4. Placed in the context of Regulation No 986/68, within which it takes effect, Regulation No 1049/78 satisfies the requirement, imposed by Article 190 of the Treaty, to state the reasons upon which it is based.

Mertens de Wilmars Pescatore Mackenzie Stuart

O'Keeffe Bosco Touffait Due

Delivered in open court in Luxembourg on 14 January 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 21 OCTOBER 1980 [1]

Mr President,
Members of the Court,

I — It is essential for the Community to be able to dispose of part of its overproduction of milk products in the manufacture of animal feedingstuffs. For that reason the common organization of the market in milk and milk products established by Regulation No 804/68 of the Council of 27 June 1968 provides, as part of the intervention system, for aids to permit the utilization not only of *liquid* skimmed milk for animal feed and for producing casein (Articles 10 and 11) but also of skimmed-milk *powder* for animal feed. The size of those aids must be such as to make competitive the manufacture of animal feedingstuffs, particularly milk feed for calves, and the production of casein and caseinates.

For the 1968/69 milk year, Regulation No 825/68 of the *Council* of 28 June 1968 fixed the aid granted for skimmed milk for animal feed at 1.5 units of account per 100 kilograms and that granted for skimmed-milk powder for the same use at 8.25 units of account per 100 kilograms.

The general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed were only laid down by

1 — Translated from the French.

Regulation No 986/68 of the Council of 15 July 1968. Article 2 of that regulation provides:

"(1) Aid may be granted for:

(a) skimmed milk produced and processed in a dairy, differentiated from other skimmed milk in a manner to be specified or subject to administrative control offering safeguards equivalent to denaturing and sold to farms where it is used as feed at a price not exceeding any maximum price which *may* be fixed; [text as amended by Regulation No 491/70 of the Council of 17 March 1970]

(b) skimmed milk which has been used as feed on the farms where it was produced;

(c) skimmed-milk powder which has been denatured according to methods to be determined;

(d) skimmed-milk powder and skimmed milk produced and processed in the dairy and used in the manufacture of compound feedingstuffs. The aid for a given quantity of skimmed milk used in the manufacture of compound feedingstuffs shall be *equal* to the aid which would be granted for the quantity of skimmed-milk powder which can be obtained from that quantity of skimmed milk.

...

(2) The maximum price mentioned in paragraph (1) shall take into account:

(a) the value of skimmed milk resulting from the intervention price for skimmed-milk powder;

(b) the aid granted for skimmed milk;

(c) the prices of comparable feedingstuffs.

..."

The aid is payable only for skimmed milk which is denatured or used directly as animal feed. Where skimmed milk is used in powder form in the manufacture of compound feedingstuffs, the aid is granted only if those feedingstuffs contain not less than 60 % and not more than 70 % of skimmed-milk powder (see Article 4 of Commission Regulation No 804/76 of 7 April 1976).

For the 1971/72 milk year the aids were fixed by Regulation No 671/71 of the *Council* of 30 March 1971 at 1.65 units of account per 100 kilograms of skimmed milk and at 13 units of account per 100 kilograms of skimmed-milk powder. For the 1972/73 milk year the aids were fixed by Regulation No 649/72 of the *Council* of 30 March 1972 at 1.65 units of account per 100 kilograms of skimmed milk and at 17.62 units of account per 100 kilograms of skimmed-milk powder.

A very important change in the conferment of power to fix the aid was brought about by Regulation No 662/74 of the Council of 28 March 1974. By virtue of that regulation the power to fix the size of the aid for skimmed milk and skimmed-milk powder was transferred from the Council to the Commission, acting in the framework of the "Management Committee procedure" described in Article 30 of Regulation No 804/68.

Moreover, by Regulation No 666/74 of the same date the Council supplemented Regulation No 986/68 by adding Article 2a, which should also be quoted:

"(1) Aid shall be fixed taking into account the following factors:

The intervention price for skimmed-milk powder applicable during the milk year concerned,

The supply situation as regards skimmed milk and skimmed-milk powder and developments in the use thereof as feed,

Trends in veal prices,

Trends in the market prices of competing proteins compared with those of skimmed-milk powder.

