which rests on observance of a fixed relationship between the aids in question. On the contrary, it implies that the Community authorities enjoy a margin of discretion in the matter which permits them to lay down the relationship between the aid for skimmed milk and the aid for skimmed-milk powder having regard to all the market information listed in Article 2a (1) and to adjust that relationship in accordance with the requirements of the common organization of the market to which the products involved are subject.

2. Within the context of the determination of an "appropriate relationship" within the meaning of the second sentence of Article 2a (3) of Regulation No 986/68 between the aid for skimmed milk and skimmed-milk powder for use as animal feed, the reasons which are such as to justify the size of the gap to be created between the aid for skimmed milk and the aid for skimmed-milk powder may not be based on the particular position of certain undertakings or groups of undertakings concerned but must stem from the sector concerned as a whole and from a comprehensive assessment of the relationships subsisting in the common market between the one product and the other.

3. Article 2 (1)(a) of Regulation No 986/68 does not require that a maximum price must always be fixed for skimmed milk sold by dairies to farms which use it as feed whenever the relationship between the aid for skimmed milk and skimmed-milk powder is fixed in such a manner that skimmed milk benefits from a relatively larger aid than that granted for skimmed-milk powder. The fact that Commission Regulation No 1049/78 does not provide for the fixing of such a price does not therefore affect the validity of that regulation.

4. The statement of the reasons upon which a regulation is based must be regarded and assessed in the context of the body of legislation of which that measure forms an integral part. Therefore, the requirements of Article 190 of the EEC Treaty are satisfied if an implementing regulation contains an explicit reference to provisions of the basic regulation and thus allows recognition of the criteria which were taken into account when the regulation was adopted.

In Case 35/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven [Administrative court of last instance in matters of trade and industry], The Hague, for a preliminary ruling in the proceedings pending before that court between

DENKAVIT NEDERLAND BV, Voorthuizen,

supported by:

VERENIGING VAN NEDERLANDSE MENGVOEDERFABRIKANTEN, The Hague,

FACHVERBAND DER FUTTERMITTELINDUSTRIE EV, Hamburg,

SYNDICAT NATIONAL DES INDUSTRIELS DE L'ALIMENTATION ANIMALE, Paris,

interveners,

and

PRODUKTSCHAP VOOR ZUIVEL [Dairy Board], Rijswijk,

on the interpretation of Regulation No 986/68 of the Council of 15 July 1968 and *the validity of Article 1 of Commission Regulation (EEC) No 1049/78* of 19 May 1978,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore (President of Chamber), Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, A. Touffait and O. Due, Judges,

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

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. Article 10 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) introduced financial aid for skimmed milk and skimmed-milk powder produced in the Community for use as feedingstuffs. The general rules relating to the grant of that aid were laid down by Regulation (EEC) No 986/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 260), Article 2 (1) of which mentions, amongst the products for which aid may be granted, (i) skimmed milk produced and processed in a dairy and sold to farms where it is used as feed and (ii) skimmed-milk powder used in the manufacture of compound feedingstuffs. Article 2a of that regulation, which was

inserted by Regulation (EEC) No 666/74 of the Council of 28 March 1974 (Official Journal 1974 L 85, p. 58), provides *inter alia* that the amount of the aid for skimmed-milk powder shall be fixed "within a margin", which as from 22 May 1978 was between 38 and 48 units of account per 100 kilograms, and it lays down, moreover, that for skimmed milk the aid "shall bear an appropriate relationship" to that fixed for skimmed-milk powder. By Regulation No 1049/78 of 19 May 1978 (Official Journal 1978 L 134, p. 26) the Commission fixed the aid for the 1978/79 milk year at 4.4 units of account per 100 kilograms in the case of skimmed milk and at 43 units of account per 100 kilograms in the case of skimmed-milk powder.

2. Between 1 and 15 December 1978 inclusive the plaintiff in the main proceedings, Denkavit Nederland BV (hereinafter referred to as "Denkavit"), a manufacturer of compound animal feedingstuffs, used 1 171 063 kilograms of skimmed-milk powder in its production. The Produktschap voor Zuivel, the body entrusted with implementing aid in the Netherlands, granted Denkavit aid at the rate of HFL 146.32 per 100 kilograms, calculated in accordance with the above-mentioned provisions.

Denkavit appealed against the Produktschap's decision, which it considered to be founded on an invalid Community regulation, namely Regulation No 1049/78. Denkavit is supported in its appeal by three associations of manufacturers of compound feedingstuffs using skimmed-milk powder, whose intervention in the main proceedings was allowed on 3 September 1979.

3. By judgment of 22 January 1980 the court before which the appeal had been brought stayed the proceedings and submitted the following questions to the Court of Justice pursuant to Article 177 of the EEC Treaty:

"1. Properly interpreted, do the words 'appropriate relationship' in the second sentence of Article 2 a (3) of Regulation (EEC) No 986/68 of the Council — either pursuant to the principle of equality which is fundamental to the Treaty, or pursuant to the prohibition on discrimination laid down in Article 40 of the Treaty or for any other reason — mean that the relationship between the amount of aid for skimmed-milk powder and that for skimmed milk should be equal to the relationship between the number of kilograms of skimmed milk from which one kilogram of skimmed-milk powder may be obtained (at the present state of technology 10.7 to 10.8 kilograms) on the one hand and one kilogram of skimmed-milk powder on the other, and is Article 1 of Commission Regulation (EEC) No 1049/78, under which the relationship between the amounts of aid is 9.77, for that reason not binding?

