JUDGMENT OF THE COURT OF 13 JUNE 1978 [1]

Denkavit Futtermittel GmbH v Finanzamt Warendorf (preliminary ruling requested by the Finanzgericht Münster)

Case 139/77

Agriculture — Agricultural producer — Concept — Community definition — Absence — Duties of the competent authorities

(EEC Treaty, Art. 38 et seq.; Regulation (EEC) No 2464/69 of the Council, Art. 1)

Although in certain respects Article 38 and the related provisions allow the scope of the agricultural provisions of the Treaty to be defined, in other respects, particularly as regards the type of undertakings subject to the provisions in question, the concept of agriculture is not precisely defined in the Treaty. Consequently, for the purposes of the agricultural rules derived from the Treaty, it is for the competent authorities where necessary to define the scope of such rules in relation to persons and in relation to subject-matter.

In Case 139/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Münster for a preliminary ruling in the proceedings pending before that court between

DENKAVIT FUTTERMITTEL GMBH

and

FINANZAMT WARENDORF

on the interpretation of Article 39 and the second subparagraph of Article 40 (3) of the EEC Treaty and of Article 1 (1) and (3) of Regulation (EEC) No 2464/69 of the Council of 9 December 1969 on measures to be taken in agriculture as a result of the revaluation of the German mark (Official Journal, English Special Edition 1969 (II), p. 527),

1 — Language of the Case: German.

THE COURT

composed of: H. Kutscher, President, M. Sørensen (President of Chamber), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. When the Government of the Federal Republic of Germany took the decision on 24 October 1969 to revalue the German mark as from 27 October 1969 by 8.5 % in relation to its official parity, the Federal Republic and the Community faced the problem of compensation for the losses of income resulting for German agriculture from the linking of European agricultural prices to a common unit of account.

2. The German authorities and the Commission agreed in estimating the losses of income suffered by German agriculture as a result of the revaluation at DM 1 700 million *per annum*. In order to compensate for those losses, the Council, by its Regulation (EEC) No 2464/69 of 9 December 1969 (Official Journal, English Special Edition 1969 (II), p. 527), authorized the Federal Republic as from 1 January 1970 to grant agricultural producers direct aid, in respect of which provision was made for contributions by the EAGGF (European Agricultural Guidance and Guarantee Fund).

3. Article 1 (1) to (3) of Regulation No 2464/69 provides as follows:

"1. Aid granted to German agricultural producers under the conditions set out below shall be considered to be compatible with the Common Market.

2. Such aid may be granted up to the amount of DM 1 700 million for each budgetary year from 1970 to 1973 inclusive. The Community shall contribute to the financing of such aid on a decreasing scale as provided by Article 2.

3. Aid may be granted in the form of direct aids to agricultural producers

in so far as they are not calculated on the basis of the price or the quantity of the product.

Aid may be granted partly in the form of an advance to the agricultural producer when he sells his products, subject to a maximum of 3 % of the selling price, to be paid either by the buyer or by an agency to be appointed by the competent national authorities."

4. The Council decision of 21 January 1974 (which was notified to the Federal Republic of Germany on 24 January 1974, but not published) prolongs and amends the measure authorized by Article 1 (3) of Regulation (EEC) No 2464/69 inasmuch as the Federal Republic was "provisionally authorized to grant aid to agricultural producers in the form of compensation, paid to the producer when he sells his products, subject to a maximum of 3 % of the selling price". The aid as thus amended may be paid in the same way as is provided in the regulation "either by the buyer or by an agency to be appointed by the competent national authorities."

5. On 23 December 1969 the German legislature, basing itself on Regulation (EEC) No 2464/69, enacted the Aufwertungsausgleichgesetz (a law on compensation for the effects of revaluation), Article 4 of which authorized agricultural and forestry undertaktings, within the meaning of Article 24 (2) of the Umsatzsteuergesetz (Law on turnover tax) in conjunction with Article 51 of the Bewertungsgesetz (Law on valuation), to reduce the turnover tax (value-added tax) by 3 %. In order to qualify as an agricultural undertaking within the meaning of the latter provisions, establishments breeding and keeping livestock must have a certain agricultural area and prove a certain ratio between the head of livestock and that area.