(2) Aids shall be fixed annually for the following milk year, immediately after the fixing of the intervention price of skimmed-milk powder for the new year, *within a margin to be fixed by the Council* acting on the proposal of the Commission in accordance with the voting procedure laid down in Article 43 (2) of the Treaty.

They shall be modified during the milk year only in so far as a considerable change in the factors referred to in paragraph 1 so requires.

(3) As far as the milk year 1974/75 is concerned, the aid for skimmed-milk powder shall be between 26 u. a. and 36 u. a. per 100 kg.

For skimmed milk, it shall bear an *appropriate relationship* to the aid fixed for skimmed-milk powder.

(4) However, the aid may be fixed at levels higher than those resulting from the application of paragraph (3) if:

The skimmed milk referred to in Article 2 (1) (a) is sold, *at a maximum price to be fixed*, to farms where it is used as feed for animals other than young calves;

The skimmed milk referred to in Article 2 (1) (b) [skimmed milk having a maximum fat content of 0.10 %] is used on farms where it has been produced, for feeding animals other than young calves;

The skimmed milk and skimmed-milk powder referred to in Article 2 (1) (d) are used in the manufacture of compound feedingstuffs for animals other than young calves."

The last paragraph was added by Council Regulation No 876/77 of 26 April 1977 and amended by Council Regulation No 2624/77 of 28 November 1977.

By virtue of that amendment the Council retained the power of determining the margin within which the aid for skimmed-milk powder must be fixed *by the Commission*, regard being had to the criteria mentioned in Article 2a (1).

Subsequently, the Commission sometimes fixed the amount of the aid for skimmed milk alone (for example, Regulations Nos 935/76 and 2243/76) and sometimes the amount of both the aid for skimmed-milk powder and the aid for skimmed milk (for example, Regulations Nos 543/75, 1049/78 and 1361/79). In other cases (for example, Regulations Nos 748/76 and 977/77) the Commission altered the amount of the aid for skimmed-milk powder without fixing a new amount for skimmed milk. This way of acting appears, however, to be in accordance with the second indent of paragraph (2) of the new Article 2a which states that aids "shall be modified during the milk year only in so far as a considerable change in the factors referred to in paragraph 1 so requires".

In order to illustrate by some figures the importance of the scheme for subsidizing the use of liquid skimmed milk or skimmed-milk powder for animal feed, it may be stated that in France, for example, 419 180 tonnes of milk powder for animal feed underwent denaturing in 1976, whilst in 1977 the figure was 426 523 tonnes and 460 166 tonnes (estimated) in 1978.

In the Community as a whole, aid was granted for 3 631 000 tonnes of liquid skimmed milk for feeding calves (including 1 541 000 tonnes in the Federal Republic of Germany) and in 1977 aid was granted for 3 799 000 tonnes (including 1 287 000 in the Ferderal Republic). Payments of aid for skimmed-milk powder intended for the same use were made in respect of 1 177 000 tonnes (including 241 000 in the Federal Republic) in 1976 and 1 174 000 tonnes (including 231 000 in the Federal Republic) in 1977.

The aid granted in 1976 for skimmed-milk powder incorporated in milk feeds represented an expenditure of 442.6 million units of account.

In 1978 the total quantity of liquid skimmed milk used for feeding cattle (all animals included) and subsidized by the Community amounted to 4 069 000 tonnes (40 to 45% of that quantity being used in the Federal Republic alone). Of that quantity approximately 2 336 000 tonnes, or nearly 60% of the total quantity, were for calves. In the same year 1 168 800 tonnes of skimmed-milk powder were used for animal feed and were subsidized.

In 1979 almost 1 300 000 tonnes of powdered milk were used for feeding calves in the European Economic Community.

