On those grounds,

THE COURT,

in answer to the question referred to it by the Landgericht Oldenburg by order of 8 September 1976, hereby rules:

Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs is null and void.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 5 July 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 7 JUNE 1977 [1]

Mr President,
Members of the Court,

1. The Community suffers chronically from an in-built surplus in milk and milk-products. This situation is the result of an over-abundant supply, the long-term increase in which is estimated to be in the region of about 1·7 % per year, compared with a demand which is stagnant. More specifically, in recent years, the consumption of butter has fallen, that of liquid milk has been comparatively unchanged though showing a tendency to fall and only the consumption of cheese has increased. The surplus production of milk has been accompanied by a considerable extension of plant for its processing into skimmed-milk powder. There has, accordingly, been a rapid and very substantial increase in stocks of this product held by the intervention agencies. From approximately 160 000

1 — Translated from the Italian.

metric tons on 1 January 1973, the figure rose to about 1 000 000 metric tons on 1 January 1976 with a continuing tendency to rise during the first half of that year.

This growth in stocks has been paralleled by a gradual increase in the intervention price for milk powder, which rose from 47 units of account per 100 kg in 1971/1972 to 54 u.a. in 1972/1973; to 79 u.a. in 1974; to 88 u.a. in 1975; and subsequently to 90·16 u.a. in 1976.

In so far as skimmed-milk powder is intended for human consumption it has been possible to sell it on the market at prices approaching the intervention price. But the volume of output disposed of in this way is comparatively small.

On the other hand, in order to be competitive on the market in feeding-stuffs and taking account of the level of the prices of animal foods with a comparable protein content, powdered milk must be offered at a price which is about a sixth of that paid to the producer by the intervention agencies.

It is against this background that consideration must be given to Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (OJ L 67 of 15. 3. 1976, p. 18).

The preamble to this enactment begins by pointing out that 'stocks of skimmed-milk powder bought in by intervention agencies pursuant to Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products ... have reached considerable proportions'. Since the stocks available represent an important source of protein which can be used in animal feeding-stuffs and in order to encourage its use in feeding-stuffs for animals other than calves (in whose case milk is already part of their normal diet) the Council considers that 'provision should be made for the compulsory purchase of a certain quantity of skimmed-milk powder which has been denatured to prevent its being used for purposes other than those intended'.

Article 1 of the aforesaid regulation provides accordingly.

In consequence the granting of aid provided for under Community legislation for a variety of vegetable substances normally used in animal feeding-stuffs (colza, rape and sunflower seeds, linseed, soya beans and others) is, under Article 2, subject to the presentation of a document proving the purchase and the denaturing of the skimmed-milk powder (as stated in the preamble to the regulation, denaturing is required as a precaution against the product's being used for purposes other than for feeding-stuffs). Alternatively, Article 2 provides for the provision of a security, the purpose of which is to ensure that purchase and denaturing are subsequently effected and which, under Article 4, is in fact released upon proof that those operations have taken place.

Furthermore, release into free circulation in the Community of a number of vegetable products, coming from third countries and intended for use in feeding-stuffs, which constitute the majority of products of this kind consumed in the Community, is, under Article 3, subject to presentation of a 'protein certificate'. In order to obtain this certificate the applicant must provide security or submit the document already described.

In the case of contracts concluded before 15 March 1976, the date of entry into force of the regulation, the burden of the costs arising under these arrangements is to be borne by the successive purchasers of the products referred to in Articles 2 and 3 or of protein products processed therefrom. This is laid down in Article 5 of the regulation.

Finally is should be noted that, under Article 11, it was intended that the regulation should apply from 1 April 1976. Article 3 (1) concerning the requirement of a 'protein certificate' for release into free circulation and Article 5 concerning the transfer, to the purchaser, in the case of previous contracts, of the burden of the costs had, however, already been applicable since 19 March 1976. Article 11 also lays down the date of expiry of the regulation and provides that it shall apply to Community-grown colza, rape and other seeds in respect of which a deposit has been lodged or the document referred to in Article 6 has been submitted before 31 October 1976 and to products which have been imported from other countries before that date.

Power to extend the scheme, provided for under the last paragraph of Article 11, was not used by the Council, which rejected a proposal to that effect submitted by the Commission.

The basic rules laid down by the regulation were clarified and supplemented between March and July 1976 by means of regulations of the Commission prescribing detailed rules for its application, namely the regulations numbered 677 (dated 26 March 1976), 746, 749, 753 (of 31 March), 764 (of 1 April), 902 (of 20 April), 1110 (of 13 May), 1131 (of 14 May), 1409 (of 18 June) and 1743 (of 20 July 1976).

All I need to add is that, in addition to laying down detailed rules concerning applications, and the release and validity of the 'protein certificates', Regulation (EEC) No 677/76 set out the rates of security for individual products in the annex thereto, while Regulation (EEC) No 753/76 laid down detailed rules for the sale of skimmed-milk powder for use in animal feed.

2. The common, and central, issue in the various cases, which have been joined for the oral proceedings and are taken jointly for the purposes of this opinion, is whether Regulation (EEC) No 563/76 is or is not compatible with the provisions of the EEC Treaty. The view that it is not compatible was, to some extent on the same grounds, put forward in the four actions for damages brought against the Council and the Commission (Cases 83 and 94/76, 4 and 15/77) and in the four judgments in which various national courts referred the matter to the Court for a preliminary ruling on questions of interpretation (Cases 114, 116, 119 and 120/76).

The applicants in the first four cases, the German undertakings Bayerische HNL Vermehrungsbetriebe GmbH and Co. KG, Bernd Adleff, F.X. Zollner KG and Christof Schwab, carry on the business of production and sale of chickens, breeding of laying hens and production and sale of eggs. They claim to have suffered damage as a result of the increase in the price of feeding-stuffs in consequence of the application of Regulation (EEC) No 563/76.

Three of the cases in the second group (Cases 116, 119 and 120) arise in connexion with proceedings pending before the College van Beroep voor het Bedrijfsleven of the Netherlands, the Finanzgericht Hamburg and the Finanzgericht Bremen, respectively. Those proceedings arise out of actions by importers against action taken by the national authorities refusing to allow, during the period from 15 April to 11 May 1976, the importation of vegetable feeding-stuffs without prior presentation of the 'protein certificate' or, in Case 116/76, refusing to issue the said certificate until security had been lodged.

On the other hand, Case 114/76 arises from a dispute between two undertakings: the plaintiff produces fodder and feeding-stuffs from raw materials obtained from various importers and the defendant, which raises laying hens, had bought the feeding-stuffs which it required from the plaintiff. As those

supplying the first undertaking had passed on to it the charge imposed under Regulation (EEC) No 563/76, it wished in turn to pass the charge on to the defendant which, however, refused to pay the amount involved. The first undertaking accordingly brought its action before the Landgericht Oldenburg for the payment to which it claimed to be entitled under Regulation (EEC) No 563/76. In common with the three courts referred to earlier, the Landgericht Oldenburg asked the Court of Justice to give a preliminary ruling on the validity of the said regulation.

More particularly, it should be noted that the issue concerning the validity of Regulation (EEC) No 563/76 is contained in one comprehensive question from the Finanzgerichte Hamburg and Bremen and the Landgericht Oldenburg in different but not substantially different terms, while the College van Beroep voor het Bedrijfsleven has asked seven questions relating to seven situations in which the said regulation may be incompatible with Community law, in each of which the result would be that the regulation was 'not binding'. I do not regard it as necessary to repeat the text of these questions since their contents fall to be discussed in turn when I come to consider the various aspects of the issue.

In each of the cases referred to above invalidity is alleged to arise from the following:

Infringement of Article 39 (1) of the Treaty, which lays down the objectives of the common agricultural policy;

Infringement of the provision, in the second subparagraph of Article 40 (3) of the Treaty, prohibiting discrimination;

Breach of the general principle of proportionality.

In addition, the infringement of Articles 85 (1) (e) and 86 (d) of the Treaty namely, the rules protecting freedom of competition, is a fourth charge common to all the proceedings with the exception of Case 114/76.

The facts to be considered in this connexion are the same in all the cases.

