In Case 28/76,

Reference to the Court pursuant to Article 177 of the EEC Treaty by the Finanzgericht of Baden-Württemberg, for a preliminary ruling in the proceedings pending before that court between:

FIRMA MILAC GMBH GROSS- UND AUSSENHANDEL, Darmstadt,

v

HAUPTZOLLAMT FREIBURG,

on the interpretation of certain provisions of regulations of the Council and of the Commission concerning the application of compensatory amounts and corrective amounts for imports into the Federal Republic of Germany of unsweetened whole milk powder coming from France,

THE COURT

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

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order for reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Between 26 June and 14 August 1974 the plaintiff, 'Milac GmbH Groß- und Außenhandel', whose registered

office is in Darmstadt, imported into the Federal Republic of Germany from France four consignments of unsweetened whole milk powder having a fat content by weight between 9·6 % and 24·5 % in immediate packings of a weight in excess of 2·5 kg.

The Neuenberg-Rheinbrücke customs office classified the product under tariff subheading 04.02 A II b 2 of the Common Customs Tariff and, pursuant to Regulation No 725/74 of the Commission of 29 March 1974 'altering the monetary compensatory amounts' (OJ L 89 of 1. 4. 1974, p. 1) imposed compensatory amounts at the rate of DM 25·74 basic amount plus DM 0·91 supplementary amount for each percent of fat content per 100 kg net weight.

The plaintiff lodged an objection with the chief customs office in Freiburg but was unsuccessful. Subsequently it lodged an appeal against the charge before the Finanzgericht, Baden-Württemberg, arguing in particular that the compensatory amounts imposed by the German customs authorities should be reduced by a corrective amount equal to 2 u.a. per 100 kg and that in addition the compensatory amounts prescribed by Regulation No 75/74 are too high as the development of the market has neutralized the effect of the revaluation of the Deutschmark.

2. The Finanzgericht decided that the solution of the case is bound up with the application of certain provisions of Community law and, by order of 3 December 1975, stayed the proceedings and, pursuant to Article 177 of the EEC Treaty, referred the following question to the Court of Justice:

'1. Are the monetary compensatory amounts under Article 1 of Regulation (EEC) No 974/71 in conjunction with Article 1 of Regulation (EEC) No 218/74, Annex I, Part 5 as amended by Regulation (EEC) No 725/74, for milk powder under subheading 04.02 A II b 2 of the Common Customs Tariff, to be reduced by the amount of 2 or less u. a. even where the fat content is in excess of 3 % by weight and the remaining conditions of Regulation (EEC) No 712/74 are fulfilled?

2. Were the rates of the monetary compensatory amounts under Regulation (EEC) No 725/74 referred to in question one compatible with the basic enabling provision between 25 June and 15 August 1974?'

3. The order for reference was received at the Court of Justice on 15 March 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by 'Milac GmbH Groß- und Außenhandel' represented by Dietrich Ehle and by the Commission of the European Communities, represented by its Legal Adviser Peter Gilsdorf.

Upon heraring the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without holding a preparatory inquiry.

However, it decided:

— to request the Council to be present at the hearing in order to state its position, if necessary, in respect of questions concerning the validity of Regulation No 633/74;

— to request the Commission to state in writing, before 1 August 1976, whether the matter referred to on the last line of page 28 of its written observations is to be interpreted as meaning that as the market price for whey in powder had dropped, the provisions of Article 2 of Regulation No 974/71 required that the compensatory amounts applicable to this product should be calculated afresh.

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

A — Observations submitted by 'Milac GmbH Groß- und Außenhandel'

'Milac GmbH Groß- und Außenhandel' (hereinafter referred to as 'Milac') assumes that the Court is in possession of the file of the case before the German court and refers to its submission of 4 April 1975 lodged in the legal arguments set out in this submission. In the context of the present proceedings for a preliminary ruling it limits its written observations to the principal questions making the following observations in particular:

1. The first question

In the present case the Commission — and possibly also the Council — infringed the principle of *equality of treatment* and was guilty of a *misuse of powers* by failing to apply to milk powder having a fat content by weight in excess of 3 %, a corrective amount of two units of account applicable to milk powder having a fat content by weight less than 3 %. In support of this argument it puts forward the following considerations.

(a) The principle of equality of treatment is a general principle of law within the Community legal order. Its form differs according to the nature of the facts and the scope of the rules in question.

The scope of application of that principle in the present case is that of the common organization of the market in milk and milk products based in particular on the fixing of identical and uniform prices within the common market. In this respect reference need only be made.

— to the determination of prices contained in Regulation No 604/68 of the Council (OJ English Special Edition 1968 (II), p. 176) which sought *inter alia* (fourth recital) to standardize measures taken by the intervention agencies. A necessary precondition for such measures is the existence of uniform intervention prices;
— to the decided cases of the Court of Justice in particular in Cases 34/70 *(Syndicat National du Commerce Extérieur des Céréales and Others* v *Office National Interprofessionnelle des Céréales and Minister of Agriculture* [1970] ECR 1233), 153/73 *(Holtz and Willemsen GmbH* v *Council and Commission of the European Communities* [1974] ECR 675), 31/74 *(Galli* [1975] ECR 47) and 51/74 *(Hulst* v *Produktschap voor Siergewassen* [1975] ECR 79).

The national court raises the question whether the introduction of different intervention prices is, in all, compatible with the common organization of the market in the milk sector. However this question is not the main subject of the present reference.

We are here solely concerned with determining the limits imposed on the legislative power of the Community by the principle of equality of treatment with particular regard to the compensation of different intervention prices in intra-Community trade. If the intervention price itself is a 'sacred principle' of the common agricultural market and of the milk market, derogations from it are only admissible if they comply with the principle of equality of treatment.

