In Case 244/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Commerce, Paris, for a preliminary ruling in the action pending before that court between

UNION LAITIÈRE NORMANDE, a group of agricultural co-operatives, Condé-sur-Vire,

and

FRENCH DAIRY FARMERS LIMITED, London,

on the interpretation of certain provisions in Regulation No 1411/71 of the Council of 29 June 1971 (Official Journal, English Special Edition, 1971, (II), p. 412), as amended by Council Regulation, No 566/76 of 15 March 1976 (Official Journal 1976, L 67, p. 23) regarding imports into the United Kingdom of standardized whole milk, UHT treated, coming from France,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco, A. Touffait and T. Koopmans, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. Milk is subject to the common organization of the market in milk and milk products established by Regulation No 804/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 176).

Regulation No 1411/71 of the Council of 29 June 1971 (Official Journal, English Special Edition 1971 (II), p. 412), adopted as part of that organization, lists in Article 3 (1) (a) and (b) the products to which it applies, that is to say "milk" and "drinking milk", the latter including "raw milk", "whole milk", "semi-skimmed milk" and "skimmed milk". The second indent of subparagraph (b) of that provision, amended and supplemented by Council Regulation No 566/76 of 15 March 1976 (Official Journal 1976, L 67, p. 23) provides that the term "whole milk" within the meaning of these rules comprises two formulae: "standardized whole milk" and "non-standardized whole milk".

Article 1 of Regulation No 566/76 shows that "standardized" whole milk differs from "non-standardized" whole milk in that the fat content of the first (at least 3·50 %) may be constituted by additives, whereas that of the second (at least 3 %) must not be the result of any alteration whatsoever since the milking stage. Ireland and the United Kingdom opted for the formula of non-standardized whole milk.

In addition, Article 3 of Regulation No 1411/71, as amended by Regulation No 566/76, makes the following provisions for "whole milk", standardized or non-standardized, in paragraphs (5) to (7):

"5. With regard to whole milk, Member States shall apply within their territories, as from 1 October 1976 at the latest, one of the two formulae set forth in the second indent of paragraph 1 (b). They shall decide on the formula for their territory by 1 July 1976 and shall inform the Commission accordingly on or before that date.

6. As from 1 October 1976, a Member State that opts for the formula of non-standardized whole milk shall not prohibit, without prejudice to requirements for the protection of public health:

(a) the preparation within its territory of standardized whole milk for sale within the territory of another Member State which has opted for the latter formula;

(b) the marketing within its territory of standardized whole milk coming from another Member State, when the fat content of such milk is not less than a guideline figure fixed by the Council acting on a proposal from the Commission in accordance with the voting procedure laid down in Article 43 (2) of the Treaty.

7. The guideline figure in paragraph 6 (b) shall be fixed by 1 January of each year for the following milk year. However, it shall be fixed in 1976 for the period from 1 October 1976 until the end of the 1976/77 milk year.

The guideline figure shall be fixed for each Member State which opts for the formula of non-standardized whole milk; it shall be the weighted average fat content of the whole milk produced and marketed in the Member State in question during the previous year."

The guideline figure referred to in paragraph (6) (b) above, for the milk year 1978/1979, is 3·78 % for the United Kingdom, according to Article 1 of Council Regulation No 300/78 of 13 February 1978 (Official Journal 1978, L 45, p. 5).

British Statutory Instrument 1976 No 1883 (Drinking Milk Regulations 1976) applies Regulation No 1411/71, as

amended by Regulation No 566/76, to the United Kingdom.

2. The Union Laitière Normande (hereinafter referred to as "the U.L.N.") which was incorporated under French law in the form of a group of agricultural co-operatives, made a contract on 1 June 1978 with French Dairy Farmers Ltd. (hereinafter referred to as "F.D.F."), a company incorporated under English law, for supplies of standardized whole milk with a fat content higher than 3.78 %, treated by the process known as ultra-high temperature (UHT) treatment and produced in France.

Under the terms of the contract F.D.F. agreed to buy, for collection before 30 September 1978, 300 000 litres of packaged UHT milk, in brick-shaped packs of one litre, in cartons of 12 packs.

A first consignment of 144 cartons was sent by the U.L.N. on 12 June 1978, but was returned by F.D.F. on the same day on the ground that an import licence from the British Ministry of Agriculture was required to import the goods into the United Kingdom, by virtue of Article 5 (1) of the Importation of Carcases and Animal Products Order 1972 of 29 February 1972 (made under the Diseases of Animals Act 1950). Later, the U.L.N. made a second delivery of prepacked UHT milk, which could be imported into the United Kingdom under a licence granted to F.D.F. on 4 August 1978. The latter found they were unable to market the milk, however, because the competent British administrative authority refused to grant the dealer's licence required for that purpose, on the ground that the imported product did not comply with the British legislation on treatment and packaging of milk, in particular Regulation 30 (2) of Statutory Instrument No 277 of 17 February 1959 concerning milk and milk products (The Milk and Dairies (General) Regulations, 1959) amended by Statutory Instrument No 1033 of 16 June 1977 (The Milk (Special Designation) Regulations 1977).