6. The company which is the plaintiff in the main action engages in producing feeding-stuffs and in fattening calves on substitute milk-based fodder which it produces itself. For this purpose it buys calves of about one week old and sells them for slaughter after fattening them for four months. Not having any agricultural land for the purpose of fattening its calves, the company constitutes not an agricultural undertaking but rather an industrial undertaking within the meaning of German tax law.

7. In 1974 the turnover of the plaintiff company on sales of calves which it had fattened was DM 21 394 474.21. In its tax return for that year, it claimed aid of DM 641 834.24 (that is to say 3 % of its total turnover) under Article 4 of the Aufwertungsausgleichgesetz. By a decision of 26 March 1976, the Finanzamt (Tax Office) Warendorf, the defendant in the main action, refused to grant that aid, on the grounds that the plaintiff company is an industrial undertaking within the meaning of German tax law and not an agricultural undertaking.

8. After its objection to that decision had proved unsuccessful, the plaintiff company commenced before the Finanzgericht (Finance Court) Münster the proceedings which constitute the main action.

9. By an order of 26 September 1977, the Finanzgericht Münster stayed the proceedings and referred the following questions to the Court of Justice of the European Communities for a preliminary ruling under Article 177:

"1. Under Community law does the expression 'agricultural producers' in Article 1 (1) and (3) of Regulation (EEC) No 2464/69 include industrial livestock breeders and keepers within the meaning of German tax law?

2. If the first question is answered in the affirmative:

   Are Article 39 and the second subparagraph of Article 40 (3) of the EEC Treaty and Article 1 of Regulation (EEC) No 2464/69 of the Council or any other provisions of Community law to be interpreted as meaning that they forbid the Federal Republic of Germany, as a Member State of the EEC to which Regulation (EEC) No 2464/69 was addressed, in the event of the grant of direct aid by way of compensation for the revaluation of the German mark in respect of agricultural products subject to an organization of the market, to exclude specific classes of agricultural producers — in this case, industrial livestock breeders and keepers within the meaning of German tax law — from the grant of aid?

3. Is this prohibition directly applicable in the national sphere so that an individual trader is entitled to rely upon it before the national courts?"

10. Upon 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.

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

A — Observations submitted by the plaintiff in the main action

Preliminary observations

On the basis of an analysis of the provisions of the German tax law in question, the *plaintiff in the main action* claims that in practice only persons producing not more than 50 fattened calves per hectare per annum qualify as agricultural fatteners of calves for the purposes of that law.

However, on the structural and economic plane there is no difference between *industrial fattening of calves*, on the one hand, and *agricultural fattening of calves*, on the other, for the purposes of German tax law. Both the "agricultural" fattener and the "industrial" fattener have to buy young calves from breeders, and obtain mixed milk-based feeding-stuffs from a manufacturer of such feeding-stuffs. Both take between 100 and 250 young calves into cattle sheds at a time. Thus the agricultural area of the "agricultural" fattener is irrelevent to the fattening of calves and can be used only for other activities (for example, the cultivation of cereals, vines and so on).

The *purchase prices* of young calves and the *selling prices* of fattened calves depend on market conditions, which in their turn are influenced decisively by the common organization of the market in beef and veal set up by Regulation (EEC) No 805/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 176). In fact, the aforementioned prices are *prices dependent on the agricultural price policy.*

Finally, with the help of sample figures, the plaintiff in the main action argues that, on the basis of Article 4 of the Aufwertungsausgleichgesetz in conjunction with Article 24 (2) of the Umsatzsteuergesetz, for the same gross selling price an agricultural fattener of calves receives a higher return than an industrial fattener of calves.

The questions referred by the Finanzgericht Münster

The first question

The plaintiff in the main action maintains that the expression "agricultural producers" appearing in Regulation (EEC) No 2464/69, a binding and directly applicable regulation which allows measures to be taken within the framework of the common agricultural policy (third paragraph of Article 3), designates a concept the content of which must be defined by Community law.

On the basis of an analysis of the wording of Articles 37 (4), 40, 42, 43 and 45 of the Treaty, the plaintiff claims that "agricultural producers" within the meaning of Community law are producers of *agricultural products.*

The second sentence of Article 38 (1) of the EEC Treaty defines *"agricultural products":* they are the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. In accordance with Article 38 (3) of the EEC Treaty those products are listed in Annex II to the Treaty or have been subsequently added to that list.

Thus the concept of an "agricultural producer" within the meaning of Community law *relates to the production of a specific product,* and not to the way in which it is produced.

