finally adopted by the Council (Directive No 76/118 of 18 December 1975). This question of form is an important one, for directives are not necessarily directly applicable in Member States and they allow a certain latitude in interpretation. More important, where a directive is adopted on the basis of Article 100 the Council must be unanimous, whereas a regulation under Article 43 may be adopted by a qualified majority.

C — According to Article 7 (1) of Directive No 75/106 of 19 December 1974, Member States had to put into force national provisions to comply with this directive within 18 months of its notification.

But Article 7 (2) authorizes certain Member States, including the United Kingdom, to defer implementation thereof *until 31 December 1979*, and thus to prohibit before that date marketing the milk in question in so far as the latter has been packaged in forms which do not comply with the national legislation.

This time-limit had thus not expired at the time of the events in the dispute, and still has not today, and the Member States allowed to defer implementation have until 31 December 1979 to introduce the provisions of the directive into their internal laws. Therefore the directive can only be of use to the plaintiff in the main action when the fixed period has come to an end and if the Member State has failed to fulfil its obligations.

To hold otherwise would mean ignoring a Council directive the legality of which has not been questioned.

On the other hand it is accepted that repackaging the milk in imperial units would affect *ipso facto* the original state of the product; it might be dangerous to human health and would mean that the milk would need to be heat-treated afresh.

This explanation alone seems sufficient to guide the court which made the reference to the Court of Justice and to avoid the need for an answer to the remaining questions.

III — I do not wish, however, to sidestep the first problem, if only because the plaintiff needs to have the situation after 1 January 1980 clarified in this respect.

The explanation I have given on the texts shows that the sale under a designation of milk which has been subjected to various forms of heat treatment and transported over long distances is subject to the legislation of the producing Member State, given that there are as yet no Community regulations — or even directives — in this sphere. In the United Kingdom, especially, certain restrictions imposed by the health regulations prevent imports into that country of standardized whole milk from other Member States.

Are these restrictions still justified under Article 36 by the requirements relating to protection of public health?

It is known that particularly high levels of infection due to brucellosis have continuously been observed in large dairy herds and in densely-populated herds. In France, for example, 25 % of the herds are still infected.

Naturally, it is desirable to limit the obstacles to the free movement of goods and to protect free trading in the rest of the Community by limiting animal health measures to that part of Community territory in which a contagious disease appears. But the intensification of trade by means of increasingly intensive production, on the one hand, and distribution on the other, entailing in particular the collection of milk from various sources in industrialized establishments, and the rise in trade due to the establishment of a single market, have led to increased health risks.

The Commissions's view is that in any case heat treatment carried out by the ultra-high temperature method will avoid the danger of contamination, even by milk coming from farms which may have been infected by epizootic disease. It points out that in so far as methods of treating and packaging milk in the producing State are indentical with, or offer guarantees equivalent to, those required by the importing State, the importing Member State is no longer justified under Article 36 of the Treaty in demanding that the milk be treated or packaged a second time.

The whole problem is, in fact, to decide whether the requirement of identical treatment or equivalent guarantees has been complied with and who shall be able to say that this condition has been met.

According to the Commission, *if* the health authorities in the exporting State declare that indentical or equivalent guarantees exist in their country and invite the health authorities in the importing Member State to verify this for themselves on the spot, and *if* that verification proves positive, the authorities in the importing Member State have no need to apply their own legislation.

Thus the conditions to be met are these:

(1) the French authorities consider that the French guarantees are identical or equivalent;

(2) the French authorities invite the English authorities to verify this;

(3) this verification is positive.

But the Commission does not say how the experts' opinions are to be reconciled in the event of a dispute, or who shall bear the costs of the tests.

Such a system of bilateral co-ordination seems to me to be difficult to put into practice and liable to produce discrepancies; I do not think it can be left to the goodwill of the national authorities. In any case, it would be wrong to rely on the judgment of the courts in the country of origin to decide on the *suitability* of the measures adopted by the importing country; that is a decision which really should be made by the

courts in the latter country, for where the exporter is not responsible, it is the authorities in that country who are responsible for protecting the life and health of humans.

Determination of the methods of analysis required to test the composition of the milk in question and the manner of its preparation, and determination of the sampling procedure are measures of application of a technical nature, the adoption of which should be entrusted to the Commission in order to simplify and expedite the procedure.

As the Court said in the *Tedeschi* judgment of 15 October 1977 ([1977] ECR 1555, at p. 1577), it is within the framework of the *Community* harmonization measures that the appropriate checks must be carried out and the measures of protection adopted. As long as measures necessary to protect human health and procedures to check that they are observed have not been established and harmonized at Community level, recourse to Article 36 remains justified and the national authorities in the importing State must apply their own legislation.

What is more important, the Commission's argument largely renders the proposals which it made itself to the legislature in 1971 and 1972 devoid of purpose. These proposals have been approved by the Assembly which in its resolution "emphasizes that the growing number of requirements covering matters of hygiene, animal health and consumer protection calls for a system of control which is particularly strict and progressive"; that "a system of health control has a primarily *preventive* purpose, so that, where milk production is concerned, it must trace all the intermediate steps in production, from the animal to the consumer"; in this resolution, the Assembly "expresses its satisfaction, therefore, at having adopted rigorous standards of hygiene, on the basis of the national laws which are most advanced in health matters, regarding all the conditions associated with the production of heat-treated milk".

According to these proposals the treatment may only be performed on approved premises subject to inspection; the conditions for such approval are given in an annex. An official certificate from the *Community* must accompany products during their transportation to another Member State; provision is made for allowing expert opinion to be taken when a consignment is the subject of a dispute. The experts must not be of the same nationality as the Member States in the dispute.

Here again, the Court cannot take the place of the Community legislature.

As the Court repeated in the *Ratti* judgment of 5 April last, recourse to Article 36 will not cease to be justified until, under Article 100 of the Treaty, *Community* directives have harmonized the measures necessary to ensure the protection of the health of humans and animals and have established Community procedures to supervise compliance therewith, and the appropriate controls must henceforth be carried out and the protective measures taken within the scheme laid down by the harmonizing directive.

In the United Kingdom zootechnic operations (milk testing, etc.) are often

carried out at regional level through the Milk Marketing Boards which offer producers a veterinary service. It is possible, therefore, that owing to the combined effect of this technical service and the commercial activities of those Boards (exclusive purchase rights for milk and equalization of prices) — which are authorized by Council Regulation No 1421/78 after expiry of the transitional period — the prerogatives they enjoy give rise to distortion in the free movement of milk products within the Community.

But that is not the question: in the absence of Community harmonization measures, the United Kingdom's health control is lawful, even if it contributes towards a partitioning of the markets.

I propose that the questions asked should be answered as follows:

The marketing within the territory of a Member State, which has opted for the formula of non-standardized whole milk, of standardized milk from another Member State, with a fat content not less than the guideline figure fixed by the Council, was permissible in 1978 only in accordance with the regulations in force in the importing Member State concerning pre-packaging by volume and public health protection.