2. If Question 1 is answered in the negative: properly interpreted, do the words 'appopriate relationship' in the second sentence of Article 2 a (3) of Regulation (EEC) No 986/68 of the Council — either pursuant to the principle of equality which is fundamental to the Treaty, or pursuant to the prohibition on discrimination laid down in Article 40 of the Treaty or for any other reason — mean that in fixing the relationship between the amount of aid for skimmed milk and that for skimmed-milk powder the Commission has a discretionary power which is limited in the sense that (within the limits within which account can be taken of the factors referred to in paragraph (1) of the said article in view of the aims of the aid) the Commission could not reasonably have fixed the

relationship at 9.77 and is Article 1 of Commission Regulation (EEC) No 1049/78 for that reason not binding?

3. If Question 2 is also answered in the negative: properly interpreted, does Article 2 (1) (a) *in fine* of Regulation (EEC) No 986/68 of the Council mean that a maximum price, within the meaning of that provision, must always be fixed for skimmed milk which is sold to farms for use as feedingstuff, if the relationship between the amount of aid for skimmed milk and for skimmed-milk powder is fixed in such a manner that relatively greater aid is provided for skimmed milk than for skimmed-milk powder, and is Commission Regulation (EEC) No 1049/78 for that reason not binding, since it does not fix such a maximum price for skimmed milk?

4. Properly interpreted, does the obligation to state reasons set out in Article 190 of the Treaty mean that in Commission Regulation (EEC) No 1049/78 insufficient reasons are stated for the relationship applicable under that regulation between the amount of aid for skimmed milk and that for skimmed-milk powder and is Article 1 of the said regulation for that reason not binding?"

4. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Denkavit and the three associations intervening in its support, all represented by W. Alexander, of the Bar of The Hague, and by the Commission of the European Communities, represented by H. Bronkhorst, a member of its Legal Department, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It did, however, ask the Commission to provide by 1 September 1980 statistical information showing the changes, as from the 1976/77 milk year, in the use made of the intervention system for skimmed-milk powder.

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

Denkavit prefaces its examination of the questions with certain introductory considerations.

It explains at the outset that the main litigation relates to aid for skimmed milk and aid for skimmed-milk powder only in so far as those products are intended for feeding calves, which constitutes moreover the principal use for those products.

Skimmed-milk powder is merely the result of the dehydration of skimmed milk. On average, about 10.75 kilograms of the latter are required in order to obtain one kilogram of skimmed-milk powder.

The two products, which in reality are only one product presented in different forms, have the same uses. As a raw material intended for fattening claves, they are interchangeable. They are however supplied to consumers by, or through the medium of, two types of producer, namely dairies in the case of skimmed milk, and independent manufacturers of compound feedingstuffs in the case of skimmed-milk powder incorporated in compound feedingstuffs.

These two categories of producer are competitors in a very important market.

Since the price of beef and veal is not guaranteed by the common organization of the market it has not been possible to fix a high Community price for milk because that would have rendered that material too costly for fatteners and rearers of calves. A corrective to the price was therefore introduced in the form of aid for skimmed milk and skimmed-milk powder for use as feedingstuffs. In that way it was possible to make skimmed milk available to its users at prices they could afford and the principal Community outlet for that product was maintained.

By virtue of Regulation No 986/68, the aid thus introduced is paid to dairies in the case of liquid skimmed milk intended for animal feed and to the manufacturers of compound feedingstuffs in the case of skimmed-milk powder incorporated in those feedingstuffs.

Under the second sentence of Article 2a (3) of Regulation No 986/68, aid for skimmed milk is to bear an appropriate relationship to the aid fixed for skimmed-milk powder.

The amounts of aid fixed by Commission Regulation No 1049/78 are in the ratio of 9.77 (43 units of account per 100 kilograms in the case of skimmed-milk powder and 4.4 units of account per 100 kilograms in the case of skimmed milk). Since, as has been seen, one kilogram of skimmed-milk powder may be obtained from 10.7 kilograms of liquid skimmed milk, the liquid skimmed-milk equivalent of 100 kilograms of skimmed-milk powder would benefit from aid amounting to 47.30 units of account (4.4 × 10.75). The aid granted for 100 kilograms of skimmed-milk powder is thus less, by 4.30 units of account, than that granted for 100 kilograms of the dry matter contained in the liquid skimmed milk. This artificially created difference in the cost price of the products in question may assume crucial importance in the choice of supplier since it leads to a difference of HFL 22 on the total sum expended on feedingstuffs for fattening a calf. This may determine whether a fatstock calf will return a profit or a loss. In fact, that difference has already led to an increased use of liquid skimmed milk to the detriment of skimmed-milk powder. Since that difference has been substantially maintained even in Regulation No 1361/79, which replaced Regulation No 1049/78, the manufacturers of compound feedingstuffs have good reason to fear that it may become permanent.