(b) Furthermore, the fixing of different intervention prices was decided in order to facilitate subsequent adjustment of prices in Member States which revalued their currency (the Federal Republic of Germany and the Benelux countries). In the present case it is not necessary to examine the suitability or necessity of such a fixing of prices: it is necessary on

the other hand to determine whether the fixing of different intervention prices for France and the Federal Republic of Germany was carried out in conformity with the principle of equality of treatment in such a way as to have absolutely no effects with regard to competition (cf. in particular Regulation No 1188/73 of the Council, OJ L 122 1973, p. 1, sixth recital) and does not impair intra-Community trade.

The provisions in fact laid down by the Commission in Regulations Nos 1267/73 and 712/74 flagrantly violate the principle of equality of treatment in that they provide for the application of a corrective amount of two units of account per 100 kg. for milk powder having a fat content by weight of less than 3 % whereas there exists no corrective amount at all for powdered milk having a fat content by weight in excess of 3 %.

(c) The discriminatory nature of such rules is surprising for the following reasons in particular:

— the correction consists of a reduction of the (monetary) compensatory amounts fixed and levied under Regulation No 974/71 of the Council. These amounts are calculated and fixed for all varieties of milk powder according to the respective content of (skimmed) milk powder and of fat. As the fixing and levying of the compensatory amount is very exactly based on the content of powdered milk it is difficult to see why the same principle cannot be applied for determining the corrective amount which is intended to eliminate the discriminatory nature of the fixing of different intervention prices and which is combined with the compensatory amount to which it is related. In its letter of 4 September 1973 the Commission itself recognized that the corrective amount and the compensatory amount are closely linked and it stated that there existed interdependence between the two with regard to competition;

— the fixing of the levy by the Commission (cf. Regulation No 1443/73, OJ L 144, 1973, p. 44) is based on the milk powder content of the product. It is difficult to see why the corrective amount of two units of account for a milk powder content by weight in excess of 3 % is not taken into consideration;

— in Regulations Nos 1267/73 and 712/74 of the Commission a very precise distinction was made for forage under tariff heading 23.07 of the Common Customs Tariff by the Commission according to the content by weight of 'skimmed-milk powder'. The corrective amount was graduated according to the content of skimmed-milk powder. In the regulations the Commission does not set out exactly what it means by 'skimmed-milk powder'. This legislative treatment produces the twofold result:

  — that, because of the failure to fix a corrective amount for milk powder having a fat content by weight in excess of 3 % the product is placed in a less favourable position with regard to intra-Community competition and excluded from the German market;

  — on the other hand, for forage intended for the German agricultural market, such scrupulous account is taken of the corrective amount that these products may enter the German market without facing any restriction on competition.

In view of this it may be asked whether the Commission is not, within the common market, practising a policy of discriminatory prices which give rise to distortions in competition and which in this form is surely incompatible with the principle of a single market with identical conditions of competition and with free movement of goods.

(d) The distortions of competition created by this legislation are not merely theoretical. Their existence can be proved by means of statistics concerning trade in milk powder between France and the Federal Republic of Germany provided by the Federal Office of Statistics in Wiesbaden (observations, pages 9 to 10).

(e) Furthermore the Commission cannot rely on the argument of impracticability of fixing graduated corrective amounts for milk-powder having a fat content in excess of 3 % because:

— such a graduated scale was applied in the case of forage;
— a simple calculation is all that is required;
— in the period following the introduction of the system of corrective amounts the German customs authorities undertook analogous corrections when recovering the monetary compensatory amount for whole milk powder;
— in its judgment in Case 95/75 *(Effem* v *Hauptzollamt Lüneburg* [1976] ECR 361) the Court held that when calculating the levy applicable to trade with third countries the Commission was obliged to fix and impose levies according to the quantities of cereals incorporated in the product.

(f) Finally, the Commission cannot place any reliance on the concept of 'skimmed-milk powder' in order to produce the argument that the corrective amount was merely fixed for a single type of milk powder for reasons of practicability. This argument is opposed by the following considerations:

— the concept of *substantive* equality with regard to competition is the principle governing compensatory amounts and corrective amounts, not the formal concept of 'skimmed-milk powder';
— the Common Customs Tariff does not use the term skimmed-milk powder but the terms 'milk in powder' and 'fat content';
— in commercial usage 'skimmed-milk powder' means milk powder having a fat content by weight of up to 1·5 %. However, in the annexes to Regulations Nos 1267/73 and 712/74 the Commission does not refer to 'skimmed-milk powder' nor does it restrict the corrective amount to milk powder with a fat content up to 1·5 %. On the other hand it arbitrarily fixes the limit for taking the corrective amount into account at a fat content by weight of 3 %;
— it is the content of milk powder and not the content of 'skimmed-milk powder' which is the determining factor in fixing the levy for calculating the compensatory amount.

2. The second question

(a) The question arises particularly with regard to a partial amount which was not taken into account in correcting the compensatory amount applicable to milk powder having a content by weight in excess of 3 %. In imposing and correcting the monetary compensatory amount the Commission can only apply a single criterion:

— either the compensatory amount for the whole milk arising from the incidence of the monetary measures on skimmed-milk powder was justified at the level which was in force at the time; in this case it should also have been adjusted by two units of account or by a partial corrective amount corresponding to the milk powder content;
— or else the fixing of different intervention prices for skimmed-milk powder in France and in the Federal Republic of Germany had no effect on trade in the sector of powdered milk having a fat content by weight in excess of 3 %; in this event the compensatory amount for whole milk powder should have been abolished or considerably reduced.