Although we are dealing with two groups of proceedings the subject-matter and object of which are quite different, it is for the purposes of this opinion perfectly feasible to consider at one and the same time the legal issues which are common to all of them and which are concerned with the validity of one and the same regulation of the Council. This does not alter the fact that, from the procedural point of view, there is a considerable difference between the cases in each group: in the proceedings for a preliminary ruling, once the questions referred to the Court have been answered, the case is disposed of, whereas in the proceedings for damages, the answer will only be the first step as regards the issues of liability and damage. The determination of these issues will in fact depend on the answer to be given to the question relating to the validity of Regulation (EEC) No 563/76: it will be necessary to give them consideration only if the regulation is found to be manifestly wrongful. The regulation is the result of choices of economic policy made under discretionary powers and as such cannot give rise to non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty unless a flagrant violation of a superior rule of law for the protection of the individual has occurred (see the recent judgment of 31 March 1977 in Joined Cases 54 to 60/76, *Compagnie Industrielle et Agricole du Comté de Loheac and Others* v *Council of the European Communities*).

Apart from the grounds indicated above, which are common to all the cases with which we are concerned, the validity of the regulation has been contested on certain other grounds particularized in

one or other of the cases. I shall return to them after dealing with the common issues.

3. By way of introduction attention must be given for a moment to the general issue of judicial review of the use of the discretionary powers available to the Council and the Commission in defining and applying the common agricultural policy.

It is beyond dispute that, although the Court is invested with the responsibility of reviewing the validity of regulations, it has no power to evaluate the wisdom of choices of economic policy made by the Council or by the Commission. It is called upon to consider whether or not there has been an infringement of the limits imposed by rules in the Treaty or general principles upon the exercise of the discretionary powers conferred on these Community institutions. It is not, therefore, for the Court to say whether, in the light of the economic situation, the Council could have adopted a better provision than that the validity of which is called in question. The Court has itself declared that 'the courts cannot substitute their own evaluation of the matter for that of the competent authority but must restrict themselves to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power' (judgment of 14 March 1973 in Case 57/72, *Westzucker* v *Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 321).

This does not, however, mean that it is altogether out of the question for the Court to appraise economic considerations to the extent to which their appraisal is necessary in determining the legality or otherwise of the measure. As we shall see later, this will be the case in particular when inquiry is made into the observance of the principle of proportionality. But it is clearly no part of the Court's duties to assess the wisdom or otherwise of an aspect of economic policy adopted by the Council or by the Commission or to go into the propriety of economic provisions on which certain decisions of those bodies were based. As to the assessment of the need for a measure or of the seriousness of the situation which led to it, there may be cases in which the Court is called upon to make it, for example, in cases where the validity of protective measures is in question and it is accordingly necessary to determine the existence or otherwise of conditions which justify them. But this is only an example: in reality the provision under consideration in the present cases has nothing to do with protective measures since the only thing involved is an administrative measure affecting the agriculture market connected with a structural situation aggravated by economic conditions at a given time.

4. The first of the charges which are common to the various cases is, as we have seen, concerned with the incompatibility of Regulation (EEC) No 563/76 with the objectives of the common agricultural policy laid down in Article 39 (1) of the Treaty. Without quoting that provision word for word, I would remind the Court that the objectives which it lays down are, in essence, the following:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production;
(b) thus to ensure a fair standard of living for the agricultural community;
(c) to stabilize markets;
(d) to ensure the availability of supplies; and
(e) to ensure that supplies reach consumers at reasonable prices.

The undertakings which are consumers of feeding-stuffs and are involved in the present proceedings contend that the obligation to purchase the skimmed-milk powder in question bears no relation to any of those objectives and that, furthermore, there has been an

infringement of the provision in the first subparagraph of Article 40 (3) of the Treaty upon which, to be valid, the Council regulation must be based. That provision lays down that 'the common organization established in accordance with paragraph (2) may include all measures required to attain the objectives set out in Article 39'. The undertakings claim that the contested regulation was by no means necessary for the achievement of the objectives referred to in Article 39. Apart from having nothing to do with ensuring the availability of supplies or reasonable prices for consumers it does not encourage an increase in agricultural productivity but is inconsistent with the rational development of agricultural production and the aim of ensuring a fair standard of living for the agricultural community. With reference to the question of fixing the intervention price for milk at too high a level, the undertakings concerned contend that, far from helping to stabilize the markets, it results in over-production and an increase in stocks. In their view, stabilization of markets must mean the adjustment of supply to demand, in particular the demand within the Community; when this consideration is taken into account, the whole Community policy in milk and milk products as subsequently expressed in the regulation under consideration must be regarded as alien to the pursuit of that aim.

On the other hand, the Commission and the Council contend that Regulation (EEC) No 563/76 is justified in terms of the pursuit of the objective of stabilization of markets. In this connexion they point out that, on account of the unacceptable level of stocks of skimmed-milk powder built up during 1975, the regulation was intended to prevent their further increase. In particular, the Commission maintains that the stabilization of the market requires not only preventive measures but also corrective measures designed to obviate or reduce the consequences of an already existing imbalance. If the usefulness of the measures in question is to be assessed in relation to their purpose they must be looked at against the general background of the Community's policy in milk and milk-products.

Furthermore, according to the Commission, the measure adopted was not only, for the foregoing reason, appropriate for the stabilization of the markets but was an essential indeed the only feasible one for the purpose since action designed to eliminate the causes of the structural surpluses would not have been able to contribute in the short term to the reduction of stocks. The introduction of a levy which, in the long term, is better calculated to produce an improvement in the situation, could not, however, be achieved from one day to the next because of the many problems to which it gave rise.

Before commenting on these conflicting arguments, I think it would be as well to reiterate a principle which I laid down earlier: an appraisal of whether or not the regulation is consistent with Articles 39 and 40 of the Treaty cannot involve consideration of the whole of the Community's economic policy in milk and milk-products. I refer in particular to the question of the fixing of intervention prices for milk, which, it is contended, are excessively high and which gave rise to the surplus situation which Regulation (EEC) No 563/76 sought, in part and on an interim basis, to correct.

In view of this, the question arises what connexion an agricultural regulation must have with Article 39 for it to be considered valid. It is clearly impossible to claim that every legislative measure must pursue all the objectives laid down in the article; it is sufficient that it should pursue one of them. But the main difficulty arises from the fact that, on occasion, the pursuit of one objective leads to the neglect of others.

According to Granaria, the plaintiff in Case 116/76, which in particular put

forward the arguments on this point, a regulation which, while calculated to achieve certain objectives of Article 39, runs contrary to other objectives laid down therein must be regarded as inconsistent with Article 39 and, in consequence, invalid. This, it claims, is exactly the position with Council Regulation (EEC) No 563/76.

Such a concept is perhaps somewhat inflexible and doctrinaire. The multiple objectives of Article 39 involve requirements which in practice may, in the context of a particular measure, conflict with each other. It is, accordingly, easy to imagine situations in which the pursuit of an objective which is regarded as having priority can be achieved only by means of measures which are in point of fact incompatible with another of the objectives aid down in the same provision.

In its judgment of 13 March 1968 in Case 5/67, *Beus* v *Hauptzollamt München* [1968] ECR 83, the Court ruled that the objectives of Article 39, which are intended to safeguard the interests of both farmers and consumers, may not all be simultaneously and fully attained.

From this it follows that the Council must be acknowledged to have the power to reconcile the various interests involved and if necessary to make a choice in each individual case, giving priority to one interest over another having regard to considerations of expediency arising out of the particular circumstances. This is moreover in line with the principles laid down by the Court in the context of the coal and steel market in its judgment of 8 February 1968 in Case 28/66, *Netherlands* v *Commission* [1968] ECR 1. Referring to the general objectives set out in Articles 2 and 3 of the ECSC Treaty, the Court held on that occasion that they cannot always be pursued simultaneously in their totality and that the Community must reconcile them and, *when conflict arises,* must grant such priority to one or other of the objectives as appears necessary, having regard to the economic facts or circumstances. The same principle has also been expressly recognized as being applicable to the objectives of Article 39 of the EEC Treaty (judgment of 24 October 1973 in Case 5/73, *Balkan Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091).