So far as the *first question* is concerned, Denkavit considers that the term "appropriate relationship" occurring in the second sentence of Article 2a (3) of Regulation No 986/68 should not be contrasted with the term "equal" which is used in Article 2 (1) (d) of the same regulation and that both terms express one and the same principle.

If liquid skimmed milk is used in the manufacture of (dry) compound feedingstuffs it is possible to determine with precision the quantity of dry matter contained in that milk and therefore to provide that the aid for that dry matter should be equal to the aid for skimmed-milk powder intended for the same purpose.

Liquid skimmed milk intended for feeding calves is, on the other hand, delivered in that state to the farmer with the result that the aid per unit of weight granted in respect of that product clearly cannot be equal to that granted per unit of weight for skimmed-milk powder. In order to ensure that aid is only granted for the dry matter of skimmed milk recourse was had to the concept of an "appropriate relationship" which allows

account to be taken of the average composition of liquid skimmed milk produced in the common market as a whole.

Both the requirement of an "appropriate relationship" and the rule of "equality" are based on the same principle: the incidence of the aid on the utilization of skimmed-milk powder must be the same as its incidence on the utilization of skimmed milk for animal feed.

That principle stems from Article 2a (1) of Regulation No 986/68 which lists the factors which must be taken into account when the aid is fixed. None of those factors, however, warrants a difference as to the effect of the aid depending upon whether liquid skimmed milk or skimmed-milk powder is involved.

It follows therefore that Article 1 of Regulation No 1049/78 is invalid inasmuch as the Commission has adopted a relationship which is not the "appropriate relationship" within the meaning of the second sentence of Article 2a (3) of Regulation No 986/68.

The *second question* arises only if the answer to the first question is in the negative. Even if it is assumed that the appropriate relationship is not necessarily that existing between a given weight of skimmed-milk powder and the quantity of liquid skimmed milk which must be dehydrated in order to obtain that quantity of powder, that still does not mean that the appropriate relationship may be the relationship adopted by the Commission.

According to the case-law of the Court, the general principle of equality, which finds particular expression in the prohibition of discrimination contained in Article 40 of the EEC Treaty, requires that similar situations shall not be treated differently unless differentiation is objectively justified.

A breach of equality of treatment was established by the Court in the cases known as the quellmehl and gritz cases (Joined Cases 117/76 and 16/77 *Ruckdeschel & Co. and Another* and *Diamalt AG* [1977] ECR 1753 (quellmehl) and Joined Cases 124/76 and 20/77 *SA Moulins et Huileries de Pont-à-Mousson* and *Société Coopérative "Providence Agricole de la Champagne"* [1977] ECR 1795 (gritz)). Each of those cases concerned products which were admittedly interchangeable but distinct from a technological and commercial point of view and as regards which the difference in the aids did not exceed one unit of account per 100 kilograms. There is all the more reason for holding a breach to have occurred in the present case where the two products involved are not only interchangeable as regards their principal use, which is the feeding of calves, but are in reality only two forms of the same product, namely skimmed milk before and after dehydration, and where the difference in the aids amounts to 4.30 units of account per 100 kilograms. The reduction, by means of aids payable by the Community, of the relative costs of one of the competing products necessarily leads to a distortion of competition and has extremely serious effects.

Moreover, no objective justification may be invoked for the difference in treatment and the artificial advantage which dairies enjoy.

In the main proceedings the Produktschap submitted that the relatively higher level of aid for skimmed milk is warranted by the Community's concern to promote, with a view to stabilizing the market in milk products, the use on Community farms of as large a quantity as possible of skimmed milk in liquid form for feeding animals so as to restrain the production of skimmed-milk powder and thus reduce the intervention buying of that product.

That consideration might be valid if it referred to the situation in 1968 when there was a general aid for skimmed-milk powder and skimmed milk for feeding all species of animal, without distinction. Since then, however, the market has changed greatly and the use of milk for feeding young animals other than calves has been exposed to fierce competition from protein-based vegetable products. In that sector, therefore, a very large aid for skimmed milk was fixed, which would indeed promote the disposal of that product as compared with vegetable products and thus have the effect of restricting the production of skimmed-milk powder. However, in the calf sector skimmed milk was never in competition with protein sources other than skimmed-milk powder with the result that the larger aid granted for it could at most lead to a reduction in the use of skimmed-milk powder which would then have to be offered as such for intervention.

Moreover, in 1974 the amending regulation, Regulation No 666/74, inserted in Regulation No 986/68 more specific criteria for the fixing of the aids for skimmed-milk powder and skimmed milk. Those criteria contain no factor justifying the inequality in the aids granted in the calf sector.

The argument that the difference in treatment is justified by the fact that only skimmed-milk powder may be offered for intervention is devoid of relevance since a dairy may, if it wishes, convert skimmed milk into skimmed-milk powder.