A letter of 20 July 1978 from the Ministry of Agriculture, Fisheries and Food informed the company that standardized whole milk with a fat content of 3·78 % can only be imported and marketed in the United Kingdom if it is there given ultra-high temperature treatment and packaged on registered premises. The Ministry added that the information it was giving only dealt with regulations which directly impinged on imported milk, and that there were other regulations applicable to "domestic" sales of milk, such as the Milk (Great Britain) Order 1977, as amended, and the 1963 weights and measures provisions (Weights and Measures Act 1963) which specified the permitted sizes of retail containers.

Not having a dealer's licence, F.D.F. decided according to a letter dated 12 September 1978 to take steps to terminate the contract.

The U.L.N. considered the arguments presented by F.D.F. invalid and brought an action against it, by a writ issued on 27 September 1978, before the Tribunal de Commerce, Paris, for non-performance of the contract in question. The U.L.N. based its action mainly on Article 30 of the Treaty and on the provisions of Council Regulation No 566/76.

In a judgment of 16 October 1978, the Tribunal de Commerce, Paris, decided to

stay the proceedings and refer to the Court, under Article 177 of the EEC Treaty, the following questions for a preliminary ruling:

1. Can Article 3 (6) of Regulation No 1411/71 (as enacted by Article 2 of Council Regulation No 566/76 of 15 March 1976), which provides that a Member State that opts for the formula of non-standardized whole milk shall not prohibit, without prejudice to requirements for the protection of public health, ... the marketing within its territory of standardized whole milk coming from another Member State, when the fat content of such milk is not less than a guideline figure fixed by the Council ..., be interpreted, as the authorities of the United Kingdom appear to do, as meaning that milk thus imported may be marketed only for purposes other than human consumption?

2. Does the reservation concerning the protection of public health contained in Article 3 (6) of Regulation No 1411/71 (as enacted by Article 2 of Regulation No 566/76) justify British national legislation requiring the reprocessing and repackaging of UHT milk produced and packaged in another Member State according to methods which are identical to those used in the United Kingdom and have been approved by the national administrative authorities in that Member State?

3. If the second question is answered in the negative, does the aforementioned British national legislation constitute a measure having an effect equivalent to a restrictive measure prohibited by the Treaty?

4. Is the application of British weights and measures legislation to milk produced and packaged in another Member State compatible with the terms of Article 3 (6) of Regulation No 1411/71 (as enacted by Article 2 of Council Regulation No 566/76), which stipulates requirements of public health as the only reservation in relation to intra-Community trade?

5. Does the combined effect of the British national measures based on reasons of protection of health and on the application of the national weights and measures legislation constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States such as are prohibited by Article 36 of the Treaty?

3. A certified copy of this judgment was received at the Court Registry on 6 November 1978.

The Union Laitière Normande, represented by Mr Funck-Brentano, Advocate at the Cour de Paris, the Government of the French Republic, represented by its Agent, Guy de Lacharrière, Legal Adviser at the Ministry for Foreign Affairs, the Government of the United Kingdom, represented by W. H. Godwin, Treasury Solicitor's Office, and by Peter Scott and P. G. Langdon-Davies, and the Commission of the European Communities, represented by its Legal Advisers, Etienne Lasnet and Bjarne Hoff-Nielsen, submitted their written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court opened the oral procedure, after inviting the French Government, the Government of the United Kingdom, the Union Laitière Normande and the Commission of the European Communities to give certain written explanations.

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

A — The Union Laitière Normande considers that the requirements imposed by British law on importers of milk, especially standardized whole milk, are incompatible with Community law. The following are the requirements concerned:

1. an import licence and a dealer's licence must be obtained;

2. the standardized whole milk must be imported in bulk in order that it may be reprocessed and repackaged in Great Britain on premises registered for the purpose;

3. products must be packaged in pint containers.

1. To import standardized whole milk into Great Britain a special licence is required under Article 5 (1) of the Importation of Carcases and Animal Products Order 1972. Whether or not the product can be put on the market depends then on the grant of a dealer's licence, according to Regulation 30 (2) of Statutory Instrument No 277 on milk, of 17 February 1959, supplemented by Statutory Instrument No 1033 of 16 June 1977.

The case-law of the Court of Justice shows quite definitely that the requirement of these two licences is contrary to the principle of the free movement of goods.

The common organization of the market in milk, established by Regulation No 804/68 of 27 June 1968 and amended by, in particular, Regulations No 1411/71 of 29 June 1971 and No 566/76 of 15 March 1976, precludes any national rules which require the issue of an import licence and a dealer's licence.

The British national requirements for the issue of these licences also constitute a measure having an equivalent effect to a quantitative restriction which is not justified by any principle of Community law.

2. (a) In view of the geographical position of the United Kingdom, the requirement that imports be made in bulk compels continental operators to transport standardized whole milk in special containers, which obviously complicates delivery of this product, as it can only be effected by sea.

Indeed, any measure which subjects imports of foreign products to conditions different from, or more difficult to satisfy than, those required for national products amounts to a measure having an effect equivalent to a quantitative restriction according to Commission Directive No 70/50 of 22 December 1969.

(b) The obligation imposed on importers to carry out reprocessing and repackaging of the product in Great Britain on premises registered for the purpose must be considered as a measure having an effect equivalent to a quantitative restriction, since it makes it impossible to market in Great Britain milk imported from another Member State, for the reprocessing and repackaging can only be carried out in British territory on premises specially registered for the purpose by local authorities, whose competence has certain territorial limits.