Furthermore this is the reasoning on which the arguments of the Commission concerning products under tariff subheading 04.02 A II a of the Common Customs Tariff in its letter of 4 September 1973 are based.

(b) In its judgment in Case 55/75 *[Balkan Import-Export* v *Hauptzollamt Berlin Packhof* [1976] ECR 19) the Court of Justice recognized that the Commission had a measure of discretion in this respect so wide that in practice there can be no judicial review of the calculation and fixing of the compensatory amounts applied to the various products. It may be asked whether the fact that the assignment to the Commission of such a wide measure of discretion is compatible with the constitutional principle of the guarantee of legal protection. Without losing sight of the necessity of the system of monetary compensatory amounts it must nevertheless be borne in mind that:

— the monetary compensatory amounts imposed by the Federal Republic of Germany were fixed at too high a rate from the very beginning;
— these amounts should have been reduced a long time ago.

That these statements are undeniable is shown by the declarations submitted in the present case by the Council of experts and those of the Member of the Commission responsible for agricultural matters. Although the Commission defends all the rates of the monetary compensatory amounts it only does so 'reluctantly'. Solely a reduction in the monetary compensatory amounts to the level of the actual effect of a monetary measure would be capable, particularly with regard to intra-Community trade, of protecting trade from distortions of competition.

B — Observations submitted by the Commission of the European Communities

The *Commission* first sets out the regulations applicable to the disputed case. It points out the following in particular:

(a) By Regulation (EEC) No 1188/73 'fixing the target price for milk and the intervention prices for butter, skimmed-milk powder and the Grana padano and Parmigiano Reggiano cheeses for the 1973/74 milk year' (OJ L 122, 1973, p. 1) the Council, considering that the particular situation obtaining in certain Member States did not permit of the application of a uniform intervention price for skimmed-milk powder and that it was therefore necessary to subject the said price to a corrective, introduced a corrective amount. Paragraphs 1 and 2 of Article 2 of this regulation provided that:

'1. ... the price at which the intervention agencies in Belgium, Germany, Luxembourg and the Netherlands buy in skimmed-milk powder shall be equal to the intervention price, less a corrective of 2 u.a. per 100 kg.

2. The corrective mentioned in paragraph 1 shall be applied, for the product in question, in the trade of each of the Member States referred to in paragraph 1 with other Member States and third countries, the Benelux countries being considered as one Member State.

For this purpose, the amounts levied at importation and those granted at exportation within the framework of the common agricultural policy, shall be reduced by the amount of the corrective.'

Regulation No 1188/73 entered into force on 14 May 1973. The detailed rules for its application were laid down by Regulation No 1267/73 of the Commission (OJ L 130, 1973, p. 22) which remained in force until 31 March 1975.

For the 1974/1975 milk year the price of milk products was fixed by Regulation No 663/74 of the Council (OJ L 85, 1974, p. 52) Article 3 of which repeats the provisions concerning the corrective

mentioned in Article 2 of Regulation No 1188/73.

The detailed rules for the application of Regulation No 663/74 were laid down by the Commission in Regulation No 712/74 (OJ L 88, 1974, p. 14).

On the occasion of the amendment of agricultural prices in October 1974 Article 3 of Regulation No 663/74 was repealed by Article 3 of Regulation No 2469/71 of the Council (OJ L 268, 1974, p. 1). Consequently Regulation No 712/74 was repealed by Regulation No 2522/74 of the Commission (OJ L 271, 1974, p. 1).

Therefore the rules applicable to the period concerning the court making the reference are those contained in Regulations Nos *663/74* and *712/74.*

(b) The *monetary compensatory amounts* were established by Regulation No 974/71 of the Council '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' (OJ English Special Edition 1971 (I), p. 257). For the period involved in the present case the amounts were laid down by Regulation No 218/74 of the Commission (OJ L 24, 1974, p. 1) in particular in Annex I to this regulation with the following amendments:

— for the period from 1 April 1974 to 1 July 1974 the annex setting out the monetary compensatory amounts under Regulation No 218/74 was that laid down by Regulation No 725/74 of the Commission (OJ L 89, 1974, p. 1);
— for the period from 1 July 1974 to 1 August 1974 the abovementioned annex was that contained in Regulation No 1692/74 of the Commission (OJ L 177, 1974, p. 1);
— for the period after 1 August 1974 the annex was that contained in Regulation No 2038/74 of the Commission (OJ L 211, 1974, p. 1).

The fact that in its questions the court making the order for reference solely refers to Regulation No *725/74* and not to the subsequent regulations amending the annex to Regulation No 218/74 does not have any legal consequences as the monetary compensatory amounts to be levied on imports into the Federal Republic of Germany for the products in question in the present case were maintained at the same level throughout the periods covered by these regulations.

Having made these observations the Commission turns to examine the two questions referred by the German court.

In respect of their *nature* it observes that the text of the first question does not clearly show whether it concerns the interpretation or the validity of certain provisions of Community law. Having regard to the grounds of the order for reference and in view of the problems which Milac requested the German court to submit to the Court of Justice, this question should be read as essentially seeking to know whether:

'Provisions of Community law also require the application of the corrective amount for the product in question (whole milk powder),

1. whether the basic regulation, No 663/74 of the Council
   (a) requires such an interpretation of Community law and that Regulation No 712/74 of the Commission constitutes an infringement of this provision;
   (b) in any event allows of such an interpretation and that the regulation of the Commission did not make use of this possibility thus infringing legal provisions of superior force;
2. or if question (1) is answered in the negative, the Council regulation prohibiting such an interpretation itself constitutes an infringement of a legal provision of superior force'.