The difference which exists between the aids does not lead to an increase in the total consumption of skimmed milk and skimmed-milk powder taken together but, rather, disproportionately reduces the consumption of skimmed-milk powder. Indeed, skimmed-milk powder which is incorporated into a compound feedingstuff is taken into consideration for the grant of aid only if the compound feedingstuff contains more than 60 % by weight of skimmed-milk powder. Liquid skimmed milk on the other hand is always taken into consideration where it is used for the feeding of animals, irrespective of the quantity. Consequently, the fact of giving a relative advantage to the use of liquid skimmed milk may lead to a reduction in the total consumption of skimmed milk and skimmed-milk powder taken together.

In short, it may be said that the relatively higher level of aid for liquid skimmed milk on the one hand favours, in an artificial manner, dairies (and manufacturers of compound feedingstuffs who are linked to dairies) to the detriment of individual manufacturers of compound feedingstuffs and, on the other hand, does not succeed in increasing the total consumption of skimmed milk and skimmed-milk powder taken together.

On the basis of these considerations the conclusion ought to be reached that it was not open to the Commission to fix a relatively larger aid for skimmed milk and that accordingly Article 1 of Regulation No 1049/78 is invalid.

The *third question* arises only if the two preceding questions are answered in the negative.

According to Denkavit, even if the introduction of a relatively larger aid for skimmed milk was justified, the Commission infringed Article 2 (1)(a) *in fine* of Regulation No 986/68 by not at the same time fixing a maximum price at

which a dairy might sell that skimmed milk.

Since its adoption in 1968, Regulation No 986/68 of the Council has provided in Article 2 (1)(a) thereof that

"(1) Aid may be granted for:

(a) skimmed milk produced and processed in a dairy differentiated from other skimmed milk in a manner to be specified and sold to farms where it is used as feed at a price not exceeding any maximum price which may be fixed;

..."

That provision is founded in the second recital in the preamble to the said regulation, which is worded thus:

"... payment of aid to the dairy for skimmed milk should, where appropriate, be subject to the condition that the dairy has not charged a higher price for the processed skimmed milk than any maximum price which may be fixed ..."

As appears clearly from that recital, the aforementioned Article 2 does not confer on the Commission a discretionary power to fix or not to fix a maximum price for subsidized skimmed milk but places on that institution the obligation of making the grant to the dairy of aid for skimmed milk subject, where appropriate, to a maximum selling price.

The event justifying the fixing of a maximum price, which is referred to in Article 2 (1)(a) of Regulation No 986/68, consists in a difference between the aid for skimmed-milk powder and that for liquid skimmed milk, since in such a case it is necessary to guarantee that the larger aid should also reach its final destination, that is to say, the livestock fattener.

In 1968 there existed such a difference between the aids. That difference was abolished in 1972 and the Commission, by Regulation No 675/72, abolished the maximum price fixed by Regulation No 1105/68.

In effect, as from the 1972/73 milk year the Commission considered that the relatively similar amount of the aids made the fixing of a maximum price superfluous. A difference between the aids was again introduced as from 1 May 1976. At that time the Commission ought to have again fixed a maximum price but it did not do so either then or subsequently. By fixing, as from 1976, a relatively larger aid for liquid skimmed milk without at the same time fixing a maximum price for it, the Commission contravened the aforementioned Article 2 (1)(a) of Regulation No 986/68 of the Council.

The *fourth question* is concerned with whether adequate reasons have been stated for the relationship between the aid for skimmed milk and that for skimmed-milk powder adopted in Regulation No 1049/78.

The relatively larger aid for skimmed milk was introduced by Commission Regulation (EEC) No 935/76 which gives no indication of any reason justifying the alteration of the previously existing relationship between the aid for skimmed-milk powder and the aid for liquid skimmed milk intended for animal feed. The difference was subsequently maintained by Regulations (EEC)

Nos 784/76, 977/77, 1049/78, 1361/79, which also give no indication of the reason justifying the relationship adopted.

It is true, of course, that the reasons upon which a regulation is based do not have to be stated exhaustively or in great detail but they must give an explanation for at least the essential part of the provisions which have been enacted so that persons concerned may be in a position to defend their rights and the Court of Justice may carry out judicial review.

That means:

— That the considerations which were decisive as regards the adoption of a decision must be stated;

— That, in particular, where there is any question of the exercise of discretionary powers the explanation must satisfy strict requirements.

The Commission regulations in question, particularly Regulation No 1049/78, in no way indicate why an additional aid was introduced for liquid skimmed milk when the aids had been the same for years.

The absence of any statement of the reasons upon which it is based means therefore that Regulation No 1049/78 is invalid since it contravenes Article 190 of the EEC Treaty. It is suggested that the appropriate course for the Court to adopt is to declare the provision under challenge to be incompatible with the applicable superior rules and principles and to add that it is for the Commission to take the necessary measures to remove that incompatibility.

The *Commission of the European Communities* considers that there is no reason for holding that Regulation No 1049/78 is lacking in validity.