It cannot be argued, as do the British authorities, that such an obligation is necessary to protect the life and health of consumers and that it is therefore justified by Article 36 of the EEC Treaty.

That article authorizes Member States in fact to derogate from the rules concerning the free movement of goods for, among other reasons, the protection of health and life of humans and animals, provided that the measures adopted do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Because it makes an exception to one of the fundamental principles of the Common Market, Article 36 must be interpreted and applied strictly. The derogations from the free movement of goods for which it provides are allowed solely to the extent to which they prove to be indispensable for the protection of consumers.

Human health and life must obviously be a primary concern of the national authorities, and it is for the Member States to decide on the domestic measures which should be taken to give full effect to this concern within the limits imposed by the Treaty; but Member States may not adopt measures preventing imports which, but for such measures, would be allowed, including those which make importation more difficult or burdensome than marketing the national product.

According to the case-law of the Court of Justice, certain measures adopted by States only escape the prohibition in Articles 30 to 34 of the Treaty if they were adopted for a purpose compatible with the interests of the Community, and on condition that the restrictions they impose are in proportion to that purpose.

That is not so in the case of the British regulations, the provisions of which are manifestly disproportionate to the purpose they are actually meant to achieve.

In fact they require subsequent heat treatment for whole milk which has already been given ultra-high temperature treatment prior to exportation from France, with apparatus made and licensed, moreover, in the United Kingdom, and which is thus free of all contamination. In addition, this milk was found on analysis by the British laboratory to satisfy the requirements of the British legislation.

In the present instance, the British national provisions stipulating that standardized whole milk cannot be marketed until it has been reprocessed and repackaged in Great Britain on premises registered for that purpose constitute not merely a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty, but also a means of arbitrary discrimination and a disguised restriction on trade between Member States.

3. Lastly, the obligation to market the imported milk in containers holding a pint or a multiple or sub-multiple thereof makes it more difficult, both now and in the future, to import into Great Britain and is therefore a typical example of a measure having equivalent effect prohibited by Community law.

Although Council Directive No 71/354 of 18 October 1971 (Official Journal, English Special Edition 1971 (III), p. 878) on the approximation of the laws of the Member States relating to units of measurement, amended by Directive No 76/770 of 27 July 1976 (Official Journal 1976, L 262, p. 204) authorizes Great Britain to use the traditional British measures for packaging its national products until 31 December 1979, it cannot impose such measures on products coming from other Member States which already comply with the directives on harmonization mentioned above.

This interpretation is borne out by Article 5 of Council Directive No 75/106 dated 19 December 1974 (Official Journal 1975, L 42, p. 1) relating to the making-up by volume of certain prepackaged liquids, which clearly states that "Member States may not refuse, prohibit or restrict the placing on the market of prepackages which satisfy the requirements ... laid down in this directive for reasons concerning the volume of the contents ...".

It would be unjust to force the U.L.N. to sell in terms of the pint in order to comply with the British national weights and measures legislation, for the burden imposed on it would be excessive seeing that from 1 January 1980 Great Britain will have to comply with the harmonization directives mentioned above, and that it would therefore be unreasonable to create in the meantime a special packaging line which could not possibly pay for itself in such a short time.

Thus the obligation to sell by the pint should be considered as a measure having an equivalent effect to a quantitative restriction, which must not be applied to a product made up in another Member State in which the units of measurement in force already comply with the provisions in the Community directives on harmonization.

Next, the U.L.N. notes that the combination of British national measures referred to led the court making the reference to the Court of Justice to ask whether Article 2 (6) of Regulation No 566/76 should be interpreted as authorizing the marketing in Great Britain of standardized whole milk only for purposes other than human consumption.

In order to reply to this question, it is necessary to examine the Community text in the light of its actual scope and effectiveness. Now, the effect of this regulation is to allow the marketing of standardized whole milk in a Member State which has opted for the formula of non-standardized whole milk, with no other requirement than compliance with the guideline figure for the fat content fixed for that country, and protection of public health. The true purpose of the regulation is thus to encourage the development of the market in milk between Member States.

The United Kingdom did not mention the requirements, which it now advances in Statutory Instrument 1976 No 1885 giving effect to Regulation No 566/76. A purely national regime for milk producers in the United Kingdom cannot be applied to Common Market operators.

The U.L.N. claims accordingly that the Court of Justice should declare that Article 30 *et seq.* of the Treaty and Article 2 (6) of Council Regulation No 566/76 invalidate the British national provisions at issue in the main dispute, since these measures are measures having an equivalent effect to quantitative restrictions which are forbidden by the Treaty, and which are not covered by the exception allowed by Article 36 in the circumstances of this case (treatment of standardized whole milk in apparatus similar to that used in Great Britain and packaging on premises authorized by the French national authorities).

B — The *French Government* observes that, in the first place, the milk exported by the U.L.N. to the United Kingdom complies with the requirements of Regulation No 1411/71, as amended by Regulation No 566/76, with regard in particular to the fat content of whole milk, and of Council Regulation (EEC) No 300/78 fixing, as provided in the above-mentioned regulation, the guideline figure for the fat content of standardized whole milk imported into Ireland and the United Kingdom.