Thus the content of the first question is complex. The question raises

simultaneously the problem of *interpretation* and of the *validity* of provisions of Community law.

The second question solely relates to the *validity* of Regulation No. 712/74 considered at least in the light of the interpretation of the basic Regulation No. 974/71 in respect of the time of the importation in question. The wording of this question gives rise to no objections.

Turning to an examination of the *substance* of the questions referred, the Commission makes, *inter alia,* the following observations:

I — The first question

1. For the reasons set out above a reply must first be given to a first subsidiary question concerning, on the one hand, the *interpretation* of Regulation No *663/74* (Article 3) of the Council and, on the other, the validity of Regulation No *712/74* of the Commission.

(a) Two factors are of decisive importance in respect of the *interpretation* of Article 3 (2) of Regulation (No 663/74):

— the first is drawn from the wording of the first and second paragraphs of that article which show that the product referred to in paragraph 2 can only be that referred to in paragraph 1, that is to say 'skimmed-milk powder' for which Article 2 of that same regulation fixes the intervention price at 79·00 u.a. per 100 kg and which, in accordance with Annex I to Regulation No 1108/68 of the Commission (OJ, English Special Edition 1968 (II), p. 387) has a maximum fat content of 1·5 %;

— the other is drawn from the *historical background* to Article 2 of Regulation No 1188/73 which is repeated without alteration by Article 3 of Regulation No 663/74 for the 1974/1975 milk year. The original proposals put forward by the Commission envisaged general rules having a wider scope seeking to harmonize agricultural prices and to abolish monetary compensation.
This measure was not accepted by the Council in respect of the milk and beef and veal sectors where comparatively large price increases were expected, but was replaced by more limited harmonizing measures in the form of price reductions in the countries where the currency had been revalued that is, precisely by the 'corrective amounts' at issue in the present case.
Thus during the meeting of 30 April 1973 two drafts of articles were prepared by the Council in agreement with the Commission providing, in trade between the States referred to in Article 2 of Regulation No 1188/73, for the application of 'corrective amounts' within the meaning of these provisions for skimmed-milk powder and beef and veal. The drafts furthermore provided for the grant of corrective amounts in respect of products on the price of which the corrective amount for skimmed-milk powder or beef and veal 'may have an influence'. According to the recital in the preamble of the draft relating to skimmed-milk powder the corrective amount therefore could have or should have been extended to trade in certain products other than the intervention products which would certainly include whole milk powder. However, the Council did not accept these drafts. In adopting the text of Article 2 set out above it exluded the beef and veal sector from the system of corrective amounts and, in the milk sector, it consciously and deliberately restricted the system to skimmed-milk powder.

In the ligth of these considerations it follows therefore that Article 3 of Regulation No 663/74 of the Council does not give the Commission the right to fix the corrective amount for products

other than skimmed-milk powder such as whole milk powder.

No argument to support a different interpretation may be derived from the objectives of the abovementioned article. On the other hand the exclusive application of the corrective amount solely to the products in question complies with the Commission's intention to confine the consequences of the restricted measure of harmonization of prices to that which is strictly necessary.

(b) With regard to the *validity* of the implementing Regulation No 712/74 which repeats the provisions of Regulation No 1267/73 with merely a partial amendment of the Annex concerning the list of products, it should first be stated that the corrective amount cannot be described as a reduction of the compensatory amount. In fact the two mechanisms are quite independent of each other, and have legal bases whose objectives are not identical although they may be analogous. The object of the corrective amounts is to compensate for the nominal difference in price, expressed in units of account, for skimmed-milk powder; monetary compensatory amounts are intended to compensate for distortions in the real price structure which have arisen because of monetary measures. The deduction procedure linking the two mechanisms was introduced for practical reasons in order to avoid a levying procedure and a granting procedure independent of each other; from a legal point of view the reduction of the compensatory amounts prescribed by the implementing regulations of the Commission therefore does not constitute an alteration of the methods of calculation of these amounts but is solely the practical result of a subtraction.

Although it is true that in these regulations the Commission extended the application of the corrective amount to certain products (cf., the annexes to these regulations) which are not 'skimmed-milk powder' within the rules laid down for intervention (a fat content up to 1·5 %), it did not however go beyond the bounds of the powers assigned to it.

In fact 'milk powder having a fat content by weight equal to or less than 3 %' is a product which, in commercial trade and for the processing industry, which, in commercial trade and for the processing industry, has the same characteristics as milk powder having a fat content up to 1·5 %. In the case of this product the fat content is still so minimal that both from the economic point of view and as regards the formation of prices, it has no influence. The Commission was obliged to apply the corrective amount to that product as well, although it has a low fat content, in order to avoid any possibility of evasion of the law. In so doing it acted within the limits of the margin of discretion which it enjoys on a technical level. It could have fixed another fat content as the limit but it decided to adopt the limit of 3 % taking account of commercial usage. On the other hand powdered milk such as that at issue, having a fat content by weight of between 9·6 % and 24·5 %, is a product which is clearly different and one which constitutes, even from the point of view of prices, something distinct from skimmed-milk powder. The same applies *mutatis mutandis* to the *preparations* referred to in the annexes to Regulations Nos 1267/73 and 712/74. They are products which all have a content by weight of at least 50 % of skimmed-milk powder within the meaning of tariff subheading 04.02 A II B 1, that is to say, having a fat content by weight of 1·5 % at most. As this milk, as distinct from whole milk, is largely used for the manufacture of forage and as the products in question may be obtained by merely mixing them with milk powder, these two kinds of milk powder are in direct competition. Failure to include these preparations in the rules in question would have caused serious

deflections of trade in this sector as well which could have jeopardized the objective sought by the Council regulation.