In regard to the *first question* it is appropriate to observe that had the Council intended that a "mathematical relationship", such as that contended for by Denkavit, should exist between the aid for skimmed-milk powder and the aid for liquid skimmed milk, it would have sufficed for it to lay down once and for all a fixed coefficient for the aid in favour of the latter.

In fact, Article 2a of Regulation No 986/68 contains in paragraphs (1) and (4) a fairly wide range of factors concerning both skimmed-milk powder and skimmed milk on the basis of which the Commission must reach its decision within the framework of certain discretionary powers which it enjoys. The expression "appropriate relationship" may not be interpreted in the sense of a relationship of equality and the Commission is free to grant a relatively larger aid for one product than for the other.

This conclusion is not invalidated by the wording of Article 2 (1)(d) of Regulation No 986/68 which, on the contrary, only confirms it. That provision requires that the same aid be granted for skimmed-milk powder produced in a dairy and used in the manufacture of compound feedingstuffs as for skimmed milk produced in the same fashion for the same purposes and subsequently mixed in powder form with compound feedingstuffs.

Thus there is an obligation to pay relatively equal aid for two products which in the final analysis are identical and which are in a similar situation and cannot therefore be treated in a different manner. No such obligation is specifically laid down for the other products mentioned in Article 2 (1). Therefore, the general rule contained in the second sentence of Article 2a (3),

under which the size of the aid must be fixed not on the basis of relative equality but only in an appropriate relationship, continues to apply to those products.

Nor is Regulation No 1049/78 incompatible with the prohibition of discrimination contained in Article 40 (3) of the EEC Treaty. So far as the alleged discrimination between producers is concerned, it must be noted that manufacturers of skimmed-milk powder use special, expensive plant in the preparation of their products. They are therefore placed in a situation which is objectively different from that of producers of liquid skimmed milk so that a difference in treatment by the Community legislature appears justified.

In regard to the comparability of the products, it appears from the case-law of the Court that two products must be treated similarly if they are interchangeable and the choice between one or the other depends essentially on the costs of supply. But, by reason of the advantages, as compared with liquid skimmed milk, which skimmed-milk powder possesses in terms of storage, conservation and quantities required, it is impossible to state that the use of one or other of these two products depends essentially on the costs of supply.

Denkavit's arguments are therefore unsound. So far as a comparison between dairies on the one hand and manufacturers of compound feedingstuffs on the other hand is involved, the comparison relates to different producers between whom no comparison can be made and to the manufacture of products which are not comparable.

As for the *second question*, it should be observed that in exercising the discretionary power which it enjoys under the second sentence of Article 2a (3) it is open to the Community to take into consideration a large number of factors relating to agricultural policy.

In fixing a relatively smaller aid for skimmed-milk powder than that for skimmed milk the Commission took into consideration various factors. First, it considered it appropriate to confer a small advantage on a product the manufacture of which, in contrast to skimmed-milk powder, is not especially demanding in energy and the use of which had undergone a certain decline in recent years because of the preference shown by farmers for skimmed-milk powder. Secondly, it did not consider it necessary also to give the certainty and advantage of a relatively high price to producers of skimmed-milk powder, who already have the advantage of being able to offer their product for intervention.

These factors satisfactorily justify the grant of a slightly higher level of aid for skimmed milk than for skimmed-milk powder.

In regard to the *third question*, it is clear from the wording of Article 2 (1)(a) that the Commission is not obliged to fix a maximum price at which dairies must sell skimmed-milk powder to undertakings where the same is used for feeding cattle, although it is empowered to do so. For that reason, a regulation which does not fix such a maximum price cannot be regarded as valid.

So far as the *fourth question* is concerned, the Commission considers that it duly satisfied the requirement to state the reasons upon which the regulation was based by referring in its regulation to the factors listed in Article 2a of

Regulation No 986/68 and to the market situation of skimmed milk and skimmed-milk powder. That fairly succinct statement of reasons is consistent with the case-law of the Court of Justice according to which the statement of reasons upon which a regulation is based "may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve on the other".

On the basis of the foregoing, the Commission suggests that the questions put by the College van Beroep should be answered as follows:

"Consideration of Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed has disclosed no factor of such a kind as to warrant a finding that Regulation No 1049/78 is invalid."

III — Oral procedure

Denkavit and the parties intervening in support in the main proceedings and also the Commission of the European Communities submitted oral argument at the sitting on 23 September 1980.

The Advocate General delivered his opinion at the sitting on 21 October 1980.

Decision

1 By judgment of 22 January 1980, which was received at the Court on 28 January 1980, the College van Beroep voor het Bedrijfsleven submitted to the Court, pursuant to Article 177 of the EEC Treaty, several questions on the interpretation of Regulation No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260) and on the validity of Commission Regulation No 1049/78 of 19 May 1978 fixing, for the 1978/79 milk year, the amount of the aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal 1978, L 134, p. 26).

2 Those questions have been raised in the context of a dispute between a manufacturer of compound animal feedingstuffs and the Produktschap voor Zuivel, which is the national intervention body in the Netherlands entrusted with implementing the Community system of aids for milk. The dispute is concerned with the amount of the aid for skimmed-milk powder granted to the said manufacturer by that body in respect of the quantity of that product used between 1 and 15 December 1978.