It follows that those who fatten calves are "agricultural producers" within the meaning of Community law, and it is irrelevant for what reasons, by what means and in what legal form the fattening of the calves is carried out. Thus the concept of agricultural producers within the meaning of Community law also includes the industrial fattening of calves.

National law cannot change anything in that uniform Community definition. In particular, Regulation (EEC) No 2464/69 did not authorize the Federal Republic of Germany, either expressly or indirectly, to alter the concept of an "agricultural producer", which must be defined in accordance with Community law, according to any other legal conceptions or traditions. This is all the more so as, under Article 1 (2) of Regulation No 2464/69, the Community contributed to the financing of the aid. On the contrary, in Regulation No 2464/69, the Council intended to establish and did establish rules resulting in compensation for revaluation in respect of all products coming under the common agricultural policy — and thus also under the agricultural price policy — for which income was lost as a result of the revaluation of the German mark within the framework of the agricultural common market.

Consequently, where Article 4 (1) of the Aufwertungsausgleichgesetz, referring to Article 24 (2) of the Umsatzsteuergesetz and Article 51 of the Bewertungsgesetz, restricts the compensation for revaluation to undertakings having a certain agricultural area, it constitutes a national measure which departs from the content of the authorization given in Regulation (EEC) No 2464/69.

Even if the intention at the time of the *preparatory discussions* was to exclude industrial livestock keeping and breeding, within the meaning of German tax law, from the rules on compensation according to the Aufwertungsausgleichgesetz, such intention is irrelevant to the interpretation of the regulation, since it is not expressed in the final text of Regulation (EEC) No 2464/69 (cf. the judgment of the Court of 18 February 1970 in Case 38/69 *Commission* v *Italy* [1970] 1 ECR 47, at pp. 56-57).

Therefore, in the opinion of the plaintiff in the main action, the following answer should be given to the first question referred by the Finanzgericht Münster for a preliminary ruling:

"'Agricultural producers' within the meaning of Article 1 (1) and (3) of Regulation (EEC) No 2464/69 are

producers of agricultural products within the meaning of Article 38 (2) and (3) of the EEC Treaty in conjunction with the list in Annex II to the EEC Treaty, regardless of whether and by what criteria national law classifies such producers as 'agricultural' or 'industrial'."

The second and third questions

The plaintiff in the main action considers that these questions are relevant even if the first question is not answered *in the affirmative.* In that event, the Federal Republic of Germany would have a duty within the framework of Community rules to use the authorization in Regulation No 2464/69 in such a way that the plaintiff as an industrial fattener of animals would benefit from compensation for revaluation.

Interpretation according to the prohibition on discrimination laid down by Community law

The plaintiff in the main action points out that under the second subparagraph of Article 40 (3) of the Treaty, the common organization shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers within the Community. As regards trade in and fattening of calves, there is a "common organization" of the market in beef and veal. All livestock keepers, including German industrial livestock breeders and keepers, come within the scope of that regulation as agricultural producers. Therefore the plaintiff also enjoys the protection of the prohibition on discrimination laid down in Article 40 (3) of the EEC Treaty.

Starting from that argument, the plaintiff in the main action submits in particular that the principle of non-discrimination laid down in Article 40 (3) applies to *producers within a single Member State* and (the argument defended by the Commission and the Advocate General in Case 50/76 *Amsterdam Bulb NV* [1977] ECR 137) binds not only the Community legislature but also the Member States when they exercise the powers conferred on them within the framework of the common agricultural policy.

In the present case, Regulation (EEC) No 2464/69 is enacted as a *common agricultural policy* measure, and consequently in applying and implementing it the Federal Republic of Germany had to observe the Community law prohibition on discrimination laid down in Article 40 (3) of the Treaty.

The plaintiff in the main action emphasizes the particularly marked effect of the prohibition on discrimination in the case of *unequal treatment of the same product.* That prohibition springs directly from Article 40 (3) of the Treaty, which prohibits "any discrimination between producers". This case concerns unequal treatment of those who fatten calves thus producers of the same agricultural product, and this inequality of treatment exists even though on the structural and economic plane there is no difference between "agricultural" and "industrial" fattening of calves.