It is clear that in exercising these economic policy options, the Council has a wide margin of discretion. Accordingly, it is not enough to establish that, in a particular intervention measure, one objective or the other is subordinated or sacrificed to the claims of another to justify a finding that the Treaty has been infringed: what must be established is that the facts do not justify the sacrifice of that objective.

In the present case, the question to be determined is whether Regulation (EEC) No 563/76 does, in fact, conflict with any of the objectives set out in Article 39. According to the undertakings concerned there is above all incompatibility with the objective in subparagaph (a) relating to increased agricultural productivity inasmuch as the regulation is the last link in a chain of provisions imposing an artificially high level of prices and thereby increasing surplus production of milk at the cost of the rational development of production.

I have already said that the previous conduct of the Council, except in circumstances in which it gives rise to illegal acts which, in law, constitute the basis for the regulation under consideration here, cannot be a decisive factor in determining whether or not the regulation is valid. Again, we have seen that Regulation (EEC) No 563/76 was intended to make good a situation which, on an objective view, was one of difficulty for the intervention agencies both on account of the size of stocks and the financial burden thus involved. While, in the circumstances, it is true that the regulation contributes nothing to

the objectives referred to in Article 39 (1) (a), neither, in my view, can it be said that, in itself, it conflicts with it.

Again, the undertakings concerned have alleged that the regulation in question is also in conflict with the second objective provided for in Article 39 (1). They contend that this objective, which is to ensure a fair standard of living for the agricultural community, must be achieved by increasing productivity, promoting technical progress, the rational development of production and the optimum utilization of the factors of production, that is to say, in accordance with the guidelines laid down in Article 39 (1) (a). This is clear, they state, from the wording of Article 39 which, after prescribing these guidelines in paragraph (1) (a) as primary objectives of the agricultural policy, lays down, in subparagraph (b), the need '*thus* to ensure a fair standard of living for the agricultural community'. From this it is argued that the attainment of this objective must be pursued by means of the measures provided for under subparagraph (a).

Although such a strict interpretation is literally justified by the wording of Article 39 (1) (b), it does not appear to satisfy the working requirements of a system which is characterized by the need to cope with urgent and conflicting needs. Prominent among those needs are those of a social character which, in the short term at least, frequently require purely economic considerations to take second place. In the present circumstances such an interpretation might justify the conclusion that the whole of the market policy so far followed by the Community is illegal in view of the fact that, as we are aware, its essential basis is the fixing of prices to suit agricultural products in order to assure farmers of an adequate income, whereas the policy favouring the modernization and structural improvements and, in consequence, the rational development of agricultural production has been late in gathering momentum and is now evolving slowly and with considerable difficulty.

In my opinion it would be fair and realistic to interpret the provisions in question as meaning that it is only in the long term that the objective in Article 39 (1) (b) can be secured through the attainment of the other objective, referred to in subparagraph (a), namely structural improvement. But to lay down that there must have been, since the entry into force of the Treaty, an essential and automatic relationship between the two kinds of objective would have made any Community action impossible in terms of market policy, since no structural policy had yet been laid down, nor would it have been possible to put one into effect within a short time.

In my view, the foregoing considerations make it impossible, on any but a long-term view, to accept the argument that the first two objectives of Article 39 are strictly connected with each other.

Apart from this possibility, Granaria pointed out that the obligation to purchase imposed by Regulation (EEC) No 563/76 has made feeding-stuffs dearer and has accordingly increased the cattle raisers' costs without a corresponding increase in their returns. This, it claims, is a further point of conflict between the regulation and Article 39 (1) (b).

On the other hand the Commission emphasized that, in terms of social policy, it would not have been fair to make milk producers solely responsible for paying the charges which had to be borne in order to facilitate the disposal of stocks of skimmed-milk powder. A solution along these lines would, in practice, have meant a retroactive reduction in the guaranteed prices previously granted to milk producers.

In this connexion it must be borne in mind that the question of the various

consequences for the different categories of farmer of the measure concerned must be reconsidered in the light of the principles of non-discrimination and of proportionality. In terms of the compatibility of the measure in question with the objective contained in Article 39 (1) (b), it must, I think, be recognized that there is no conflict.

Finally, viewed in the light of Article 39 (1), Regulation (EEC) No 563/76 appears to be valid in so far as it pursues the aim of stabilizing the market in milk powder and is not inconsistent with other aims. It must, of course, be borne in mind that the regulation was not intended to provide a radical solution for the problem of the surplus in milk powder but merely to alleviate certain negative results of a policy which undoubtedly required to be reviewed. There seems to be no doubt whatever that the regulation in question, regarded in the short term, was able to provide partial relief in a serious situation of imbalance and, accordingly, to make a contribution to the stabilizing of the market.

5. The second question, common to all the cases dealt with in this opinion, is concerned with observance of the principle of non-discrimination. In particular, the Court is asked to rule whether Regulation (EEC) No 563/76 does or does not contravene the second subparagraph of Article 40 (3) of the EEC Treaty, under which the common organization of the market 'shall exclude any discrimination between producers or consumers within the Community'.

The question of discrimination within the meaning of that provision concerns the relationship between persons who, apart from belonging to the same category (that of producers or that of consumers) are engaged in the same activity or in similar or competing activities, because it is only in this way that it is normally possible to compare their respective situations and to identify any discriminatory treatment. But the principle is also of more general application.

In its judgment of 24 October 1973 in Case 5/73, *Balkan Import-Export* v *Hauptzollamt Berlin-Packhof* ([1973] ECR 1091, especially paragraph 26 of the Grounds of Judgment) the Court held (and here I depart from the incorrect wording of the Italian version) that Article 40 refers only to discrimination between producers or between consumers while the balance to be held between the conflicting interests of these two groups is dealt with in Article 39.

In the present case there can be no question of discrimination between milk producers who may indirectly be regarded as benefiting from the regulation made by the Council and breeders involved in the present cases who purchase feeding-stuffs and who are called upon to pay the costs arising from that regulation. There are two grounds for this: in the first place, Regulation (EEC) No 563/76 does not confer any advantages on milk producers who, at most, have benefited from the purchase of milk powder by the intervention agencies, which is something which occurred and still occurs independently of the application of the regulation. In this connexion I need not reiterate that the Community's general policy with regard to milk and milk-products is not the subject of review here. Secondly, a distinction may be drawn between a category of producers and a category of consumers since Regulation (EEC) No 563/76 produces unfavourable results for cattle breeders not in their capacity as such but as purchasers of feeding-stuffs. It must not be forgotten that the obligation to purchase milk powder is imposed on producers and importers of seeds and the cost is charged to the purchasers of these seeds only within the limits of Article 5 of the regulation.

Now that that has been made clear, consideration must be given to the question of discrimination or, in general

terms, the question whether it is legal for particular categories (in the present case, producers or importers of seeds for use in feeding-stuffs or breeders who are purchasers of animal feed) to be made to bear the economic burden of unfavourable situations which have developed in other industries or, more especially, whether in this particular case it is possible to speak of discrimination within the category of breeders.

I turn first to the second possibility. In this connexion the Commission has claimed that the system laid down in Regulation (EEC) No 563/76 deals with the general subject of feeding-stuffs for animals (with the sole exception of calves) and makes no distinction between the various groups of breeder. This is technically beyond dispute. It is true that, as a matter of economic fact, it is poultry farmers and, although to a lesser extent, pig breeders who bear the financial cost of the system introduced by the regulation either because, in contrast with cattle breeders who are often milk producers as well, they bear the burden of the system without any corresponding benefit, or because they depend on feeding-stuffs purchased on the market to a greater extent than cattle breeders who can at the appropriate time of the year have additional recourse to pasture in order to feed their herds. Since, however, these considerations are connected with circumstances which do not always operate in favour of an entire category and in any case are outside the field to which Regulation (EEC) No 563/76 specifically applies, they are in my view insufficient to justify the view that that measure conflicts with the rule of non-discrimination contained in the second subparagraph of Article 40 (3).