3 The national provisions applied in the present case by the Produktschap voor Zuivel are based on Commission Regulation No 1049/78 of 19 May 1978 fixing the amount of the aid for skimmed milk and skimmed-milk powder for use as feed. Article 1 of that regulation fixed the amount of aid to be applied as from 22 May 1978 at 43 units of account per 100 kilograms for skimmed-milk powder and 4.40 units of account per 100 kilograms for skimmed milk. The power to fix the aid for skimmed milk and for skimmed-milk powder was in fact conferred upon the Commission by Regulation No 662/74 of the Council of 28 March 1974 (Official Journal 1974, L 85, p. 51) which extended to the fixing of these aids the procedure known as the "Management Committee procedure" provided for in Article 30 of Regulation No 804 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176).

4 The aforementioned manufacturer appealed against the decision of the Produktschap voor Zuivel awarding it the said aid on the ground, in particular, that that decision was based upon a regulation which contravened Regulation No 986/68 of the Council by providing for a higher level of aid for liquid skimmed milk than for skimmed-milk powder, lacked an adequate statement of the reasons upon which it was based and entailed discrimination in breach of the Treaty.

5 It is in order to decide this issue relating to the validity of Commission Regulation No 1049/78 that the national court before which the appeal was brought has submitted to the Court of Justice in the present reference questions relating to the interpretation of Regulation No 986/68 of the Council.

First question

6 In its first question the national court asks the Court of Justice whether the words "appropriate relationship", which occur in the second sentence of Article 2a (3) of Regulation No 986/68, require that the aid for skimmed milk and the aid for skimmed-milk powder must in every case be fixed according to the criterion which is set forth in Article 2 (1)(d) of that regulation and which is based on observance of the relationship which exists between one kilogram of skimmed-milk powder and the number of kilograms of skimmed milk from which the said quantity of skimmed-milk powder may be obtained. That relationship is approximately 10.75 kilograms of skimmed milk to each kilogram of skimmed-milk powder. In putting that

question, the national court seeks to ascertain whether, because it fixes for skimmed milk an amount of aid which does not respect the above-mentioned criterion but is equivalent to a relationship of 9.77 kilograms of skimmed milk per kilogram of skimmed-milk powder and thereby confers on skimmed milk an advantage over skimmed-milk powder, Commission Regulation No 1049/78 is contrary to Article 2 (1)(d) and the second sentence of Article 2a (3) of Regulation No 986/68 of the Council.

7 In effect, the issue which the Court is thus called upon to decide is whether the "appropriate relationship" between the aid for liquid skimmed milk and the aid for skimmed-milk powder which is stipulated for by the second sentence of Article 2a (3) of Regulation No 986/68 is quite simply the fixed relationship laid down in Article 2 (1)(d) of the same regulation.

8 Article 2 (1) provides that:

"1. Aid may be granted for:

(a) skimmed milk produced and processed in a dairy, differentiated from other skimmed milk in a manner to be specified and sold to farms where it is used as feed at a price not exceeding any maximum price which may be fixed;

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

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

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

9 This provisions draws a distinction between two categories of skimmed milk: on the one hand, milk falling under subparagraphs (a), (b) and (c), which is

used directly "as feed" and, on the other hand, the specific products falling under subparagraph (d), namely milk used "in the manufacture of compound feedingstuffs".

10 It is only in subparagraph (d) that Article 2 (1) adopts the principle that the aid for skimmed milk and the aid for skimmed-milk powder must be fixed in such a manner as to respect the relationship which exists between a given quantity of skimmed milk and the quantity of skimmed-milk powder which can be obtained from it. That form of drafting shows clearly that the application of that principle does not extend to all categories of skimmed milk but applies exclusively as regards the products expressly mentioned in subparagraph (d), that is to say milk "produced and processed in the dairy and used in the manufacture of compound feedingstuffs". It is in fact indisputable that, at that stage of utilization, liquid skimmed milk and skimmed-milk powder must be regarded as comparable products.

11 Accordingly, it is only as respects skimmed milk produced and processed in a dairy and used in the manufacture of compound feedingstuffs that the producer of skimmed-milk powder intended for the same purpose may, by virtue of the provisions of Article 2 (1)(d) of the said regulation, claim that the aid for each of the products should be laid down in accordance with the fixed relationship indicated by those provisions.

12 So far as the products referred to in subparagraphs (a), (b) and (c) of Article 2 (1) are concerned, the criteria which must be taken into account in fixing the amount of the aid cannot therefore be derived from subparagraph (d) of that article. Those criteria are supplied by Article 2a of Regulation No 986/68 of the Council, as amended by Regulation No 666/74 of the Council, which requires that the aid for skimmed milk bear an "appropriate relationship" to the aid fixed for skimmed-milk powder.

13 The aforementioned Article 2a lists, in paragraph (1) thereof, the factors which must be taken into account in the creation of such a relationship. It appears from that list that the determination of an "appropriate relationship" between the aids for those products depends upon a complex assessment touching simultaneously on the market situation, trends in prices, the supply situation as regards skimmed milk and skimmed-milk powder and the use of those products for animal feed.

