# OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 28 February 1989 *

*My Lords,*

1. Paragraph 36 of the German Milk Law (Milchgesetz), under the title 'Imitation of Milk and Milk Products', provides:

'(1) It shall be prohibited to imitate milk and milk products for use as foodstuffs or to offer or display for sale, to sell or otherwise put into circulation such imitation foodstuffs.

(2) This prohibition shall not apply to the production of margarine.'

2. The Commission took the view that, in so far as it restricted the importation and sale in the Federal Republic of Germany of milk substitutes lawfully manufactured and marketed in other Member States, the prohibition in Paragraph 36(1) of the German law was contrary to Article 30 of the EEC Treaty.

3. Accordingly, by an application lodged on 12 March 1986, the Commission sought a declaration that, by refusing to admit to the German market milk substitutes lawfully manufactured and marketed in other Member States, the Federal Republic of Germany had failed to fulfil its obligations under Article 30 of the EEC Treaty.

4. On 26 May 1986 the proceedings were suspended by an order of the President. On 2 July 1987 the Council adopted Regulation No 1898/87 (Official Journal 1987, L 182, p. 36), Article 5 of which provides: 'Member States may, until the end of the fifth period of application of Article 5c of Regulation (EEC) No 804/68 [i.e. 31 March 1989] and in compliance with the general provisions of the Treaty, maintain their national regulations which restrict the manufacture and marketing in their territory of products not fulfilling the conditions referred to in Article 2 of this regulation.' Article 2 defines 'milk' and 'milk products' and stipulates what may be called 'milk' and what designations may be used for milk products.

5. By an order of the President of 6 October 1987 the proceedings were resumed. A defence and a reply were lodged, as were observations by the French Republic intervening in support of the Federal Republic of Germany. Then on 23 February 1988 the Court delivered

* Original language: English.

judgment in Case 216/84 *Commission* v *France* [1988] ECR 793, to the effect that:

'By prohibiting the importation of substitutes for milk powder and concentrated milk under any name whatsoever and the sale of such imported products, the French Republic has failed to fulfil an obligation incumbent upon it under Article 30 of the EEC Treaty.'

6. That judgment resolved a number of the points hitherto at issue between the parties. Only the rejoinder and the oral arguments at the hearing were submitted after the delivery of judgment in Case 216/84. It is possible therefore to deal with the outstanding points shortly rather than repeat the arguments as they originally stood.

7. The Federal Republic of Germany makes a preliminary point on the subject-matter of the application, on which it placed particular emphasis at the hearing, that the prohibition in question is not on milk 'substitutes' but only on such products which 'imitate' milk. As long as they cannot be mistaken for milk, substitute products are not caught by the prohibition. The Commission, however, clearly acknowledged that fact in its application. In the Commission's view, the relevant fact is that a product constitutes an 'imitation' under Paragraph 36 of the German law by virtue of its objective properties (the intention of the producer or trader being irrelevant) and the provision prohibits the marketing of 'imitations' even if clearly labelled as not being milk or milk products. It seems to me that the distinction which the German Government seeks to draw is without substance. Both parties agree on the effect of the national provision in question, which is to impose a complete marketing ban on foodstuffs which resemble, but are not, milk or milk products. In my view, the purport of the application is clear and the terms of the declaration sought are apt to cover the national prohibition in question notwithstanding the use of the word 'substitutes' rather than the word 'imitations'.

8. Next, the German Government submits that the application is inadmissible because the Commission should have gone through the administrative procedure under Article 169 afresh following the adoption of Regulation No 1898/87. However, it is clear that Article 5 of the regulation applies only if the national provision in question is 'in compliance with the general provisions of the Treaty' (see in particular paragraph 22 of the judgment in Case 216/84), which leaves open the question whether the national provision is contrary to Article 30 of the Treaty. Since the regulation does not change that issue and since the Commission's application has not been amended to include reference to it, the application in my opinion remains admissible.

9. As to the substance of the case, it is not contested that the national measure in question is a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the Treaty. The question between the parties is whether it is justified by Article 36 or by the mandatory requirements accepted by the Court in Case 120/78 *Rewe* [1979] ECR 649, at p. 662 ('Cassis de Dijon') confirmed

in paragraphs 6 and 7 of the judgment in Case 216/84. In this connection the German Government, supported by the French Government, advances three possible justifications. It submits that Paragraph 36 of the German law is justified by the mandatory requirements of consumer protection and protection of fair trade as well as by the mandatory requirements of the common agricultural policy, namely protecting the income of Community milk producers by restraining competition from substitute products at a time when the Community rules themselves are restricting the production of milk.

10. As to consumer protection and the protection of fair trade, the German Government's arguments are met by the judgment in Case 216/84. Moreover, they are contradicted by the fact that Paragraph 36(2) of the German law already allows the production of margarine. This demonstrates that the purpose of the prohibition is not, or not primarily, to protect the consumer or fair trade but to prevent other milk substitute products from entering the market in order to protect sales of milk and milk products. Even if the main purpose of the provision were to protect the consumer or fair trade, a complete ban on marketing such as that in issue here would be out of proportion. Those purposes could be attained by less onerous restrictions such as a requirement to provide adequate information about the product: see Case 216/84, paragraphs 9 to 13, and the judgment of 2 February 1989 in Case 274/87 *Commission* v *Germany* ('Sausages'), paragraphs 12 to 19.

11. As to the alleged mandatory requirements of the common agricultural policy, it is clear from the judgment in Case 216/84, paragraphs 18 and 19, confirmed in paragraphs 21 and 22 of the judgment in Case 274/87, that it is for the Community and not for a Member State unilaterally to decide on the appropriate treatment of milk substitutes in the context of the common agricultural policy and that national measures may not run counter to a fundamental Community principle such as the free movement of goods. It follows in my view that none of the three justifications put forward by the German Government can be upheld, and the national measure in question is prohibited by Article 30 of the Treaty.

12. Finally the German Government, supported by the French Government, has argued that Regulation No 1898/87 allows the maintenance of the national provision. However, in my view, because that provision is contrary to Article 30 of the Treaty it is not 'in compliance with the general provisions of the Treaty' as required by Article 5 of the regulation and is therefore not authorized by the regulation: see paragraph 22 of the judgment in Case 216/84. At the hearing the German Government submitted that Paragraph 36 of the law had lost its character as a purely national provision and been given a Community dimension by the regulation. I

do not think that such an argument can be reconciled with the wording of Article 5 of the regulation, which specifically refers to 'national' measures and, far from purporting to incorporate them into Community law, sets a limit on the time for which they may be maintained. Therefore that argument also falls to be rejected.

13. Before concluding, I would add that the application in this case is pleaded by reference to the Commission's reasoned opinion in the pre-contentious proceedings with the addition of certain further points. The reply is pleaded in the same way. While it is desirable that pleadings should be brief and should avoid unnecessary repetition, it is also desirable, and perhaps necessary to comply with Article 38(1) of the Rules of Procedure, that the application should set out, albeit briefly, the substance of the applicant's contentions.

14. In conclusion, I consider that the Commission is entitled to a declaration that by refusing to admit to the German market milk substitutes lawfully manufactured and marketed in other Member States, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EEC Treaty, and is entitled to costs.