As regards the question of non-discrimination in its wider sense, the Commission has stated that there is nothing to prevent traders outside a given sector from being also called upon to share the burden resulting from over-production within that sector. It contends that, apart from a specific relationship between the sector bearing the charges and the sector receiving the benefits there is a general inter-relationship between all sectors of agriculture because of their inter-dependence. In any case, there is a direct connexion between vegetable proteins and animal proteins because both form part of a wider market in proteins.

The Ölmühle undertaking, the plaintiff in Case 119/76, has for its part recognized that there might be justification for a difference in treatment required in the general interests of the Community. It takes the view, however, that in the present case this condition does not obtain inasmuch as the charges imposed by the regulation in question serve only in part to correct the mistakes made by the Council and the Commission in regard to milk. It contends that such a limited objective does not justify the abandonment of the interests of parties who have no connexion with the milk sector and have received no benefit from the policy followed.

I can, in fact, find no basis for distinguishing between measures calculated to ensure the efficient working of the Common Market on the one hand and those which, on the other hand, help merely to reduce the harmful effects of previous Community policy in a particular field. Even the provisions in the second group protect a public interest, namely, that of avoiding the worst and restoring normal conditions.

This still leaves unanswered the basic question whether it is permissible, in the general interest of the Community, 'to impose specific burdens and sacrifices upon categories outside a sector in difficulty. The answer which can reasonably be given to this question can be neither definitely affirmative nor definitely negative: everything depends on the extent of the burden and of the availability of alternative solutions. For

this reason the issue will be considered from the standpoint of the principle of proportionality even though some aspects of it appear *prima facie* concerned with the subject of non-discrimination. At this juncture I should like to say that in my view little weight should be attached to the Commission's statement that there is a direct connexion between the vegetable protein sector and the animal protein sector. And I should like to recall that during the debates on the draft regulation submitted to the Council by the Commission, which provided for the compulsory inclusion of skimmed-milk powder in feeding-stuffs, the European Parliament adopted a resolution in which, while accepting that, as part of a short-term solution to the problem of surpluses, recourse might be had *inter alia* to the inclusion of skimmed-milk powder in feeding-stuffs, it nevertheless refused to accept that pigmeat producers and poultry-farmers should have to bear a substantial part of the financial consequences of the sale of those surpluses. According to the statement of the Council in its rejoinder in Joined Cases 83 and 94/76, the Commission, as a result of the resolution, amended its original proposal by suggesting to the Council that it should no longer be made compulsory to include denatured skimmed-milk powder in feeding-stuffs but only to purchase it. But I do not see how the basic issue raised by the European Parliament can be resolved in this manner.

6. The third question calling for a reply is whether in the present case the principle of proportionality has been complied with. The difference in concept between that principle and the principle of non-discrimination may be described in these terms: non-discrimination is concerned with the relationship between various groups of persons and takes the form of equality of treatment by bodies vested with public authority, whereas the principle of proportionality means that the burdens imposed on the persons concerned must not exceed the steps required in order to meet the public interest involved. If, therefore, a measure imposes on certain categories of persons a burden which is in excess of what is necessary — which must be appraised in the light of the actual economic and social conditions and having regard to the means available — it violates the principle of proportionality.

The need to have regard to that principle in reviewing the validity of Community measures which impose burdens and restrictions on those affected by them first found expression in the case-law of the Court in its judgment of 13 July 1962 in Case 19/61, *Mannesmann AG* v *High Authority* [1962] ECR 357. On that occasion the Court held that 'the High Authority, in working out and applying the financial arrangements which it has established to safeguard the stability of the market, has indeed a duty to take account of the actual economic circumstances in which these arrangements have to be applied, so that the aims pursued may be attained under the most favourable conditions and with the smallest possible sacrifices by the undertakings affected'.

In the judgment of 17 December 1970 in Case 25/70, *Einfuhr- und Vorratsstelle Getreide* v *Köster* [1970] ECR 1161, the Court was called upon to decide whether the Commission, in making, in one of its regulations, the grant of a licence subject to the obligation to export and to the lodging of a forfeitable deposit, had not contravened the principle that the means must be proportionate to the end. The judgment referred to laid down that this principle, which represents a fundamental right, is one of the general principles of law protected by the Court of Justice. The burdens arising under the regulation in question were therefore examined in order to establish whether they were necessary and appropriate to the attainment of the aim in view. The Court also took into account the amount of the deposit required in order to

determine whether it was in proportion to the total value of the goods and of the other trading costs on the basis that if there had been a disproportion, it would have given rise to a breach of a fundamental right. The Court took a similar consideration into account in its judgment of 11 May last in Joined Cases 99 and 100/76, *Roomboterfabriek 'De Beste Boter'*, concerning a different type of security.

The Court had to deal with another question relating to proportionality in its judgment of 24 October 1973 in Case 5/73, *Balkan Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, in connexion with the levying of compensatory amounts in the milk and milk-products sector, introduced under Regulation (EEC) No 974/71. On that occasion, the Court emphasized that, in exercising their powers, the Community institutions must ensure that the amounts which traders are charged are no greater than is required to achieve the aim which the authorities are to accomplish.

The judgment of 13 November 1973 in Joined Cases 63 to 69/72, *Werhahn* v *Council* [1973] ECR 1229, was concerned with similar issues; the economic circumstances were examined in detail in order to ascertain whether, in the light of the objectives being pursued, the fixing of entry prices at an excessively high level constituted a breach of the principle of proportionality.

In the judgment of 9 March 1976 in Case 95/75, *EFFEM* v *Hauptzollamt Lüneburg* [1967] ECR 361, it was held that the provisions relating to an export levy to be applied to cereals were infringed in circumstances where the levy was fixed at a standard rate without taking account of the quantity of raw materials contained in the finished product. In contrast to the Advocate General, the Court did not in that case expressly refer to the principle of proportionality but I feel justified in saying that the decision was based on that principle.

Finally, I would point out that the Court has referred to proportionality as a criterion in a whole series of judgments relating to the freedom of movement and of establishment and of freedom to provide services which the Treaty confers on individuals. In those cases, however, the principle of proportionality was applied as a measure of the legality of national provisions and measures restricting those rights.

I turn now to the present case. The burden imposed by Regulation (EEC) No 563/76 on producers and importers of seeds for use in feedingstuffs which, as we have seen, may be passed on to breeders who purchase animal feed, can be calculated by taking two factors into account: the price fixed for the compulsory purchase of milk powder and the actual value of that product compared with the price of other substances having the same nutritional value. Under Article 1 of Commission Regulation (EEC) No 753/76, the price at which the intervention agencies sold skimmed-milk powder for use in animal feed was 52·16 u.a. per 100 kg ex store. According to a working document of the Commission dated 3 February 1976, to which reference has been made by some of the parties claiming damages in the present proceedings, the market value of that type of milk at the time, having regard to its protein value compared with that of other feeding-stuffs, may be reckoned to be in the region of 15 u.a. per 100 kg. As for the price of substitute products it must be borne in mind that in the answer submitted on 3 May 1977 to certain questions put by the Court, the Commission admitted that the nutritive value of broken soya beans is, weight for weight, substantially the same as that of skimmed-milk powder and stated that, during the period when Regulation (EEC) No 563/76 applied, the price of broken soya beans was, on average, a little over 17 u.a. per 100 kg (with fluctuations from 13·3 to 20·4 u.a.).

Breeders were in consequence obliged to purchase milk powder for animal feed at a price which was more than three times its actual market value. The burden represented by the difference between the imposed price and the market value — about 35 u.a. per 100 kg — amounted to a kind of tax levied on the aforementioned categories to meet the need to dispose of surplus milk-powder stocks.

In fact, according to a report of the Federal German Minister for Agriculture, quoted by the Council, the increase in costs incurred by the breeders as a result of the obligation to purchase milk powder amounted to 2·81 % in the case of feeding-stuffs for use by poultry and to 1·34 % in the case of feeding-stuffs for use by pigs. The question therefore arises whether that need could have been satisfied by imposing a less onerous burden on those categories.