II — Whereas a difference existed in 1968 between the amount of the aid for skimmed milk and that of the aid for powder, that difference was eliminated in 1972 (Regulation No 649/72 of the Council of 30 March 1972). It reappeared, however, as from 1 May 1976 (*Commission* Regulation No 935/76 of 23 April 1976.

By Regulation No 1049/78 of 19 May 1978, which came into force on 22 May 1978, the Commission, in the absence of any opinion from the Management Committee for Milk and Milk Products, fixed the aid for skimmed-milk powder at 43 units of account per 100 kilograms and at 4.40 units of account per 100 kilograms for skimmed milk, both products being for animal feedingstuffs, that is to say, in actual fact, for feeding calves.

Between 1 and 15 December 1978, Denkavit Nederland BV, a producer of feedingstuffs for animals (especially calves) and a company well-known to the Court from the case of *Tedeschi* in which the Court delivered a preliminary ruling on 5 October 1977 ([1977] ECR 1556), used 1 171 063 kilograms of skimmed-milk powder in the manufacture of compound animal feedingstuffs.

Milk powder constitutes the principal ingredient of the milk feed manufactured by Denkavit, which contains at least 60% powdered milk. The price of skimmed-milk powder thus represents 70 to 80% of the total value of the raw materials used in that product. The compulsory addition to industrially produced cattle feed of at least 60% powdered milk, which does not benefit from the same aid as skimmed-milk produced and processed in a dairy and used for animal feed, lies at the source of the present dispute.

Supported by several national associations of "independent" manufacturers of animal feedingstuffs, Denkavit challenged before the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry] a note sent to it by the intervention board in the Netherlands, the body appointed under Article 4 of Regulation No 986/68 to implement the measures of aid in the Netherlands, whereby Denkavit was credited with the sum of HFL 1 713 499.38 pursuant to the provisions of Article 2 of a 1971 Netherlands regulation on aid for skimmed-milk powder and skimmed milk processed into milk feed.

Denkavit based its case on the following reasoning: if a calf is reared on *liquid* milk or on feed containing *liquid* skimmed milk, 100 kilograms of that ingredient benefit from an aid of 4.4 units of account. On the other hand, if a calf is reared on feed containing skimmed-milk *powder*, 100 kilograms of that powder benefit from an aid of 43 units of account. However, since 1 075 kilograms of liquid skimmed milk are required in order to manufacture 100 kilograms of powder, the aid paid in respect of 100 kilograms of powder ought to be, not 43 units of account, but:

$$\frac{4.40 \times 1\,075}{100} = 47.30$$

In terms of national currency the aid should be HFL 160.95 instead of HFL 146.32.

Since liquid skimmed milk and skimmed-milk powder are used for the same purpose and are interchangeable, the difference in the amount of the aid constitutes, according to Denkavit, discrimination between suppliers (dairies in the one case and industrial munufacturers of compound feedingstuffs in the other) which is contrary to Article 40 (3) of the Treaty. That difference, which is reflected in the cost price of a fattened calf, gives advantages to dairies and to "agricultural" calf-fatteners who manufacture compound feedingstuffs with the milk delivered to them by the dairies with which they have ties.

The Netherlands court requests the Court of Justice to examine the validity of Commission Regulation No 1049/78 in view of the complaints made regarding it by Denkavit. In view of its wide implications, consideration of this question has been reserved for the Court sitting in plenary session, although the Commission, which, apart from the plaintiff in the main proceedings, is the only party to have submitted observations, did not make any request to that effect.

III — In the first place, it must be said that there is no question but that the regulation under challenge provides for the payment of a larger aid for liquid skimmed milk sold by dairies than that granted for skimmed-milk powder used in the manufacture of compound feeds. The issue, however, is whether that difference in treatment constitutes discrimination.

According to consistent case-law of the Court, which was confirmed yet again in paragraph 16, of its judgment of 8 October 1980 in Case 810/79 *Überschär*, the general principle of equality (of which the prohibition on discrimination contained in the second subparagraph of Article 40 (3) is merely a specific enunciation) is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

However, an examination of the two situations which here require to be

compared shows that this complaint of discrimination cannot be upheld.