Furthermore the fact that on the occasion of the reform of the rules by the Regulation No 663/74 the Council raised no objection against the regulations adopted by the Commission up to that time confirms that the Commission remained within the limits of its discretion. However, if the Court of Justice were to rule that the Commission exceeded its powers by including these products in the rules concerning the corrective amount this fact cannot alter the decisive factor that the taking account of whole milk powder was not possible in the light of the Council regulation.

2. In respect of the second subsidiary question concerning the *validity* of Article 3 of Regulation No 663/74 of the Council, in that that regulation excludes the application of the corrective amount for whole milk powder, it must be asked whether that provision infringes a superior rule of Community law and in particular the prohibition on discrimination.

(a) The court making the reference expressed doubts as to the compatibility of a different intervention price in Germany for skimmed-milk powder with the objectives of the common organization of the market in milk products. In this context it also expressed doubts as to 'the legality of discriminatory intervention prices'. However, these doubts were caused by a fundamental error as to the scope of this differentiated intervention price. Because of what had happened with regard to currencies, in particular the floating of various national currencies, the unity of the intervention price, expressed in units of account, had been breached since March 1971 and from that time within the Community had merely been formal or fictitious. The revaluation of the Deutschmark which occurred at the time of the imports in question had the effect of producing an equivalent increase in Community agricultural prices expressed in national currency, in particular of the intervention price for skimmed-milk powder. The deduction of a corrective amount of two units of account, on the other hand, corresponds to a fall in the intervention prices in Germany and consequently to a harmonization of the actual intervention price in that country (and in the Benelux countries) towards the actual price in the other Member States.

This was precisely the aim sought by Regulation No 633/74 (and also by Regulation No 1188/73) which, when establishing a corrective amount, adopted measures in order to re-establish the unity of the agricultural market. In view of this objective and this function, the principle set out in the third sub-paragraph of Article 40 (3) of the Treaty whereby the common price policy 'shall be based on common criteria and uniform methods of calculation' is thus complied with.

In addition the fact that in 1973 the Council restricted to skimmed-milk powder this effective harmonization of prices was for a clear reason. The Council decided that for the 1973 to 1974 milk year the increase in the target price for milk should have an effect solely on the prices in respect of protein substances, that is to say, finally on the price of skimmed-milk powder and not on the price of butter. The more than proportionate increase in the intervention price of butter. The more than proportionate increase in the intervention price for skimmed-milk powder which resulted allowed those Member States whose currency had been revalued; in particular the Federal Republic of Germany, to take into account a specific reduction in the price of this product. The same solution was applied in the 1974/75 milk year. On the other hand for the 1975/76 year it was

possible to dispense with this method of harmonizing prices in specific sectors. The Council had decided to apply individual conversion rates also for countries whose currency had been revalued which, in the case of the Federal Republic of Germany, had entailed a revaluation of the 'green' Deutschmark and consequently a general lowering in the level of agricultural prices. At the same time this caused a corresponding reduction in the compensatory amounts so that it could be stated that as from the 1975/76 season the corrective amount applicable to skimmed-milk powder was absorbed by the general measures of harmonization of prices. Whilst it is regrettable that the Council did not decide earlier to harmonize prices in general instead of first adopting a limited measure, it cannot be criticized for having exceeded the limits of its discretion assigned by legal provisions.

(b) On the other hand the differential application of corrective amounts in commercial trade does not constitute an infringement of the prohibition on discrimination contained in the Treaty. This is so for various reasons:

— First, according to the decided cases of the Court of Justice, disparity of treatment does not constitute a breach of the principle of non-discrimination unless it appears to be arbitrary. In addition the Court of Justice does not accept the existence of discrimination if it is established that the body adopting the measure was guided by considerations which were not manifestly erroneous.

— Secondly, differential treatment applied to two different products in no way suffices in itself to establish discrimination even if the necessity of applying such treatment was not completely justified. In the present case it would first have been necessary to show that the imported whole milk powder was affected as regards its competitive position by the reduction of the prices of skimmed-milk powder applied in the countries whose currency had been revalued. In other words, in the present case there only exists real, and not merely apparent, discriminatory treatment if the reduced price of skimmed-milk powder had an effect on the price of whole milk powder. However, this is not so in the present case as the reduction in the price of skimmed-milk powder did not have any substantial effect on the competitive position of whole milk powder imported into the countries whose currency had been revalued (evidence offered: testimony of a named expert).

— Thirdly, the markets for the two products in question are essentially different. In the Community skimmed-milk powder is largely used for the preparation of animal foods (whereas whole milk powder is never used for the manufacture of such preparations) and in relatively insignificant quantities for the manufacture of soup or dietetic dishes. A substantial part of the skimmed-milk powder is moreover exported to third countries as the Community is the largest exporter of this product in the world and these exports are principally carried out in large packages. Whole milk powder on the other hand is principally used for the manufacture of food products or expensive consumer products on the basis of lipids and proteins. Taking account of the particular uses for which it is intended, this product is delivered to the final consumer and in small packages.

— Fourthly, the formation of the price of whole milk powder is influenced by factors other than those which serve to form the price of the 'basic products' (skimmed milk and fat). In view of its purpose, whole milk powder is manufactured solely according to needs and on order while skimmed-milk powder is produced almost automatically as a result of the manufacture of butter and has a permanent market. Skimmed-milk powder is better adapted than whole milk powder to prolonged

storage and its manufacture requires less expensive technical equipment than that necessary for whole milk powder. Finally, unlike the case of whole milk powder, the market price of skimmed-milk powder is not merely influenced but determined by the intervention price (storage of butter).