Two answers can be given to that question. The first and rather obvious one is that the sacrifice would certainly have been more evenly distributed if it had been indirectly shared by all citizens of the Community by making the Community budget bear the whole of the cost. In this connexion it must be borne in mind that even if the Community had sold the milk powder for animal feed at the imposed price of 52·16 u.a. per 100 kg, it still lost, in 1976, 38 u.a. per 100 kg, which is the figure representing the difference between the intervention price and the selling price. It is worth noting that this possibility was the solution adopted later by the Community after the expiry of Regulation (EEC) No 563/76; in fact, by virtue of Regulation (EEC) No 2706/76 of 8 November 1976, the selling price of denatured milk powder for animal feed was drastically reduced from 52 to 17 u.a. account to enable it to be competitive on the market. The second answer may be based on the fact that the costs of processing liquid skimmed milk into milk powder and of subsequent denaturing are higher than the market price of this milk for use in animal feed, namely prices of from 17 to 19 u.a. per 100 kg compared with the price of 15 u.a., referred to earlier, according to the information available which was confirmed at the hearing. If, therefore, continued encouragement had not been given to the processing of liquid milk into a milk powder which, in so far as it was for use in animal feed, had a market value less than the mere costs of processing and if an attempt had, instead, been made to reduce the extent of such processing, devoting the liquid milk to different uses, and actually destroying a part of it, it would have been possible, at less total cost, to prevent the growth of surplus stocks of milk powder. In those circumstances the extent of the burden on producers and importers of feeding-stuffs and upon cattle raisers could have been less. At the hearing, the Commission objected that destruction of huge quantities of liquid milk might have created problems from the ecological standpoint. I do not find that argument very convincing. In any event it cannot, in my view, be denied that, on the basis of a solution of this kind, designed to slow down production of milk powder and, in consequence, sales to the intervention agencies, the essential objective pursued by means of the system introduced by Regulation (EEC) No 563/76, namely, the reduction of milk powder stocks held by those agencies, could have been attained by means which were less burdensome.

Finally, the fact that, compared with the advantage sought for the Community, that system made demands which were too heavy on certain categories of producers and consumers leads me to conclude that the said regulation breached the general principle of proportionality.

7. The Grows-Farm undertaking, the defendant in the main action which gave rise to the proceedings for a preliminary ruling in Case 114/76, contended before the Landgericht Oldenburg that the

regulation in question contravened the German basic law, in particular Article 12 safeguarding the right to choose a trade, occupation or profession. According to Grows-Farm, an obligation to purchase which is tantamount to the imposition of a levy on certain traders is, under German law, permissible only if the principle of proportionality is observed and provided that there is a factual connexion between te parties who benefit from the levy and those on whom it is imposed. The undertaking in question denies that there is such a connexion between importers and consumers of vegetable feeding-stuffs on the one hand and milk producers on the other, and further contends that a reduction in stocks of skimmed-milk powder could have been attained by less coercive measures, in particular by placing the product on sale at competitive prices based on its market value. The financial loss which this would have caused the Community would have had to be made good by drawing on the resources of the general budget.

The rights guaranteed under national constitutions cannot, of course, be invoked as such before this Court because it is not for the Community Court to ensure that national law is observed. At the same time there can be no doubt that the Community legal order adopts as its own the fundamental rights which are part of the common heritage of the legal systems of the Member States. The principle that every individual has freedom to choose his trade, occupation or profession is recognized in all the Member States of the Community, although in differing terms. It must therefore follow that a similar fundamental principle of freedom exists in Community law also.

However, the present case is concerned with the validity of a regulation which does not govern the selection of a particular occupation but the pursuit of an occupation already embarked upon. The legality, in principle, of provisions governing economic activities and which, in the public interest, may also impose substantial limits on their exercise undoubtedly forms part of the national legal systems (the said Article 12 of the German basic law specifically states that the practice of trades, occupations and professions may be regulated by or pursuant to a law) as well as in the Community system (see the judgment of 14 May 1974 in Case 4/73, *Nold* v *Commission* [1974] ECR 491, and Mr Advocate General Trabucchi's opinion in that case).

In order to determine whether a particular restriction imposed by Community rules upon the exercise of specific economic activities does or does not go beyond the permitted limits, it is necessary to make a considered appraisal of the public interest which it seeks to further and of the individual interest with which it conflicts, in the light of the circumstances in which public authority comes to be exercised and of the available instruments to meet the requirements of the situation.

This again involves the principle of proportionality to which I referred a little earlier. However, this ground for invalidity must be taken as having been covered by the consideration given to the charge based on that general principle.

8. In Case 116/76 the Netherlands court asked *inter alia* whether Regulation (EEC) No 563/76 must be regarded as in conflict with the principles laid down in Articles 3 (f), 85 and 86 of the Treaty of Rome relating to the protection of freedom of competition in the Common Market. The same question was also raised in the applications for damages. The applicants in those cases complained of an infringement of Article 85 (1) (e) and of Article 86 (d) of the EEC Treaty which make it illegal to make the conclusion of contracts subject to acceptance by the other party of supplementary obligations

which, by their nature or according to commercial usage, have no connexion with the subject-matter of such contracts. The obligation imposed by Regulation (EEC) No 563/76 upon undertakings dealing in vegetable feeding-stuffs to purchase denatured milk powder was, according to the applicants, introduced in contravention of the prohibition. While recognizing that the provisions of Articles 85 and 86 do not have the same force as regards public authorities as in the case of undertakings, the applicants nevertheless consider that the principles expressed in those provisions must also hold good for the Community institutions.

The Commission stated that, under the system at issue the parties to whom the regulation applies are not subject to a straightforward obligation to purchase since they can get out of it by waiving the security provided as guarantee. Having regard, however, to the amount, viewed in the light of economic fact, of the security, those who had to pay it were virtually compelled to purchase milk powder if they wished to avoid incurring still greater loss. Moreover, there can be no doubt that the main feature of the regulation under consideration is, as the title shows, the imposition of an obligation to purchase.

For its part the Granaria company, the plaintiff in the proceedings for a preliminary ruling in Case 116/76, contends that there is another respect in which Regulation (EEC) No 563/76 infringes the rules on competition, in particular the general principle in Article 3 (f), since it causes distortion of prices owing to the fact that not all products capable of being used in feeding-stuffs come within the field of application of Articles 2 and 3 thereof. The regulation in question has accordingly the effect of artificially benefiting certain products used in feeding-stuffs. Granaria specifically refers to cereals, dry vegetables and fish flour as being among the basic products benefited.

Nevertheless, in my view, despite all the considerations based on the rules of competition, the argument advanced by the Commission and by the Council is a sound one: this is that the prohibitions laid down in Article 85 (1) and in Article 86 are intended for undertakings and have no application at all to measures adopted by the Community authorities in implementation of a facet of agricultural policy. The rules and principles for the control of action by the Community authorities for the protection of the public interest and the rights of individuals are different.

More especially as regards agricultural matters reference may also properly be made to Article 42 of the Treaty, which provides that the rules on competition shall apply to agriculture only to the extent determined by the Council. Finally, as regards the argument put forward on the basis of Article 3 (f) I note, along with the Commission, that subparagraph (d) of the same article provides for the adoption of a common agricultural policy without providing for competition policy to be given any priority over agricultural policy.

The imposition of an obligation to purchase, to the extent to which it is necessary for the attainment of one of the objectives laid down in Article 39 of the Treaty and does not infringe general principles binding upon the action of public authorities (in this instance the prohibition of discrimination and the principle of proportionality), must be regarded as an instrument of economic policy of which the Community legislature may avail itself without the limitations which the rules on competition would involve.

It follows from this that the obligation to purchase provided for under Regulation (EEC) No 563/76 cannot affect the validity of that enactment on the ground that it would conflict with the provisions of Articles 3 (f), 85 (1) (e) and 86 (d) of the EEC Treaty.

9. A question relating to the form of Regulation (EEC) No 563/76, which should logically have received priority over all other criticisms but which was raised only in Case 116/76, concerns the adequacy of the statement of reasons on which it was based. The Netherlands court asked whether the object of the regulations was to reduce stocks of milk-powder held by the intervention agencies or to increase the use of protein extracted from milk for the feeding of animals. If the first is the case, doubts are expressed whether the statement of the grounds on which the regulation is based is set out in accordance with the requirements of Article 190 of the Treaty.