Moreover, this milk had all the guarantees as to quality necessary for the protection of public health. For that purpose, the United Kingdom grants import licences only on condition that the heat treatment given to UHT milk meets the British standards, which are higher than the French ones. France agreed to comply with those standards. Specific tests were carried out in the processing plants and a veterinary certificate was issued certifying that the conditions required by British regulations had been met.

But the British regulations provide that to market this product within the territory of the United Kingdom a dealer's licence must also be granted which requires the milk to be given heat treatment a second time on registered premises and to be "repackaged", which means that the imported milk is placed in a less favourable competitive position.

In those circumstances the United Kingdom market is a protected market. The proof is that French exports of drinking milk to the United Kingdom are totally non-existent, whereas with other EEC countries they exceed 200 000 tonnes per year in the aggregate.

C — The *Government of the United Kingdom* sets out to give full details of the legislation at issue in the questions referred to the Court and to show that it in no way conflicts with provisions of Community law. It therefore omits to deal initially with the problem of admissibility of the questions in the form in which they are put.

The United Kingdom legislation which affects the importation of the plaintiff company's milk falls under three headings:

— protection of animal health;

— protection of human health;

— regulation of quantities.

The United Kingdom considers that the requirements imposed by its legislation in relation to the protection of human and animal health are essential. On the other hand, it considers that the requirement as to selling the product by the pint and not by the litre is not particularly important but it is one which is not, at present, incompatible with Community law.

As to the requirements concerning the protection of animal health (the provisions which the British Government discusses first because they are the ones which most affected the plaintiff's plans to import), milk imported into the United Kingdom has been controlled since 1954. The milk is required to be heat-treated before it is imported to prevent the risk of spreading animal disease. It was for this reason that an import licence setting out the milk to be imported had to be obtained. Such a licence was duly granted, and no complaint was made in this connexion.

The legislation for the protection of human health applies equally to imported and to home-produced milk.

Regulation 30 (2) of the Milk and Dairies (General) Regulations, 1959, as amended by Regulation 2 of the Milk and Dairies (General) (Amendment) Regulations 1977 provides that, with exceptions immaterial to this case, every bottle or carton in which it is intended to deliver milk to consumers must be filled and closed on registered premises. Registered premises means dairies which have been inspected and registered under Part III of the above-mentioned 1959 Regulations by the appropriate local authority. The local authority can only register premises in its own district.

Section 37 (1) of the Food and Drugs Act 1955 provides that the use of a "special designation" is obligatory for the purpose of sales of milk for human consumption. Section 36 (1), however, provides that no person shall use a special designation for a designated area unless he holds a licence authorizing the use of that designation. Regulation 4 of the Milk (Special Designation) Regulations 1977 requires any person who intends to use in relation to milk a special designation authorized by the regulations to apply in writing to the licensing authority for a licence.

By Regulation 6 the licence is to be subject to the general conditions set out in Schedule 1 and (in this case) Part IV of Schedule 2 to the regulations (which sets out in detail the requirements for the ultra-high temperature treatment).

The result of this legislation is that no local authority has power to grant a licence to sell milk for human consumption as "ultra-heat treated" if:

— the milk has not been treated in the manner described in Part IV of Schedule 2 to the 1977 Regulations, and

— the treatment, filling and closing of the cartons has not been carried out on registered premises.

It is a basic principle of United Kingdom food and drugs legislation that the hygienic production and handling of all food should be ensured. Milk presents a particular hazard in this respect; its consumption in the United Kingdom is widely distributed and it is normally drunk by the consumer without any cooking or other processing. It is essential, therefore, that it should come on to the market in a clean and safe condition.

In general, this objective is achieved by heat-treating the milk to ensure that it is free from infective agents. The first requirement, therefore, is to ensure that this treatment is carried out under officially approved conditions at the dairy, and that the milk is then packaged and handled in ways which avoid any risk of re-contamination. This is achieved essentially by means of the registration and licensing system and by testing samples of milk at any time before its delivery to the consumer. But real safeguards can only be achieved by the application of all these procedures; merely testing by means of random samples is not sufficient. It is therefore essential to rely on a combination of testing and tight control over the conditions under which the milk is processed and distributed.

The United Kingdom is of the considered opinion that in the absence of Community legislation harmonizing the standards of hygiene for milk, these requirements are necessary in the interests of human health.

Lastly, the weights and measures legislation at present in force in the United Kingdom (namely the Weights and Measures Act 1963) provides that milk shall be prepacked only in quantities of one third of a pint, half a pint, or a multiple of half a pint.

The milk prepacked by the U.L.N in one-litre cartons does not comply with this requirement.

The United Kingdom is of the opinion that the questions referred to the Court really come down to asking whether the British legislation set out above is compatible

(a) with Article 3 (6) of Regulation (EEC) No 1411/71 of the Council, as substituted by Article 2 of Council Regulation (EEC) No 566/76 or

(b) with Articles 30 and 36 of the EEC Treaty read together.

Article 3 (6) of Regulation No 1411/71 requires the United Kingdom (as a Member State which has opted for the formula of non-standardized whole milk) not to prohibit the marketing within its territory of standardized whole milk coming from another Member State, provided that the fat content fulfuls certain requirements. But this obligation is made expressly "without prejudice to requirements for the protection of public health".