14 That assessment precludes the application of the criterion mentioned in Article 2 (1) (d) of the said regulation, which rests on observance of a fixed relationship between the aids in question. On the contrary, it implies that the Community authorities enjoy a margin of discretion in the matter which permits them to lay down the relationship between the aid for skimmed milk and the aid for skimmed-milk powder having regard to all the market information listed in Article 2a (1) and to adjust that relationship in accordance with the requirements of the common organization of the market to which the products involved are subject.

15 Commission Regulation No 1049/78 is precisely in accordance with those rules. In fact, the first recital in the preamble thereto refers expressly to Article 2a (1) of Regulation No 986/68 of the Council, thus showing that in fixing the aid for skimmed milk at 4.40 units of account per 100 kilograms and the aid for skimmed-milk powder at 43 units of account per 100 kilograms the Commission took into consideration the factors listed in that provision in order to establish between those aids an "appropriate relationship" within the meaning of the second sentence of Article 2a (3).

16 Moreover, the application of such a "relationship" between the aid for skimmed milk and that for skimmed-milk powder is not contrary to the prohibition of discrimination laid down in the second paragraph of Article 40 (3) of the Treaty.

17 Indeed, the fact that the fixing of the aid for skimmed milk used "as feed" must take account of several factors relating to the state of the market for that product, considered in particular in comparison with the market for skimmed-milk powder, in itself precludes a relatively larger aid for skimmed milk than that for skimmed-milk powder from being regarded as involving discrimination as against the latter product since the difference between the two aids corresponds to the needs of the markets in question and the requirements of the common organization by which the said products are covered.

18 For all these reasons the answer to the first question must therefore be that, by the words "appropriate relationship", the second sentence of Article 2a (3) of Regulation No 986/68 of the Council does not require that the aids for skimmed milk and for skimmed-milk powder intended for animal feed and lying outside the scope of Article 2 (1) (d) must necessarily

be fixed at amounts such that the relationship between those aids is equal to that between one kilogram of skimmed-milk powder and the quantity of skimmed milk from which it may be obtained. Therefore, since it proceeds upon a proper construction of that provision, Commission Regulation No 1049/78 does not display any invalidating factor in this respect.

Second question

19 In its second question the national court wishes to know whether, in the event of the answer to the first question being in the negative, the Commission in this case, in Article 1 of Regulation No 1049/78, exceeded the margin of discretion which it enjoyed by virtue of Article 2a (1) of Regulation No 986/68 of the Council when fixing an "appropriate relationship", within the meaning of the second sentence of Article 2a (3) of that regulation, between the aid for skimmed milk and the aid for skimmed-milk powder.

20 As has already been stated, in fixing the level of aid for skimmed milk and for skimmed-milk powder used as feed, the Commission is bound to take into consideration all the factors listed in Article 2a (1) of Regulation No 986/68 so that the relationship between the two aids may accord with the needs of the market for each product and the requirements of the common organization of the markets in question.

21 Within the context of that assessment, the reasons which are such as to justify the size of the gap to be created between the aid for skimmed milk and the aid for skimmed-milk powder may not be based on the particular position of certain undertakings or groups of undertakings concerned but must stem from the sector concerned as a whole and from a comprehensive assessment of the relationships subsisting in the common market between the one product and the other.

22 On this matter it is not open to dispute, first, that the conditions under which skimmed milk and skimmed-milk powder used as feed are marketed and utilized are not identical, particularly because of the advantages in terms of conservation, storage and quantities required which skimmed-milk powder

offers in comparison with liquid skimmed milk and, secondly, that skimmed-milk powder has access to other markets, such as that for feedingstuffs for animals other than young calves under more favourable conditions than liquid skimmed milk.

23 It is also indisputable that skimmed-milk powder may benefit from the advantages offered by the intervention system provided for in Article 6 of Regulation No 804/68, whereas skimmed milk is excluded from access to such a system.

24 Moreover, the opportunity of being offered for intervention, which is available only to skimmed-milk powder, is the source of difficulties in the functionining of the common organization of the market in question since it has precisely the effect of encouraging the processing of skimmed milk into skimmed-milk powder so that it may gain access to the intervention system with the result that it contributes to the aggravation of the financial burden afflicting that system. The figures supplied by the Commission in answer to a written question put by the European Parliament on 23 November 1979 (Written Question No 1150/79, Official Journal C 66, p. 46) reveal precisely that in 1978 the processing of skimmed milk into skimmed-milk powder increased by 8.9% in comparison with the previous year.

25 Therefore, having regard to these factors, it does not appear that in fixing the aids at levels such that the relationship between the aid for skimmed milk and that for skimmed-milk powder for use as feed was 9.77 the Commission committed an obvious error or a misuse of power or that it clearly exceeded the limits of its discretionary power.