— It is possible that if the difference is too great in evaluating substances other than lipids, between whole milk powder and skimmed-milk powder, the latter could replace the former, at least for the manufacture of certain processed products. However, for reasons of profitability this procedure would be limited as the use of skimmed-milk powder in place of whole milk powder must go hand in hand with an alteration of production methods and practices. A reduction of two units of account per 100 kg (around 2·5 %) of the intervention price for skimmed milk powder could but with difficulty and never to a substantial extent, cause such a substitution.

— In addition analysis of the prices applied on the world market confirm that the 'milk' equivalent value of whole milk powder is higher than that of butter and of skimmed-milk powder (Annex IV to the observations). This implies that the price of whole milk powder obeys its own rules and is not solely dependent on the price pf its components 'skimmed milk and fat'.

— The development of imports into Germany of whole milk powder from France does not upset these conclusions. If the price of whole milk powder in Germany had been substantially influenced by the reduced price of skimmed-milk powder, the figures relating to 1973 and 1974 (annex V to the observations) should not have revealed a trop in production (and in· imports) but an increase in production, especially with regard to the better prospects for exports of German products which were recorded.

— In conclusion the differential treatment of the two products in question with regard to the corrective amount is justified by clear, concrete reasons. Therefore by adopting Article 3 (2) of Regulation No 663/74 the Commission cannot have misused its discretion or committed a manifest error in its appraisal of the market situation. As this provision does not for any other reason conflict with rules of Community law of a superior order, it cannot be regarded as being illegal.

II — The second question

(a) In the opinion of the court making the reference there could in the present case be an infringement of the principle contained in Regulation No 974/71 of the Council whereby 'the 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' (final recital).

However, this does not concern an infringement of a rule of positive law but of a recital of the abovementioned regulation.

It is evident from the order making the reference that the violation of the principle was caused by the fact that the rate of protection of the monetary compensation was excessive. In this respect the court by which the reference was made referred to an opinion by the committee of experts of the German Federal Ministry (already mentioned by 'Milac') indicating a protective rate of 19·5 % in respect of France.

— It is noticeable first that this is a general criticism in respect of the total incidence of the system of compensatory amounts in Germany and by no means an argument solely relating to whole milk powder. In the final analysis such criticism is directed against the Council which fixed the general level of

compensatory amounts in accordance with the provisions of Regulation No 974/71 whereas the question raised does not put forward the problem of the validity of the provision adopted by the Council. Under Regulation No 974/71 the Commission did not have and does not have the power to correct the general level of compensatory amounts which, in respect of Germany, are calculated on the basis of Article 2 (1) (a) (according to the text laid down by Regulation no 1112/73 of the Council, OJ L 114, 1973, p. 4). Such a correction could only be made by virtue of a Council regulation on the basis of Article 43 of the Treaty, in particular by amending the rate of exchange applicable for the purposes of the common agricultural policy.

— Similarly, the Commission does not have the power to amend the level of the compensatory amounts as calculated pursuant to Regulation No 1974/71 *for specified products*. The position would be different if, under Article 1 (3) of Regulation No 974/71 (in the version laid down by Regulation No 2746/72 of the Council, OJ, English Special Edition 1972 (28 to 30 December), p. 64) the Commission failed to apply compensatory amounts in certain circumstances, namely when the monetary measures taken were not such as to cause disturbances in commercial transactions. However, a possible refusal to envisage a risk of disturbance can only be based on considerations of the general outlook and must be justified by the actual situation of the products in question on the market or in commercial transactions. The general consideration that the protection afforded by the monetary compensation system is excessive is therefore of no relevance.

Further, it is not certain that, in reliance on Article 1 (2) of Regulation No 974/71 and taking account, for example, of a 'partial disturbance' of commercial transactions the Commission could fix reduced compensatory amounts. First, only in exceptional cases could a measurable relation between the partial disturbance and a corresponding reduction in the compensatory amount be established: this is not so in the present case.

Secondly, from the clear text of Articles 2 and 3 of that regulation, which does not make any provision for exceptions, it can be deduced that these provisions are still applicable in their entirety in cases of disturbance within the meaning of Article 1 (3).

This is not altered by the fact pointed out by Milac before the German court that by Regulation No 539/75 (OJ L 57, 1975, p. 2) the Commission substantially reduced the limit for the compensatory amount applicable to whey powder. When, at the beginning of 1975 the price actually obtaining on the market for this product fell sharply the amount of the final reference price used until then for fixing the compensatory amount could not be retained. Similar measures for the purposes of adjusting the values taken into account for calculating monetary compensatory amounts were also taken in respect of other products and were covered by the provisions of Article 2 of Regulation No 974/71.

(b) Moreover, the German court also asks, albeit by implication, whether the Commission was not obliged, precisely by reason of the application of the corrective amount for skimmed-milk powder, therefore to reduce the monetary compensatory amount itself provided for whole milk powder.

In fact the Commission did not have the necessary powers to do this since, in laying down the specific provisions of Regulations Nos 1188/73 and 663/74 the Council had excluded recourse to any such solution. The situation from a legal point of view would have been different if, in these regulations, the Council had only provided for the reduction of the intervention price, by stating that this reduction should be taken into account

in calculating the monetary compensatory amounts. However, this was not done in the present case. On the contrary, the Council had established a corrective mechanism which was also based on Article 43 of the Treaty and which had a separate existence independent of the rules relating to monetary compensation. It deliberately restricted the application of the corrective amount to trade involving skimmed-milk powder. In these circumstances the Commission would have infringed the said regulations if, in the context of Regulation No 974/71, it had again taken into account the corrective amount in respect of trade relating to whole milk powder. In addition, Regulations Nos 1188/73 and 663/74, as subsequent enactments of a special nature, take precedence over the relevant provisions of Regulation No 974/71.