The requirements of the British public health legislation that the milk, once imported, should be treated and packed in the required manner, are not measures having an effect equivalent to quantitative restrictions on imports under

Article 30. Even if they were, they would be justified under Article 36 on the grounds of protecting the health and life of humans.

Proceeding to examine the *first question*, the Government of the United Kingdom observes that it appears to be founded upon a misapprehension. The United Kingdom does not, in fact, interpret Article 3 (6) of Regulation No 1411/71 as meaning that milk imported under that regulation "may be marketed only for purposes other than human consumption", but rather as permitting the importing State to require that the existing rules of law for the protection of public health must be complied with before the milk can be sold for human consumption.

The *second question* is based on the premise that the milk is produced and packed in the exporting Member State according to methods which are identical to those used in the United Kingdom. But, as the Commission itself has recognized, practices vary as between one Member State and another. Until Community provisions are adopted for heat-treating milk intended for human consumption, it is the United Kingdom Government which is responsible for the health of the population of the United Kingdom. Without wishing to cast any aspersions on the methods used by the plaintiffs or on measures in force in any part of the Community, the United Kingdom points out that in the absence of Community legislation it has no way of ensuring that milk imported from other Member States meets the requirements necessary for the protection of human health.

Therefore, until appropriate Community measures are adopted, the United Kingdom Government considers it necessary to maintain in force its own legislation on this matter and respectfully asks the Court to answer the second question in the affirmative.

The form of the *third question* is open to objection, for it asks the Court to express an opinion on the compatibility of a national measure with Community law, something which is outside its sphere of jurisdiction. In effect, this question asks whether Articles 30 and 36 of the EEC Treaty read together prohibit national legislation by one Member State requiring the reprocessing and repacking of UHT milk produced in another Member State according to methods which are identical to those required by the legislation of the first Member State. The United Kingdom Government considers that, for the reasons already given, the reply to this question should be in the negative.

The *fourth question* is again a question as to the compatibility of the United Kingdom legislation with Community legislation.

The requirement of the United Kingdom legislation that milk should be sold by the pint is in conformity with the terms of Article 7 (2) of Council Directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain pre-packaged liquids, which permits the United Kingdom to defer implementation of this directive (which will require the United Kingdom to permit pre-packaged milk made up in quantities of one litre to be placed on the market within its territory) until 31 December 1979.

This being so, it is in the submission of the United Kingdom impossible to interpret Article 3 (6) of Regulation No 1411/71 as requiring the United Kingdom to permit milk to be sold in a

pre-packed quantity which is, for the time being, not required under Community law.

Accordingly, the fourth question should be answered in the affirmative, which means that the *fifth question* should be answered in the negative.

D — The first point made by the *Commission* is that in the view of the consistent rulings by the Court in past cases it will not challenge the admissibility of the questions even though they concern, at least in part, the compatibility of national legislation with Community law. It then goes on to note that there is a provision in Article 22 (1) of the basic regulation for the sector of milk and milk products (Regulation No 804/68 of the Council of 27 June 1968) which expressly prohibits in the internal trade of the Community the levying of any customs duty or charge having equivalent effect, and any quantitative restriction or measure having equivalent effect.

It does not, however, contain any provisions concerning the production and marketing of milk and milk products.

In spite of the proposals on the subject submitted to it by the Commission, to date the Council has adopted neither general rules concerning the quality and marketing of milk, nor regulations concerning health problems in the production and marketing of heat-treated milk.

The Community legislation on the quality and marketing of drinking milk is therefore incomplete, the more so since harmonization of the national legal systems on the protection of human and animal health has yet to be achieved. For this reason the national legislation remains in force as long as there are no binding Community rules and subject, of course, to the application of the rules of the Treaty.

The *first question* which, as the Commission points out, really concerns Article 3 (6) of Regulation No 1411/71, as amended by Article 2 (6) of Regulation No 566/76, is of doubtful practical relevance, as the distinction between human consumption and other uses is not relevant to the case. It is the milk itself, not the use to which it is put, which might present a danger to public health. In any case it is easy to answer the question, seeing that Regulation No 1411/71 deals solely with drinking milk. Such milk can only be sold in the importing Member State (the United Kingdom in this case) if it meets the guideline figure regarding fat content which the Council has fixed for that Member State.

That does not imply, however, that the Member States must automatically allow milk which meets the guideline figure regarding fat content so fixed to be imported. The provision in question expressly states that the national requirements for the protection of public health are still to apply.

In the *second and third questions* the court making the reference asks whether national legislation requiring the reprocessing and repackaging of UHT milk produced and packaged in another Member State constitutes measures having an effect equivalent to quantitative restrictions and whether, if that is so, the latter, although prohibited by Community law, may be justified under Article 36 of the Treaty.

All the Member States have detailed health control regulations at all stages at which milk is distributed. The main regulations applicable in this respect in the United Kingdom stipulate that all UHT milk sold for consumption must be packaged in Britain on premises registered by the appropriate local authorities. This makes it practically impossible to market in Great Britain UHT milk which has already been prepackaged in another Member State, especially as the British health authorities are not authorized to inspect and, where appropriate, register premises situated in other Member States. The regulations are moreover of such a nature as to discourage in advance all imports, even future ones.