Granaria, the plaintiff in Case 116/76, maintains that the wording of the regulation reflects the objective of increasing the use of milk powder in the feeding of animals. If, as stated by the Commission and the Council, the object was, on the other hand, to dispose of surpluses of milk-powder, the regulation is not sufficiently reasoned.

I am of the opinion, however, that the essential object of Regulation (EEC) No 563/76, which is to reduce stocks of milk-powder, is sufficiently clear from the wording taken as a whole. In the preamble, it should be noted that the first recital begins with the statement that 'stocks of skimmed-milk powder bought by intervention agencies ... have reached considerable proportions' and that the fifth recital emphasizes the pressing need to implement the steps taken 'in view of the amount of the stocks, their constant growth and the resulting costs'. It must also be borne in mind that last paragraph of Article 11 expressly states that the system introduced by the Council pursues 'the objective of a considerable reduction in existing stocks of skimmed-milk powder'. Taken as a whole, therefore, the enactment shows its essential aim clearly.

However, Granaria puts forward a second argument, which is that the disposal of the stocks held by the intervention agencies must, in order to avoid upsetting the balance of the market, take place in the manner prescribed in Article 7 (2) of the main regulation, No 804/68, on the common organization of the market in milk and milk products (OJ English Special Edition 1968 (I), p. 176). If the object of Regulation (EEC) No 563/76 was to reduce stocks of milk powder it should have paid regard to the aforesaid provision of Regulation (EEC) No 804/68 and contained a reference to it. But there is no such reference and there is no mention whatever of the fact that the conditions referred to in the said Article 7 (2) of Regulation (EEC) No 804/68 have been satisfied. It follows from this, it is claimed, that Regulation (EEC) No 563/76 pursued objectives other than that of disposing of stocks and, according to Granaria, this is confirmed by the provision in the same regulation that milk powder must be denatured to ensure that it is used only for feeding-stuffs. According to the company, if the main objective had been that of reducing stocks of milk powder, this provision would not have been justified.

On this last point, the comment springs to mind that Granaria overlooks the need for the milk powder with which Regulation (EEC) No 563/76 was concerned to be used otherwise than for human consumption since this would clearly have defeated the object, sought by the system introduced, of increasing total consumption. It was in fact precisely in order to find, at least for the time being, outlets other than the usual ones, which had become saturated, and to prevent the system of compulsory purchase from harming the market in milk powder intended for human consumption, that it was necessary to make sure that milk sold on the basis of Regulation (EEC) No 536/76 was reserved specifically for feeding animals.

Moreover, the fact that Article 7 of Regulation (EEC) No 804/68 is nowhere referred to in Regulation (EEC) No

563/76 does not prevent the latter from being a factual consideration in the application of that regulation.

In point of fact, the argument put forward by Granaria attaches too great an importance to form. The arguments advanced by it are, in my opinion, insufficient evidence that there has been an infringement of Article 190 of the Treaty, which requires that Community regulations, directives and decisions shall state the reasons on which they are based.

10. The issue was raised, in the reference for a preliminary ruling in Case 116/76, whether Regulation (EEC) No 563/76 is consistent with the financial provisions of Community law. This was specifically concerned with establishing the nature of and justification for the revenue which accrued to the Community from the application of the regulation and whether there had been an infringement of the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Community's own resources or of Article 199 of the EEC Treaty.

It must first be borne in mind that under Article 2 of that decision, revenue from levies or other types of charge established by the Community in respect of trade with non-Member countries within the framework of the common agricultural policy, and Common Customs Tariff duties and other duties established by the Community in respect of that trade shall constitute own resources to be entered in the budget of the Communities. In addition, under the last paragraph of that article, revenue accruing from other charges introduced within the framework of a common policy in accordance with the Treaty shall constitute own resources provided that 'the procedure laid down in Article 201 of the Treaty establishing the European Economic Community' has been followed.

As regards the nature of the burdens imposed by Regulation (EEC) No 563/76, which produce revenue for the Community, the undertaking concerned contends that both the security provided for under Article 2 *et seq.* of the regulation and the amount by which the imposed price for milk powder was in excess of the market prices for competing products must be regarded as a concealed tax for the benefit of the Community, and one which does not fall under any of the categories of revenue provided for by the said Article 2 of the Council decision of 21 April 1970. Even if this concealed tax were to be assimilated to one of the sources of revenue referred to in the last paragraph of the article, there would nevertheless be a failure to fulfil the condition of completion of the procedure to which the provision refers. Again, as regards Article 10 (2) of Regulation (EEC) No 563/76, by virtue of which any security forfeited is to be used to offset the intervention expenditure for which no unit amount is fixed under Regulation (EEC) No 804/68, the undertaking states that a public institution cannot use amounts paid in such a way as to set them off against certain expenditure unless it treats those amounts as part of its own resources; moreover, they must be accounted for as budget items in accordance with the rules in force.

On the other hand the Council has argued that, like the collection of an administrative fine, the forfeiture of a security falls within the concept of 'other revenue' which, under the first subparagraph of Article 4 (1) of the Council decision of 21 April 1970, is distinguished from the Community's own resources.

This view seems to me to accord with the objectives of Regulation (EEC) No 563/76 which, in introducing a forfeitable security, was certainly not seeking to build up the Community's own resources but simply to ensure that the obligation to purchase skimmed-milk powder was complied with.

The Commission stated that revenue of this kind constitutes part of an intervention system and, as such, is no different from revenue produced by the sale of products which have been the subject of intervention. It quotes previous regulations under which provision was made for certain revenue to be placed to the credit of the intervention agencies and thus help to reduce their outgoings, as in the case of the amounts recovered as a result on non-compliance by sellers or buyers with contractual obligations or with requirements imposed by regulations (see Regulation (EEC) No 2306/70 of the Council of 10 November 1970 on the financing of intervention expenditure in respect of the domestic market in milk and milk products, OJ English Special Edition 1966 to 1972, p. 44, Articles 4 (2) (d), 5 (2) (d) and 6 (2) (d)).

The question of the justification for the revenue which accrues to the Community under Regulation (EEC) No 563/76 thus appears to be linked to the question of the very existence of the power of the Community authority to impose the relevant charges. On this point, reference may properly be made to Article 40 (3), of the Treaty, under which the common organization in agriculture 'may include all measures required to attain the objectives set out in Article 39'. In its judgment of 13 December 1967 in Case 17/76, *Neumann* v *Hauptzollamt Hof* [1967] ECR 441, the Court recognized that the Community was, under Article 40 (3), empowered to establish a system of levies constituting a means of stabilizing the market. The Community must, therefore, be regarded as having power to make use of measures imposing charges if they appear to be measures required to attain the objectives set out in Article 39.

More particularly, in the judgment of 17 December 1970 in Case 11/70, *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125, the Court held the introduction of a system providing for the payment of forfeitable deposits as a guarantee of export to be valid under Regulation No 120/67/EEC on the common organization of the market in cereals on the ground that the system constituted an appropriate method for carrying out the common organization of agricultural markets within the meaning of Article 40 (3). The Court stated, in particular, that forfeiture of the deposit does not constitute a fine or a penalty but is merely a guarantee that an undertaking voluntarily assumed will be carried out; and for this reason it can be validly applied by the Community.

Consideration must now be given to the objections relating to form. They are based on the provision in Article 199 of the Treaty, in which it is laid down that 'all items of revenue and expenditure of the Community ... shall be included in estimates to be drawn up for each financial year and shall be shown in the budget'.

This rule does not, however, mean that the general budget of the Community must contain every single item of the accountable transactions carried out in connexion with a Community act; it is sufficient for the budget to show the positive or negative results of intervention carried out by the Community.

This corresponds to current practice. As the Commission pointed out, the costs, losses and profits produced by intervention on the market are, as a general rule, shown only in the accounts of the various intervention agencies and only net losses are shown in the budget, as required by Article 199 of the Treaty.