On the basis of these observations the Commission proposes that the following answers to given to the questions referred:

'1. Article 3 (1) of Regulation No 663/74 must be interpreted as meaning that the corrective amount provided by this provision cannot be applied, either in whole or in part, to trade in milk powder under tariff subheading 04.02 A II b 2 of the Common Customs Tariff having a fat content by weight in excess of 3 %. Furthermore, consideration of the question raised has disclosed no factor of such a kind as to affect the validity of those provisions.

2. Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of the monetary compensatory amounts laid down by the Commission and applied between 25 June and 15 August 1974.'

The plaintiff in the main action, represented by Mr Ehle, Advocate of the Cologne Bar, the Commission, represented by its Legal Adviser, Mr Gilsdorf, acting as Agent, and the Council, represented by its Legal Adviser, Mr Schloh, acting as Agent, presented oral argument at the hearing on 29 September 1976. The latter supported the arguments put forward by the Agent of the Commission.

The Advocate-General delivered his opinion at the hearing on 28 October 1976.

Law

1 By order of 3 December 1975, which was received at the Court on 15 March 1976, the Finanzgericht Baden-Württemberg referred, pursuant to Article 177 of the EEC Treaty, two questions for a preliminary ruling on the interpretation of the combined provisions of Article 1 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 (OJ, English Special Edition, 1971 (I), p. 257) and Article 1 (with Annex I, Part 5) of Regulation (EEC) No 218/74 of the Commission of 25 January 1974 fixing the monetary compensatory amounts and certain rates for their application (OJ L 24, 1974, p. 1) as amended by Regulation (EEC) No 725/74

of the Commission of 29 March 1974 (OJ L 89, 1974, p. 1) and the interpretation of provisions of Regulation (EEC) No 712/74 of the Commission of 29 March 1974 setting out the methods of application of the corrective amount for skimmed-milk powder during the 1974/75 dairy year (OJ L 88, 1974, p. 14).

2 These questions were raised in the course of a case concerning the calculation of compensatory amounts and of the corrective amount applicable to imports of unsweetened whole milk powder having a fat content by weight between 9·6 % and 24·5 % from France into the Federal Republic of Germany between 26 June and 14 August 1974 carried out by the firm which is the plaintiff in the main action.

The competent customs office, the defendant in the main action, classified the product under subheading 04.02 A II b 2 of the Common Customs Tariff and, pursuant to Regulation No 725/74, imposed compensatory amounts at the rate of DM 25·74 as the basic amount plus a supplementary amount of DM 0·91 for each additional percent of fat content per 100 kg net weight.

The plaintiff in the main action argues on the one hand that the compensatory amounts should be reduced by a corrective amount equal to 2 u.a. per 100 kg and on the other hand that they had been fixed at too high a level as the development of the market price had neutralized the effects of the revaluation of the Deutsche Mark.

3 The first of the questions referred by the national court asks whether Regulation No 725/74 must be interpreted as meaning that compensatory amounts must be reduced by the abovementioned corrective amount and the second question asks whether that regulation is incompatible with Regulation No 974/71 of the Council upon which it is based because of the level at which the compensatory amounts have been fixed.

The first question

4 Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) provides that each year there shall be fixed a target price for milk and intervention prices — designed to assist in achieving the target price of milk — for certain products processed from milk: butter, skimmed-milk powder and Grana Padano and Parmigiano Reggiano cheeses.

In the Annex to Regulation No 1108/68 of 27 July 1968 concerning the method of application of public storage of skimmed-milk powder (OJ, English Special Edition, 1968 (II), p. 387) the Commission fixed at 1·5 % the maximum limit for the fat content of skimmed-milk powder which could be purchased by the intervention agencies.

5 Article 1 (2) of Regulation No 974/71 of the Council provides that the products for which compensatory amounts may be charged on imports from Member States and third countries or granted on exports to Member States and third countries shall be:

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

(b) 'products whose price depends on the price of the products referred to under (a) and which are governed by the common organization of markets'.

For the products referred to in subparagraph (b) Article 2 (2) of that regulation provides that '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 ... on which they depend'.

6 The particular situation obtaining in certain Member States did not permit the application of a uniform intervention price for skimmed-milk powder and therefore Article 2 of Regulation No 1188/73 of the Council of 8 May 1973 fixing the target price for milk and the intervention prices for butter, skimmed-milk powder and Grana Padano and Parmigiano Reggiano cheeses for the 1973/74 milk year (OJ L 122, 1973, p. 1) laid down a corrective amount of 2 u.a. per 100 kg to reduce the intervention price at which the intervention agencies in Belgium, Germany, Luxembourg and the Netherlands would buy in skimmed-milk powder and provided for the application of this corrective amount to the product in question in trade between each Member State referred to above and the other Member States and third countries.

7 Regulation No 663/74 of the Council of 28 March 1974 fixing the prices for the 1974/75 milk year (OJ L 85, 1974, p. 52) again increased the target price for milk, maintained the intervention price for butter in the original Member States (which had been reduced for the 1973/74 milk year) and increased the intervention price for skimmed-milk powder.

8 The fifth recital of that regulation states: 'whereas the particular situation obtaining in certain Member States at present does not permit the application of a uniform intervention price for skimmed-milk powder; whereas it is therefore necessary to apply a corrective factor to the aforesaid price'.