There cannot therefore be any doubt that these regulations answer to the concept of a measure having equivalent effect, as defined by the Court of Justice in numerous judgments.

It is accordingly appropriate to consider whether the restrictions thus imposed on the free movement of UHT milk may be authorized by Article 36 of the Treaty. It is a fact that, in sectors where no provisions have been adopted by the Community to harmonize health regulations, Member States are still entitled to invoke the grounds given in Article 36 to derogate from the prohibition against any measure having equivalent effect. In the sphere of UHT milk this harmonization has not yet been achieved: that is why Regulation No 1411/71 refers to the protection of health provided for by Article 36.

But because it allows a derogation from the fundamental principle of the free movement of goods, Article 36 must be given a strict interpretation. The measures which it authorizes must be not only *justified* on the grounds mentioned therein (meaning, in this case: necessary for the protection of the health of humans and animals) but also appropriate, that is to say, proportionate to the end pursued.

The Commission thinks it is necessary to give some details at this point about the concept of UHT milk, the methods of ultra-high temperature treatment and its effects. By subjecting the milk to a certain temperature for a very brief space of time, its freedom from infectious germs and its long-term preservation can be assured.

The *second* question is expressly based by the court making the reference to the Court of Justice on the assumption of fact that the national legislation requires the reprocessing and repackaging of imported milk even when it has already been treated and packaged by the UHT method in conditions which are identical to those required in the importing country.

The Commission is of the opinion that in those circumstances the national measures in question here cannot be justified under Article 36. They lack the requirement of necessity, because the national authorities cannot act on the basis of vague, generalized assumptions on the risks of contamination, notably by foot and mouth disease. Since the treatment required by British legislation is identical to that to which the product has been subjected prior to being imported into the United Kingdom, it would seem to be manifestly superfluous.

It is, however, possible — adds the Commission — that the UHT milk was treated and packaged in the exporting country in conditions which, whilst not

identical to those required by the importing country, afford hygiene guarantees as to protection from infectious germs which are in large measure equivalent to those of the importing country. This question was not expressly asked by the court making the reference but it would be useful to consider it in view of its importance. Obviously it is difficult to define the equivalent guarantees, because in the absence of harmonization the concepts of health control vary from one country to another. But it does appear that the treatment of milk is in large measure similar from one Member State to another and has the same essential effect; that is to say, the destruction of infectious germs which pose a threat to human and animal health.

But, says the Commission, even if real differences in the results of such UHT treatment could be shown to exist between Member States, the question arises whether that situation justifies the systematic nature of measures of the kind which gave rise to the main action. The authorities in the importing country require, in fact, that all imported milk, regardless of its place of origin, should be reprocessed and repackaged. Now, if a Member State argues that the treatment carried out in the exporting country and certified by the health authorities in that country really offers an equivalent guarantee, the systematic application of the restrictions may be inappropriate and excessive in relation to the purpose of protecting health. Such measures ought to be applied to combat a real, or highly probable, health risk, which can reasonably be disregarded in the case of UHT treated milk.

If the British regulations are really based on considerations relating to health, it is hard to see why the United Kingdom authorities allow milk to be imported in bulk prior to being given UHT treatment in Britain, *a fortiori*, why they allow prepackaged cream — high-temperature treated or even fresh — to be imported without requiring that product to be reprocessed and repackaged. Certainly no less a risk of contamination by infectious diseases is present in these products than in the UHT milk, if the latter does in fact present such risks.

Lastly, these measures are particularly restrictive in view of the fact that, contrary to what happens in most of the other Member States, they do not allow the health authorities in the importing country to check on the spot whether the apparatus used for treating and packaging UHT milk in the exporting country operates in exactly the same way as that used in the importing country or at least affords comparable health guarantees.

As to the point raised by the *fourth question*, it has nothing whatsoever to do with the proviso concerning the protection of health mentioned in Article 3 (6) of Regulation No 1411/71, as amended by Regulation No 566/76. That regulation is silent on the subject of any requirements concerning weights and measures. That does not however exclude the possibility that other Community legislation may concern weights and measures which may have to be complied with in packaging milk.

The British legislation requires imported milk to be prepackaged in quantities of one third of a pint, half a pint or multiples of half a pint, which compels importers to repackage all milk prepackaged for example in one-litre containers.

As far as the Community is concerned, declares the Commission, the Council adopted a directive on 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids (Official Journal 1975 L 42, p. 1). Among other products, milk falls within the sphere of application of that directive, Article 5 of which provides that "Member States may not refuse, prohibit or restrict the placing on the market of pre-packages which satisfy the requirements and tests laid down in this directive for reasons concerning the volume of the contents, the determination of such volume or the methods by which they have been checked". For milk in particular the directive refers to prepackaging in terms of the litre.

However, it is provided in Article 7 (2) of the same directive that certain Member States, including the United Kingdom, are authorized to "defer implementation of this directive and the annexes thereto until 31 December 1979 at the latest".

It follows that, subject to the standstill provision which appears in the same Article, the United Kingdom may until 31 December 1979 impose a requirement as to capacity where milk is prepackaged, namely that it be done in quantities in terms of the pint.