In order to feed his animals, particularly calves, a fattener may use skimmed milk produced on the farm on which he rears the calves, or skimmed milk produced and processed in a dairy which he purchases or takes back from that dairy, or feedingstuffs in the manufacture of which skimmed milk produced and processed in a dairy or skimmed-milk powder is used. However, although it is stated in Article 2 (1) (d) of Regulation No 986/68 that "the aid for a given quantity of skimmed milk used in the manufacture of compound feedingstuffs shall be *equal* to the aid which would be granted for the quantity of skimmed-milk powder which can be obtained from that quantity of skimmed milk", it is nowhere said that, conversely, the amount of aid granted for a given quantity of powder must correspond strictly to the amount of aid which would be granted for the quantity of liquid skimmed milk required for the manufacture of that quantity of powder. The mathematical equality provided for by Article 2 (1) (d) of Regulation No 986/68 applies only to liquid skimmed milk produced and processed in the dairy and converted into compound feedingstuffs, on the one hand, and skimmed-milk powder for animal feed on the other hand, even though, as has been observed by the plaintiff in the main proceedings, it is not usual practice to manufacture compound feeds industrially from liquid skimmed milk. Leaving aside those two products, which are in a similar position, no obligation to pay a proportionally equal aid for liquid milk and powdered milk is imposed by that provision.

On the contrary, Article 2a (3) of that regulation states that, as from the milk year 1974/75, the aid for skimmed milk "shall bear an appropriate relationship to the aid fixed for skimmed-milk powder".

Moreover, that position appears to me to stem directly from the reform introduced by Regulation No 662/74 of the Council of 28 March 1974 and Regulation No 666/74 of the Council of the same date.

Regulation No 662/74 of the Council, which amended the basic regulation, Regulation No 804/68, refers to a proposal from the Commission, an opinion of the Parliament and an opinion of the Economic and Social Committee. The Commission in fact proposed, "in the interests of greater flexibility and in order to take account as quickly as possible (if need be), of the development of the situation on the world market", to apply the procedure provided for in Article 30 of Regulation No 804/68 to the fixing of aid for skimmed milk and skimmed-milk powder for animal feed in accordance with the criteria to be fixed under the first subparagraph of Article 10 (2) of Regulation No 804/68 (Document COM [1974] 30 Final of 16 January 1974). The report by Sir J. Scott-Hopkins of 12 February 1974, submitted on behalf of the Committee on Agriculture, on the proposals from the Commission to the Council for regulations concerning the fixing of prices for certain agricultural products and certain measures specified in the memorandum on the improvement of the common agricultural policy (Document No 366/73 of 12 February 1974) makes no reference to this point. In the course of its sitting on 14 February 1974 the European Parliament passed a resolution on that report

(Official Journal C 23 of 8 March 1974, p. 37) but that resolution contains no reference which specifically concerns that transfer of power. This method of proceeding may lend itself to criticism in view of Article 43 (2) of the Treaty.

But account was not taken of the transfer of power brought about by Regulation No 662/74 since the regulation adopted in 1971 by the Netherlands intervention board still provides that "as from 1 January 1971 the allowances paid in respect of the processing of skimmed-milk powder and/or skimmed milk into milk-based feed substitutes to the manufacturer of those feeds shall be equal to the amount, expressed in European units of account, fixed by the *Council* of the European Communities in the EEC regulation on milk and milk products or pursuant to that regulation".

However, since the plaintiff in the main proceedings does not put in issue the validity of Regulation No 662/74 or Regulation No 666/74 and since the national court has not submitted any question on this matter I shall not dwell on it any longer.