Issues of a different kind are raised by the surcharge produced by the difference between the imposed price for milk powder for use in feeding-stuffs and the market value of that product. This surcharge, in contrast to the security, had the direct object and effect of relieving

the Community in part of the burdens in which the intervention system involves it. There was in this case therefore an economic purpose which, on a view of the essence of the situation, might create a tendency for this type of burden to be regarded, from the viewpoint of its function, as similar to a tax. I have already gone into the power to establish this form of levy; it is scarcely necessary to add that the considerations on which the validity of such a power has been recognized are without prejudice to an appraisal of the enactment which introduces the tax in question from the point of view of the principle of proportionality. Again, from an accounting point of view, the burden in question is an element in the total price paid to the intervention agencies by purchasers of milk powder and cannot therefore be dealt with separately.

For the foregoing reasons, the question whether Regulation (EEC) No 563/76 is compatible with the financial provisions of Community law must be answered in the affirmative.

11. I have already had occasion to refer to the provisions of Article 5 of Regulation (EEC) No 563/76 in the case of contracts concluded before the date of entry into force of the regulation: the successive buyers of the vegetable products referred to in Articles 2 and 3 or of the protein products processed therefrom must bear the burden of the costs arising under the arrangements laid down in the enactment. In this connexion, doubts have been expressed whether the Council has the power to interfere in relationships established by private contract by obliging the buyer of animal feed to bear the burdens imposed by Community law upon the seller and to do this during the execution of a contract of sale concluded before the regulation came into force.

This question is the specific subject of the sixth question put by the Netherlands court in Case 116/76, and has also been the subject of comment by the undertakings involved in the proceedings for a preliminary ruling in Cases 119 and 120/76, all of which are in the position of importers of vegetable feeding-stuffs and, as such, subject to the obligation to obtain the 'protein certificate' provided for in Regulation (EEC) No 563/76 (with the burdens which this implies). In contending that the said Article 5 of the regulation is illegal on the ground that the Council has no power to interfere to such an extent in relationships arising under private contracts, the undertakings concerned certainly do not seek to deprive themselves of the right conferred upon them by the said provision to pass on to their customers, in the case of a contract concluded before the date of entry into force of Regulation (EEC) No 563/76, the burden arising under the provision in question; on the contrary, in contending that Article 5 is unlawful, they seek to have the regulation declared invalid. In fact the undertakings involved in Cases 119 and 120/76 point out that if, on account of the invalidity of Article 5, there is no longer any possibility of passing on the charges to the customers this would create an intolerable extra burden for them and one which could not be covered by their margin of profit; however, a system which compelled them to submit to such a form of unwarranted expropriation, which could make them bankrupt, would be even more manifestly unlawful.

While it is true that the Council has the power to impose the obligation to purchase which constitutes the essential object of Regulation (EEC) No 563/76, it must, in my view, also be recognized, by implication, as having the power to adopt all the transitional measures necessary to avoid the damaging and patently unfair results which the introduction of the new arrangements would otherwise have had on existing contractual relationships. It must be recognized that the rules of public law prevail even over previously existing contractual obligations, and it is

in the public interest that prior contractual positions should, after the adoption of Regulation (EEC) No 563/76, be adjusted to the new situation to which it gave rise.

Hence this criticism of a specific aspect of the regulation is also, to my mind, without foundation.

12. The third paragraph of Article 11 of Regulation (EEC) No 563/76 reads: 'Pending adoption of implementing rules on the matter, Member States shall take the necessary steps to ensure that clearance is not given for products which have been declared for the purposes of being put into free circulation, unless the person concerned gives a commitment accompanied by a security guaranteeing that these provisions will be respected'.

In Case 116/76, the Netherlands court asks whether this provision is to be taken as meaning that the Member States already had, before 1 April 1976, the power to make the issue of a 'protein certificate' conditional on the provision of a security even though the second paragraph of Article 11 lays down that the regulation shall apply only from 1 April. If the answer is in the affirmative, the Netherlands court asks whether the aforementioned rule in the third paragraph is to be considered binding, having regard to the fact that Article 3 (2) of the regulation, which makes the issue of a 'protein certificate' conditional on the provision of a security, became applicable only from 1 April 1976 and having regard also to the fact that the detailed rules for the implementation of Article 3, laid down in Commission Regulation (EEC) No 677/76 also entered into force on 1 April of the same year.

It should be noted that the first paragraph of Article 11 provides that the regulation shall enter into force on the day of its publication in the Official Journal of the European Communities, which was 15 March 1976. On the other hand, the second paragraph lays down that the regulation 'shall apply from 1 April 1976, with the exception of Articles 3 (1) and 5, in so far as it concerns the costs arising from the implementation of Article 3 (1), both of which shall apply from 19 March 1976'. We must not forget that Article 3 (1) makes free circulation in the Community of seeds and other similar products from non-Member countries subject to the presentation of a 'protein certificate'. On 24 March 1976, the plaintiff in the case pending before the Netherlands court had applied for a 'protein certificate' for some of the products covered by the said provision, without first providing a security, and it was for this reason that the Netherlands intervention agency had, on the same day, rejected the application.

The undertaking concerned contends that, in the absence of implementing measures, the third paragraph of Article 11 could not, on that date, yet be considered to be applicable and that the Member States were accordingly bound to issue 'protein certificates' on demand without being able to call upon the party concerned to provide a security. According to the undertaking, the purpose of the provision in the third paragraph of Article 11 was simply to ensure that, if there were no Community implementing rules on the date when the regulation became applicable in its entirety, this would not constitute an obstacle to the adoption of national rules designed to ensure the working of the new system for the time being.

In my view, two difficulties stand in the way of this interpretation. The first is that the first paragraph of Article 11 provides for the immediate entry into force of the new arrangements, a provision the purpose of which can be understood only when taken in conjunction with the second and third paragraphs of the said Article 11. The second is the express provision in the second paragraph of Article 11 under which there is a duty to apply in advance not only the provision making it

compulsory to produce a protein certificate for free circulation in the Community of the products referred to in Article 3 but also, at the same time, the provision concerning the passing on of the costs arising from the implementation of prior contracts. The application in advance of the latter provision clearly demonstrates the intention of the Community legislature at the same time to bring into force the provision laying down the obligation to provide a security as a condition for the free circulation of the products referred to in Article 3 (1). If the contrary were true there would be no purpose in providing for the right to pass on to the purchaser, with effect from a period prior to 1 April 1976, the costs arising from the arrangements laid down in the regulation (there would have been no costs if the 'protein certificate' could have been obtained without a security).

On the other hand, as the Commission pointed out, the immediate application of the obligation to lodge the security fulfilled a practical need of paramount importance, namely, that of ensuring that there was not available to importers, between 15 March and 1 April 1976, a period in which they could import the goods covered by the regulation free of charge. This would have probably encouraged imports on a massive scale and accordingly the effectiveness of the provision would have been strikingly reduced. Making the obligation to provide security operative from 19 March by means of provisional arrangements, in part national, which were to be superseded from 1 April 1976 by exclusively Community arrangements, was intended to avoid this difficulty.

The outcome of a systematic interpretation of the provision under consideration is therefore confirmed by consideration of the objects which it seeks to achieve. It must therefore be recognized that the Member States had, with effect from 19 March 1976, the power and the duty to make the grant of the right to free circulation of the products referred to in Article 3 (1) of Regulation (EEC) No 563/76, imported from non-Member countries, conditional upon the signing by the applicant of an undertaking, guaranteed by a security, to observe the Community implementing provisions which were to enter into force with effect from 1 April 1976.

13. In its defence in Cases 83 and 94/76 the Commission, explaining the situation on the market in milk and that in vegetable proteins and referring to the possibility that the Community might give less favourable treatment to imports of vegetable feeding-stuffs with the object of improving the unfavourable position of milk, indicated in a note at the bottom of a page that this possibility exists in respect of the market organization within the Community, regardless of the complications which this may involve in terms of international relations. On the basis of this comment, the applicants in the proceedings for damages put forward, in their reply, a fresh argument in support of invalidity by contending that the system laid down in Regulation (EEC) No 563/76 conflicts with the rules of the General Agreement on Tariffs and Trade (GATT).