For the above reasons, the Commission proposes the following replies to the questions which have been referred to the Court:

(1) Article 3 (6) of Regulation No 1411/71 of the Council of 29 June 1971, as amended by Regulation No 566/76 should be interpreted as applying only to milk intended for human consumption.

(2) & (3) Regulations requiring the reprocessing and repackaging of UHT milk which has been treated and packaged in another Member State, when such treatment and packaging has not been carried out on premises registered for the purpose by the authorities of the importing country and on that country's territory, constitute a measure having an effect equivalent to quantitative restrictions on imports.

Such measures having an effect equivalent to quantitative restrictions are not justified within the meaning of Article 36 of the EEC Treaty on the grounds of health protection so long as it can be shown — and that is a matter to be decided individually in each case by the national courts — that the UHT milk is accompanied by a certificate or health-control document declaring that the milk has been treated and packaged in the exporting country by means identical to those used in the importing country or affording the same guarantees.

(4) Article 3 (6) of Regulation No 1411/71 of the Council of 29 June 1971, as amended by Regulation No 566/76 provides that, without prejudice to requirements for the protection of public health, Member States shall not prohibit the marketing of standardized whole milk when the fat content of such milk complies with the requirements laid down by Community legislation.

It follows that this regulation does not prejudice other regulations on the subject, particularly those concerning the

making-up by volume of certain pre-packaged liquids such as UHT milk.

Article 7 (2) of the directive issued by the Council on 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain pre-packaged liquids authorizes certain Member States, including the United Kingdom, to defer implementation of the directive until 31 December 1979 at the latest, subject to the standstill imposed by the third paragraph of the same article.

(5) The reply to the preceding questions makes it unnecessary to reply to this question.

III — Oral procedure

The Union Laitière Normande, represented by Mr Funck-Brentano, Advocate at the Cour de Paris, the Government of the United Kingdom, represented by Mr Scott, and the Commission of the European Communities, represented by its Legal Advisers, Mr Lasnet and Mr Hoff-Nielsen, submitted oral observations at the hearing on 31 May 1979.

The Advocate General delivered his opinion at the hearing on 14 June 1979.

Decision

1 In a judgment of 16 October 1978, received by the Court on 6 November 1978, the Tribunal de Commerce, Paris, referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty some questions concerning the interpretation of certain provisions of Council Regulation No 566/76 of 15 March 1976 (Official Journal 1976, L 67, p. 23) amending Regulation (EEC) No 1411/71 as regards the fat content of whole milk, and of Articles 30 and 36 of the Treaty.

2 These questions arose in the course of an action between a group of agricultural co-operatives incorporated under French law and its English subsidiary concerning the performance, on 30 September 1978, of a contract to supply standardized whole milk produced in France and exported to the United Kingdom. The milk in question had a fat content of 3.78 %, had been given ultra-high temperature (UHT) treatment, and was packaged in one-litre containers.

The importing company, which held an import licence for the supplies in question, had not obtained from the British authorities the dealer's licence

required by Regulation 4 in Part II of Statutory Instrument No 1033 of 16 June 1977 — The Milk (Special Designation) Regulations 1977 — in order to market in England all milk, imported or not, under the special designation "UHT".

3 When the aforementioned company decided to terminate the contract in a letter of 12 September 1978, its supplier, the group of agricultural co-operatives, brought an action against it on 27 September 1978 before the Tribunal de Commerce, Paris, for non-performance of the contract concerning those supplies, relying in particular on Regulation No 566/76 of the Council and on Article 30 of the EEC Treaty.

4 The Tribunal de Commerce, Paris, decided to stay proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Can Article 3 (6) of Regulation No 1411/71 (as enacted by Article 2 of Council Regulation No 566/76 of 15 March 1976), which provides that a Member State that opts for the formula of non-standardized whole milk shall not prohibit, without prejudice to requirements for the protection of public health, ... the marketing within its territory of standardized whole milk coming from another Member State, when the fat content of such milk is not less than a guideline figure fixed by the Council ..., be interpreted, as the authorities of the United Kingdom appear to do, as meaning that milk thus imported may be marketed only for purposes other than human consumption?

2. Does the reservation concerning the protection of public health contained in Article 3 (6) of Regulation No 1411/71 (as enacted by Article 2 of Regulation No 566/76) justify British national legislation requiring the reprocessing and repackaging of UHT milk produced and packaged in another Member State according to methods which are identical to those used in the United Kingdom and have been approved by the national administrative authorities in that Member State?

3. If the second question is answered in the negative, does the aforementioned British national legislation constitute a measure having an effect equivalent to a restrictive measure prohibited by the Treaty?

4. Is the application of British weights and measures legislation to milk produced and packaged in another Member State compatible with the terms of Article 3 (6) of Regulation No 1411/71 (as enacted by Article 2 of Council Regulation No 566/76), which stipulates requirements of public health as the only reservation in relation to intra-Community trade?

5. Does the combined effect of the British national measures based on reasons of protection of health and on the application of the national weights and measures legislation constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States such as are prohibited by Article 36 of the Treaty?"

5 Before proceeding to examine the questions which have been referred to the Court for a preliminary ruling, it should be noted that, whilst Article 177 of the Treaty does not permit the Court to evaluate the grounds for making the reference, the need to afford a helpful interpretation of Community law makes it essential to define the legal context in which the interpretation requested should be placed.