The sixth recital of that regulation states: 'whereas in order to ensure that this corrective factor affects market prices in the said Member States without leading to distortions of competition it is necessary to compensate for price differences occurring in trade in skimmed-milk powder.

Accordingly Article 3 of that regulation provides:

'1. By way of derogation from Article 7 (1) of Regulation (EEC) No 804/68 the price at which the intervention agencies in Belgium, Germany, Luxembourg and the Netherlands buy in skimmed-milk powder shall be the intervention price less a corrective amount of 2 u.a. per 100 kg.

2. The corrective amount referred to in paragraph 1 shall be applied to trade in the product in question between each of the Member States referred to in paragraph 1 with the other Member States and third countries, the Benelux countries being considered as one Member State.

For this purpose the amounts collected on importation and granted on exportation within the framework of the common agricultural policy shall be reduced by the corrective amount.

3. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 30 of Regulation (EEC) No 804/68.'

9 It appears from the third recital of Regulation No 712/74 that, in setting out the methods of application for the abovementioned article, the Commission determined the products to which the corrective amount was applicable 'taking account of the possibilities of distortion of trade which may result with regard to competitive products' and described skimmed-milk powder as being 'milk in powder or granules of a fat content not exceeding 3 %'.

According to the plaintiff in the main action the failure to fix a corrective amount for milk-powder having a fat content by weight in excess of 3 % places this product in a less favourable position by removing it from the German market.

The Commission is said to have abused its powers by not applying to that product a corrective amount corresponding to the 2 u.a. applicable to skimmed-milk powder having a fat content by weight of up to 3 %.

In so doing it has, in the view of the plaintiff, infringed Article 3 of Regulation No 663/74 which authorized it to prescribe corrective amounts for products other than skimmed-milk powder.

10 Article 3 (1) of that regulation derogates from the provisions of Article 7 (1) of Regulation No 804/68 of the Council only in respect of skimmed-milk powder.

Neither Regulation No 663/74 of the Council, nor Regulation No 1188/73, adopted for the preceding dairy year, contains a definition of 'skimmed-milk powder'.

It is evident from the fifth and sixth recitals of that regulation that the Council laid down a corrective amount only for skimmed-milk powder and that consequently the Commission did not have the power to apply it to other products derived from milk.

The Commission maintains that although it did not adopt, in implementing Regulation No 712/74, for the purpose of fixing the corrective amount for skimmed-milk powder, the fat content of 1·5 % adopted for the definition of this product, the reason for this was to avoid any possibility of frustrating the application of Article 3 of Regulation No 663/74.

The definition of skimmed-milk powder contained in the Annex to Regulation No 1108/68 was formulated for a purpose other than the imposition and the grant of monetary compensatory amounts, with the result that the Commission did not exceed the limits of its discretion by fixing the upper limit for the fat content in skimmed-milk powder at 3 %.

The second question

11 The plaintiff in the main action further maintains that Article 40 (3) of the Treaty prohibits any discrimination and that consequently in their regulations neither the Council nor the Commission were entitled to distinguish between products and place one of them in a less favourable position with regard to competing products and that in so far as it does not take account of the corrective amount applicable to skimmed-milk powder the system of monetary compensatory amounts is invalid.

12 Since the system of monetary compensatory amounts established by Regulation No 974/71 of the Council was intended to avoid a disruption of the intervention system following the widening of the margins of fluctuation for certain currencies compared with their actual parities, the Commission, in adopting the amendments to the monetary compensatory amounts contained in Regulation No 725/74 in order to take account of the changes in the currency rates, did not have the power to fix — with the object of avoiding any possibility of placing these products in a less favourable position as compared with those products for which the corrective amount was laid down by the Council — the rates of the monetary compensatory amounts for the products in question at a level lower than that which would have been applicable otherwise.

Furthermore the fact that the Council deemed it necessary in exceptional circumstances to fix a reduced intervention price for skimmed-milk powder for certain countries did not necessarily imply that the system of monetary compensatory amounts applicable to other products derived from milk also had to be amended in order to avoid any possibility of placing other products derived from milk in a less favourable position.

13 The reply to be given to the first question, therefore, is that the combined provisions of Article 1 of Regulation (EEC) No 974/71, Article 1 of Regulation (EEC) No 218/74 and Part 5 of Annex I to that Regulation in the version contained in Regulation (EEC) No 725/74 and applicable to powdered milk under tariff subheading 04.02 A II b 2 of the Common Customs Tariff must be interpreted as meaning that they do not allow the reduction of the monetary compensatory amount by 2 u.a. or less where the fat content by weight is in excess of 3 %.

14 Consideration of the second question has disclosed no factor of such a kind as to affect the validity of Regulation No 725/74.

Costs

15 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As these proceedings are, 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 questions referred to it by the Finanzgericht Baden-Württemberg by order of 3 December 1975 hereby rules:

1. **The combined provisions of Article 1 of Regulation (EEC) No 974/71, Article 1 of Regulation (EEC) No 18/74 and Part 5 of Annex I to that Regulation in the version contained in Regulation (EEC) No 725/74 and applicable to powdered milk under tariff subheading 04.02 A II b 2 of the Common Customs Tariff must be interpreted as meaning that they do not allow the reduction of the monetary compensatory amounts by 2 u.a. or less where the fat content by weight is in excess of 3 %.**

2. **Consideration of the second question has disclosed no factor of such a kind as to affect the validity of Regulation No 725/74.**

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 23 November 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 28 OCTOBER 1976

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Finanzgericht of Baden-Württemberg. The plaintiff in the proceedings before that Court is the Firma Milac GmbH, which describes itself as a 'wholesaler and exporter'. The defendant is the Hauptzollamt of Freiburg.