This contention was later echoed in the observations submitted by the undertakings involved in the proceedings for a preliminary ruling in Cases 119 and 120/76.

It was stated that the obligation to purchase constituted a quantitative restriction contrary to Article XI of GATT. Such restriction arose from the fact that skimmed-milk powder the use of which, by virtue of the said regulation, was compulsory in the Community for feeding-stuffs, replaced corresponding quantities of feeding-stuffs of vegetable origin which in consequence could be imported into the Community only with difficulty. Furthermore, the obligation to purchase was stated to be contrary to Article III of GATT which provides for

equality of treatment of foreign and domestic products in so far as internal taxation is concerned. There is only an appearance of uniform treatment of domestic and national products in respect of the obligation to purchase milk powder. In reality, production within the Community of vegetable substances containing protein for use in feeding-stuffs is very small and, in consequence, Regulation (EEC) No 563/76 bears most heavily on imports.

The admissibility of this new submission within the context of the proceedings arising from the claims for damages seems to me to be a matter for considerable doubt in view of the provision in Article 42 (2) of the Rules of Procedure of this Court that no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure. A passing reference made by the Commission to the complications which new rules governing imports of animal feed might create at international level served to provide the applicants with a new point on which to challenge the validity of the regulation but it certainly does not constitute one of those matters which, under the said provision of the Rules of Procedure, enable a fresh issue to be raised in the course of the proceedings. The applicants must, indeed, have been aware of the existence of GATT and of the obligations arising thereunder well before the Commission included the note in its defence.

Moreover, the Court has twice had occasion to make it clear that the validity of measures adopted by the Community institutions 'cannot be tested against a rule of international law unless that rule is binding on the Community and capable of creating rights of which the interested parties may avail themselves in a court of law' (see the judgments of 12 December 1972 in Joined Cases 21 and 24/72, *International Fruit Company* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219, and of 24 October 1973 in Case 9/73, *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135). In both the decisions quoted the Court, while recognizing that GATT is an agreement which is binding on the Community, ruled that specific articles thereof, namely Article XI and Article II, do not create rights for individual citizens of the Community which they may invoke in proceedings. In each of the two cases, the decision of the Court was based on grounds arising in the context of GATT having regard to 'the meaning, the structure, and the wording of the General Agreement' (paragraphs 19 and 20 of the judgment of 12 December 1972 and 28 of the judgment of 24 October 1973, quoted above). While, therefore, the argument advanced in the present cases on the basis of Article XI has already been answered, the same reply should in my view be given to the objection which relies on Article III of GATT.

In the light of these decisions, the objection that the regulation is invalid on the grounds indicated cannot in any case be upheld either for the purposes of the requests for a preliminary ruling or, even if it were not inadmissible as being out of time, in the context of the proceedings for damages.

14. The undertakings concerned in the references for a preliminary ruling in Cases 119 and 120/76 contend that there is further evidence of illegality in the fact that the Council made the Commission responsible for adopting regulations which constitute an essential part of the system of compulsory purchase of milk powder. The undertakings concerned refer in particular to the fixing of the amount of the security in Article 9 and in the Annex to Commission Regulation (EEC) No 677/76. They contend that, under Community law, the delegation of powers by the Council must be understood as constituting an implementing measure in the strict sense; in a Community consisting of

States, anything of substance in the regulations adopted must issue from the only body in which the States are represented, namely, the Council, and the Commission must confine itself to performing a purely executive role.

On the other hand, in its decision making the reference in this case, the Finanzgericht Hamburg expressed the view that Community law does not require that the content, purpose and extent of the powers conferred on the Commission by the Council should be set out by regulation issued by the Council to the same extent and with the same precision as is prescribed in Germany by Article 80 of the basic law in so far as it relates to delegated legislation. All that is required is that, as in the present case, the Council regulation shall contain the bases of the rules to be applied.

The Commission shares this view and states that it accords with the practice constantly followed for the Council regulation to lay down the basic features of a given system and to entrust to the Commission the task of setting out the detailed rules within that framework. In this way the Council vests the Commission with wide powers of discretion and wide freedom of choice, especially when the Commission takes its decisions in accordance with the so-called 'Management Committee procedure'.

There can be no doubt that it has been practice followed for many years by the Community institutions to place a wide interpretation on the last subparagraph of Article 155 of the EEC Treaty under which the Commission is to 'exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter'. Thus the Commission, in implementing the regulations of the Council, regularly exercises legislative powers which extend beyond mere executive powers in the very restricted sense urged by the undertakings in Cases 119 and 120/76. This practice accords with the Community's working requirements. It has moreover received the approval of the Court. In Case 25/70, *Einfuhr- und Vorratsstelle für Getreide* v *Köster,* the Court was asked to give a preliminary ruling on the question whether a regulation of the Commission, under which the grant of an export licence was made subject to the lodging of a deposit and further provided for the forfeiture of the deposit should the obligation to export not be fulfilled, came within the powers of that institution. The Commission had adopted these provisions on the basis of a Council regulation which went no further than providing that the issue of an export licence should be subject to the provision of a deposit as security, the detailed rules for implementation of which the Commission was to prescribe, but it did not fix the amount of the security or mention that it might be forfeited. In that case, therefore, the measure adopted by the Council was no more specific than Regulation (EEC) No 563/76 and the extent of the powers exercised by the Commission was no less than in the case with which we are now concerned; in fact, the Commission had extended to processed products the obligation of the import licence for which under the basic regulation of the Council provision was made only in the case of cereals properly so-called. In its judgment of 17 December 1970 ([1970] ECR 1161) the Court recognized that the Commission had power to adopt all those measures since they appeared to be necessary to ensure the harmonious functioning of the system outlined in the basic regulation. Again, in its judgment of 14 March 1973 in Case 57/72, *Westzucker* v *Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 321, the Court recognized that the Commission had the right to decide on both the grant and the amount of denaturing premiums and that, therefore, it had the power to decide whether they should be suspended. In that judgment the Court ruled that the

Commission enjoyed a significant freedom of evaluation, which precluded automatic consent or disapproval and which must be exercised in the light of the objectives of the economic policy laid down by the Council regulation within the framework of the common agricultural policy.

Finally, in its judgment of 30 October 1975 in Case 23/75, *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279, the Court ruled that 'since the Commission alone is able continually to follow with attention trends on the agricultural markets and to act with urgency as the situation requires, the Council may be led in the sphere of the common agricultural policy to confer on the Commission wide powers of discretion and action'. When the powers thus entrusted to the Commission are exercised under the so-called 'Management Committee procedure', this method 'allows the Council to give the Commission an appreciably wide power of implementation'. And, finally, 'when the Council has thus conferred extensive power on the Commission, the limits of this power must be judged with regard to the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling words'.

The decisions in those cases leave no doubt that the objection which we have been considering must be regarded as without foundation.

15. As I have stated, in my view Council Regulation (EEC) No 563/76 breaches the principle of proportionality and this makes the regulation null and void. Such a ruling by the Court would compel the national courts not to apply the regulation.

As regards the actions for damages, they involve the violation of a superior rule of law for the protection of individuals and the Community must, in consequence, be held to be liable for the damage which the application of the regulation has caused to the applicants.

By express decision of the Court, communicated to the applicants by the Registrar's letter of 5 April 1977, oral argument between the parties was confined to the question of liability to the exclusion of questions relating to the chain of causality between the action of the Community and the nature and extent of the damage complained of.

If, therefore, the Court finds that the Community is, in principle, liable, the oral procedure will need to be reopened in order to enable the parties to express their respective points of view on the issues excluded from the previous arguments.

In conclusion I recommend that, for the foregoing reasons, the Court should declare Council Regulation (EEC) No 563/76 null and void and should in consequence state, in Cases 114, 116, 119 and 120/76, that that enactment cannot be applied by the courts making the references and, in Cases 83 and 94/76 and 4 and 15/77, that it should find the Community to be liable within the meaning of Article 215 of the EEC Treaty. Finally it will be appropriate to set the parties a date for the resumption of proceedings in case they are unable to reach agreement on the amount of the damages.