There is no doubt that the terms of the second subparagraph of Article 2a (3) of Regulation No 986/68 (inserted by Regulation No 666/74 of the Council) are clearly different from the text of Article 2 (1) (d) of that regulation. An "appropriate relationship" is not, by definition, synonymous with "equality". This shows that the Council intended to leave the Commission a certain margin of discretion within which the Commission must take account of the factors mentioned in Article 2a (1) and not merely the quantity of liquid skimmed milk required to manufacture 100 kilograms of skimmed-milk powder. The Council only retained power to fix the margin within which the amount of the aid for powder must be laid down by the Commission. The fixing of the amount of the aid for skimmed milk derives from the fixing of the aid for powder and must bear "an appropriate relationship" to the latter.

It is true that the regulation under challenge is dated 19 May, whereas Council Regulation No 1042/78, which lays down the margin within which the aid for skimmed-milk powder may be fixed, was not adopted until 22 May. This would tend to prove that the Commission carried out its fixing *prior* to the Council but as both regulations came into force on the same date it does not appear to me that any consequence must attach to that anomaly. The amount fixed by the Commission for skimmed-milk powder, namely 43 units of account per 100 kilograms, lies within the margin predetermined by the Council (38 to 48 units of account); in fact it lies exactly half-way between the minimum and the maximum.

If it should prove to be the case that it was possible lawfully to set the aid for skimmed milk at a different level from the aid for powder, the plaintiff in the main proceedings complains, secondly, that the Commission omitted to fix the maximum price for skimmed milk referred to in Article 2 (1) (a) of Regulation No 986/68 of the Council at the same time as it set the amount of the aid for skimmed milk, that amount being no longer equal to the amount of the aid for skimmed-milk powder.

It is true that such a maximum price was fixed by Article 3 of Regulation No 1105/68 of the Commission of 27 July

1968 and that it has never again been fixed since then. Having regard to the fact that the amendment to Article 10 (3) of Regulation No 804/68 occurred only in 1974, it is in any case questionable, whether the *Commission* had power to do so. At the present time it certainly has the power to fix such a price. However, in my opinion, the text of Article 2 (1) (2) of Regulation No 986/68 (as amended by Regulation No 491/70 of the Council) in no way imposes any obligation to fix the maximum price at which skimmed milk produced and processed in a dairy may be sold to farms where it is used as feed even where the amount of the aid for that milk differs from the amount granted for skimmed-milk powder. On the other hand, it is always necessary that the skimmed milk should have been denatured or subjected to administrative control offering equivalent safeguards.

Since the factors which must be taken into account when fixing the amount of the aid overlap to a large extent with those which must govern the fixing, if any, of a maximum price, it may be thought that fixing the latter would duplicate the fixing of the aid. That at least is what is implied by the versions other than the French version, which is totally incomprehensible, of the preamble to Regulation No 675/72 of the Commission of 27 March 1972: the amounts of aid fixed for skimmed milk and skimmed-milk powder make it possible to revoke the maximum price provided for by Regulation No 1105/68. Observance of the criteria laid down by Article 2a frees the Commission from the need to fix the maximum price referred to in Article 2.

On the one hand, Article 2a (4) of Regulation No 986/68 (as amended by Regulation No 2624/77) makes the fixing of aids at levels higher than those resulting from the application of paragraph (3) subject, in much more mandatory terms, to the fixing of the maximum price at which skimmed milk produced and processed in a dairy may be sold to farms where it is used as feed for animals other than young calves (essentially pigs and poultry). After the Commission had had recourse (by Regulation No 1844/77 of 10 August 1977) to the possibility of setting a different level for the special aid for skimmed-milk powder intended for that purpose, it in fact proceeded to fix that maximum price (see Article 3 of Regulation No 2793/77 of 15 December 1977 and Regulation No 1077/80 of 30 April 1980).

Finally, the plaintiff in the main proceedings argues that, in so far as it introduces a difference in the amount of aids, the disputed regulation contains no statement of the reasons upon which it is based and that that constitutes an infringement of Article 190 of the Treaty.

The terms of the preamble as well as the provisions of that regulation are unquestionably rather brief.

However, since a regulation adopted by the Commission in the exercise of its discretionary power and against the background of a practice dating back to 1976 was involved, the reasons upon which the regulation was based could be stated summarily.