26 For those reasons, the answer to the second question must be that in fixing the aids at levels such that the relationship between the aid for skimmed milk and that for skimmed-milk powder for use as feed was 9.77 the Commission did not exceed, in Regulation No 1049/78, the limits of the margin of discretion which it enjoys by virtue of Article 2a of Regulation No 986/68 when fixing the amounts of the aids for those products.

Third question

27 In its third question the national court asks whether, in the event of the answer to the second question being in the negative, the last sentence of Article 2 (1) (a) of Regulation No 986/68 must be interpreted as meaning

that a maximum price, within the meaning of that provision, must always be fixed for skimmed milk which is sold to farms for the purpose of feed if the relationship between the amount of aid for skimmed milk and for skimmed-milk powder is fixed in such a manner that a relatively higher level of aid is provided for skimmed milk than for skimmed-milk powder and whether, consequently, because it does not fix such a maximum price, Regulation No 1049/78 must be regarded as invalid.

28 Article 2 (1) (a) of Regulation No 986/68 provides that aid may be granted for skimmed milk produced and processed in a dairy and sold to farms where it is used as feed "at a price not exceeding any maximum price which may be fixed".

29 As appears from the very wording of this provision, the fixing of a maximum price for the sale by dairies of skimmed milk to farms which use it for feed is only provided for in regard to that tpye of milk and is envisaged as a possibility and not as a necessary condition for the grant of the aid.

30 To submit, as does the plaintiff in the main proceedings, that such a possibility consists in the application of an "appropriate relationship" which does not respect the fixed relationship mentioned in Article 2 (1) (d) of Regulation No 986/68 amounts to depriving the second sentence of Article 2a (3) of that regulation of any useful purpose, since the mandatory application of a maximum price whenever the aids in question are not laid down in accordance with a fixed relationship would have precisely the result of introducing into the criteria governing the fixing of the aid for skimmed milk which are laid down by that provision an automatic mechanism which is excluded by Article 2 (1) (a) of Regulation No 986/68 and which is contrary to the principles underlying Article 2a (1) of that regulation.

31 Having regard to these factors, therefore, the answer to the third question must be that Article 2 (1) (a) of Regulation No 986/68 of the Council does not require that a maximum price must always be fixed for skimmed milk sold by dairies to farms which use it as feed whenever the relationship between the aid for skimmed milk and skimmed-milk powder is fixed in such a manner that skimmed milk benefits from a relatively larger aid than that granted for skimmed-milk powder. The fact that Commission Regulation

No 1049/78 does not provide for the fixing of such a price does not therefore affect the validity of that regulation.

Fourth question

32 In its fourth question the national court asks, finally, whether Commission Regulation No 1049/78 satisfies the obligation, laid down by Article 190 of the Treaty, to state the reasons upon which it is based.

33 The statement of the reasons upon which this regulation is based must be regarded and assessed in the context of the body of legislation of which this measure forms an integral part.

34 Article 2a (1) of Regulation No 986/68 sets forth the rules governing the fixing of the aid for skimmed milk and for skimmed-milk powder for use as feed.

35 The first recital in the preamble to Commission Regulation No 1049/78 contains an express reference to that provision and thus allows recognition of the criteria which it takes into account both for the fixing of the aid for skimmed milk and for the fixing of the margin to be maintained between that aid and the aid for skimmed-milk powder. The second recital in the preamble to that regulation states that the amounts of aid fixed by the regulation follow from the application of those rules "to the present market situation".

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

Costs

The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these 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 College van Beroep voor het Bedrijfsleven, The Hague, by judgment of 22 January 1980, hereby rules:

1. **By the words "appropriate relationship" the second sentence of Article 2a (3) of Regulation No 986/68 of the Council does not require that the aid for skimmed milk and that for skimmed-milk powder which are intended for animal feed and do not come within Article 2 (1) (d) must necessarily be fixed at such levels that the relationship between those aids is equal to the relationship between one kilogram of skimmed-milk powder and the quantity of skimmed milk from which one kilogram of skimmed-milk powder can be obtained. Therefore, since it proceeds upon a proper construction of that provision, Commission Regulation No 1049/78 does not display, on this point, any invalidating factor.**

2. **In fixing the aids at levels such that the relationship between the aid for skimmed milk and that for skimmed-milk powder for use as feed was 9.77, the Commission did not exceed, in Regulation No 1049/78, the limits of the margin of discretion which it enjoys by virtue of Article 2a of Regulation No 986/68 when fixing the aids for those products.**

3. **Article 2 (1) (a) of Regulation No 986/68 of the Council does not require that a maximum price must always be fixed for skimmed milk sold by dairies to farms which use it as animal feed whenever the relationship between the aid for skimmed milk and the aid for skimmed-milk powder is fixed in such a manner that skimmed milk benefits from a relatively higher level of aid than that granted for skimmed-milk powder. The fact that Commission Regulation No 1049/78 does not provide for the fixing of such a maximum price does not therefore affect the validity of that regulation.**

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

Mertens de Wilmars Pescatore Mackenzie Stuart

O'Keeffe Bosco Touffait Due

Delivered in open court in Luxembourg on 14 January 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

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

Mr President,
Members of the Court,

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

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

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

1 — Translated from the French.