6 Although the national court did not give its reasons for asking the Court to interpret the Community law, it appears from the file on the case that it considers an interpretation necessary for its decision on the consequences which are to follow from the non-performance of the disputed contract to ascertain whether the English legislation which prevents the marketing of the products in question within the United Kingdom was or was not, at the date on which those products were imported, justified under Community law.

7 It also appears from the file on the case that, whereas certain provisions in that legislation, such as Regulation 4 in Part II of the British Statutory Instrument No 1033 of 16 June 1977, read together with the provisions in Schedule 2, Part IV require, for obtaining a dealer's licence for whole milk bearing the special designation "UHT", that the product, immediately after having been treated by the UHT method, be packaged on "registered premises", other provisions in the same legislation, especially those in the Weights and Measures Act 1963, provide in paragraph 3, Part V of Schedule

4 that for the marketing of any "pre-packaged" milk, whether imported or not, the product must be made available for distribution in containers of a capacity of one third of a pint, half a pint, or a multiple of half a pint.

8 It is accepted that in this case the milk in question was imported into the United Kingdom and made available for distribution in that Member State in containers with a capacity of one litre. Since this milk was "pre-packed" in a way which did not comply with the requirements laid down by the British Weights and Measures Act 1963, the first difficulty in marketing the goods in England was presented by the provisions in that act, so that in fact the question of the compatibility with Community law of the British legislation concerning the marketing of UHT whole milk in the United Kingdom must, in the case of the imports concerned in this dispute, be considered first with reference to that act.

9 That being so, the fourth question should be answered first and the others examined only if it appears that the British national legislation concerning the packaging of pre-packed milk could not have applied in this case to the marketing in England of the product under discussion.

10 In order to encourage the approximation of the national laws concerning weights and measures in the context of Article 100 of the EEC Treaty, the Council, on the basis of Directive No 71/316 of 26 July 1971 (Official Journal 1971, L 207, p. 1) and Directive No 71/354 of 18 October 1971 (Official Journal 1971, L 243, p. 29), later amended by the Act of Accession, adopted Directive No 75/106 of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain pre-packaged liquids (Official Journal 1975, L 42, p. 1), the provisions of which are, by virtue of point 7 of Annex III, applicable equally to milk when sold by volume.

11 The object of this directive, according to the first recital in the preamble, is to harmonize "the conditions of presentation for sale of liquids in pre-packages", on the ground that these conditions are, in most of the Member States, "the subject of mandatory regulations which differ from one Member State to another, thereby hindering trade in such pre-packages".

12 For those reasons the directive determines the conditions which pre-packages containing the products listed in Annex III, such as milk, measured by volume for the purpose of sale "in individual quantities of between 0·05 litre and five litres inclusive" must satisfy before they may be marketed within the Community, and provides in Article 5 that "Member States may not refuse, prohibit or restrict the placing on the market of pre-packages which satisfy the requirements and tests laid down in this directive for reasons concerning the volume of the contents . . .".

13 The same directive further provides in Article 7 (1) that Member States have a period of 18 months from the date of its notification in which to put into force the laws, regulations and administrative provisions needed in order to comply with it. It also states in paragraph (2) of that Article that "Belgium, Ireland, the Netherlands and the United Kingdom may defer implementation of this directive and the annexes thereto until 31 December 1979 at the latest".

14 Consequently the United Kingdom is authorized until 31 December 1979, by an express provision in the directive cited above, to maintain in force the provisions of its national laws fixing the capacity of packages for products allowed onto the market, in particular those of the Weights and Measures Act 1963, the effect of which is not to allow the marketing of milk in that Member State unless the product is packaged in containers with a capacity of one third of a pint, half a pint or a multiple of half a pint.

15 Since it is accepted that the product in dispute was imported into the United Kingdom pre-packaged in one-litre containers in the course of the year 1978, it follows from Article 7 (2) of Directive No 75/106, cited above, that the provisions in the British Weights and Measures Act can be applied to the marketing of the products in question in England without infringing the rules of Community law.

16 On those grounds the reply to the fourth question must be that since the final date for implementing the provisions of Council Directive No 75/106

of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain pre-packaged liquids was, by Article 7 (2) thereof, deferred in the case of the United Kingdom until 31 December 1979 at the latest, the retention by that Member State of the provisions of the Weights and Measures Act 1963 was not, at the date of the imports in question, prohibited by the rules of Community law and could therefore at that date be applied to the marketing in England of pre-packaged milk from another Member State, made up in containers of a capacity of one litre.

17 Since the reply to the fourth question makes it unnecessary to examine the other questions referred by the national court for a preliminary ruling, a decision on them is not required.

Costs

18 The costs incurred by the Government of the French Republic, the Government of the United Kingdom and the Commission of the European Communities, which submitted observations to the Court are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Commerce, Paris, by judgment of 16 October 1978, hereby rules:

Since the date for the implementation of the provisions of Council Directive No 75/106 of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain pre-packaged liquids was, by Article 7 (2) thereof, deferred in the case of the United Kingdom until 31 December 1979 at the latest, the

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

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 12 July 1979.

A. Van Houtte
Registrar

H.Kutscher
President

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

Mr President,
Members of the Court,

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

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

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

1 — Translated from the French.