In the context of the present proceedings the Commission has explained to some extent the factors which it saw fit to take into account. Those explanations are to

the same effect as the observations which the Commission submitted in the cases of *Buys* and *Denkavit Futtermittel* in which the Court delivered its rulings on 8 October 1979 ([1979] ECR 3203) and 15 November 1979 ([1979] ECR 3439) respectively.

Whereas industrial fatteners use exclusively industrially-produced milk-based substitute feed, agricultural fatteners make use to a large extent of milk produced on their own farms. In part, they use directly whole milk produced by their dairy herds to feed their cattle (5% of the total production of whole milk in the Community is used in that way) and they also use for the same purpose skimmed milk which they take back from the dairy to which they delivered their whole milk (more than 2 million tonnes of skimmed milk are so used every year). From statistics it appears that, roughly speaking, in May 1979 one third of calves were reared by agricultural fatteners on whole or skimmed liquid milk and two thirds were reared on skimmed-milk powder contained in industrially-produced feeds.

The meat from calves reared on liquid milk is as "white" as that from calves reared on substitute feeds. The former is even superior in quality to the latter. Finally, it is more expensive to use whole or skimmed liquid milk than to use substitute feeds.

Those explanations appear to me to be plausible. With similar reasoning, this Court, in its judgments of 13 June 1978 and 15 November 1979 in the *Denkavit Futtermittel* cases, [1978] ECR 1317 and [1979] ECR 3439 respectively, accepted that industrial calf-fatteners might be lawfully excluded from the benefit of the aids provided for by Regulation No 2464/69 of the Council in connexion with the German revaluation of 1969.

Moreover, those explanations accord with the approach decided upon by the Council, particularly in Regulation No 876/77 of 26 April 1977, from which I extract the following recitals:

"... because of the high costs resulting from prolonged public storage, it is necessary to take special measures to facilitate the use of skimmed milk for purposes other than the manufacture of skimmed-milk powder..."

"... in order to encourage the maximum use of liquid skimmed milk as feed, it is necessary to encourage the disposal of skimmed milk to be used for feeding animals other than young calves...".

It is a good thing that less use should be made of compound feedingstuffs based on milk powder for the "battery" fattening of animals, especially calves, in preference to milk produced on the farm. That development is capable, moreover, of reducing the amount of skimmed-milk powder offered for intervention, which weighs heavily on the Community budget. The figures produced by the Commission on the changes, as from the 1976/77 milk year, in the amount of skimmed-milk powder entering *public* storage show that the difficulties in disposing of that product in the market are diminishing and are not in any case due to the differences in the amounts of aid.

Even though the regulation which they challenge was not addressed to them, being the prudent traders which they are, the plaintiff in the main proceedings and the associations which have intervened in its support could not fail to be aware of these considerations.

In truth, they accuse the Commission of having misused its power to the benefit

of the dairies. It is possible that an agreement between dairies — cooperative or otherwise — and manufacturers of "additives" or fatteners with whom they have ties or even the existence of a dominant position held by dairies might have the result that the "independent" industrial manufacturers of compound feeds, in contrast to fatteners or the manufacturers of "additives" who have ties with the dairies, could only obtain skimmed milk or milk powder from dairies with difficulty. In that case it would be for the Commission to examine that situation having regard to Article 85 or Article 86. However, it must not be forgotten, either, that the "independent" industrial manufacturers are also linked to a certain number of fatteners by what are described as "integration" agreements.

In conclusion, therefore, I propose that, in answer to the questions submitted by the national court, the Court should rule that:

Consideration of the questions raised by the College van Beroep voor het Bedrijfsleven has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 1049/78.

Should the Court be led to the view that Commission Regulation No 1049/78 is not valid, I consider that, as was done in the judgments of 15 October 1980 in the cases of *Providence Agricole de la Champagne, Maïseries de Beauce* and *Roquette,* the Court might hold that the lack of validity does not affect payments of aid made by the national authorities on the basis of that regulation prior to the date of the judgment of the Court.