Following the revaluation of the Netherlands guilder, the Netherlands were granted, in Regulation (EEC) No 3141/73 of the Council of 19 November 1973 (Official Journal 1973 L 321, p. 1), an authorization corresponding to that granted in Regulation (EEC) No 2464/69, and in making use of that authorization they observed the prohibition on discrimination laid down for Community products.

Incidentally, the plaintiff in the main action challenges the decision of the Bundesverfassungsgericht (Federal Constitutional Court) of 8 December 1970 (which is mentioned in the

grounds of the order making the reference) relating to the application of the principle of equality in the field of the Aufwertungsausgleichgesetz.

According to the plaintiff in the main action, the prohibition on discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty is a rule which can be invoked by individuals before national courts not only where that prohibition is infringed by measures taken by Community institutions but also where that provision is infringed by legislative measures adopted by *Member States* pursuant to an authorization under Community law with the framework of the common agricultural policy.

In conclusion, it should be declared that by failing to grant compensation for revaluation to industrial livestock breeders and keepers, the Federal Republic of Germany infringed the prohibition on discrimination laid down in Article 40 (3) of the Treaty, and that that prohibition is directly applicable in the national sphere.

Interpretation according to the aims and functioning of the organization of the market in beef and veal

The plaintiff in the main action points out that the court making the reference also asks for an interpretation of "any other provisions of Community law" in relation to the application of Regulation (EEC) No 2464/69 by way of the Aufwertungsausgleichgesetz. The aims and functioning of the organization of the market in beef and veal (Regulation (EEC) No 805/68) form part of such "other provisions".

The aims and functioning of the organization are jeopardized in particular by national measures of such a nature as to exert an influence on *market conditions.*

This is the case *inter alia* where Member States take action, through internal legal provisions, affecting the machinery of *price formation* in the common organizations of markets (cf. the judgment of the Court of Justice in Case 31/74 *Galli* [1975] 1 ECR 47).

On the contrary, the power to adopt specific measures affecting the process of price formation belongs exclusively to the Community.

Within the framework of the common organization of the market in beef and veal, the Federal Republic of Germany took action affecting the process of price formation when, under the Aufwertungsausgleichgesetz, it provided a reduction of 3% in value added tax only in favour of agricultural fatteners of calves whilst it did not allow the same abatement to industrial fatteners of calves such as the plaintiff. Furthermore, the Federal Republic of Germany thereby infringes the principle laid down in the third subparagraph of Article 40 (3) to the effect that any common price policy shall be based on common criteria and uniform methods of calculation.

Interpretation in the light of Article 1 of Regulation (EEC) No 2464/69

The plaintiff in the main action points out that it has already stated its position on the concept of "agricultural producers" which is used in Article 1 of Regulation (EEC) No 2464/69. The content of the concept is a matter of Community law, the concept relates to products and it includes industrial livestock breeders and keepers.

Although Regulation (EEC) No 2464/69 confers certain powers, to the extent to which the Federal Republic of Germany makes use of those powers, it must observe the Community law laid down in the regulation.

In support of this submission the plaintiff in the main action relies *inter alia* upon the following arguments:

— According to its own wording, Regulation (EEC) No 2464/69 arose from the fixing of prices in units of account within the framework of the

common agricultural policy. Consequently, not only does it form an integral part of that policy, but it must also remain within the limits of the different organizations of agricultural markets.

— It is true that Regulation (EEC) No 2464/69 gives authorization to grant "aid": materially, however, it is less a question of aid in the sense of gratuitous subsidies from the State than one of correction for the reduction in agricultural prices expressed in German marks. Such correction had to be related to products, had to be applied so as to have no effect on competition, and had to relate to all products subject to an organization of the market of which the prices were directly or indirectly influenced.

— Article 1 (1) of Regulation (EEC) No 2464/69 makes the authorization subject to the "conditions set out below". This means that the Federal Republic of Germany is not free in the way it distributes compensation for revaluation, but must act in accordance with the conditions laid down in the regulation. One of those conditions is set out in Article 1 (3) of the regulation, according to which:

"Aid may be granted partly in the form of an advance to the agricultural producer when he sells his products, subject to an maximum of 3% of the selling price . . ."

Just as Regulation (EEC) No 974/71 had regulated all questions relating to the basis and conditions of assessment to the charge, as well as to the amount thereof, Regulation No 2464/69 also lays down binding conditions for the grant of compensation for revaluation. Moreover, its binding force follows from the nature of the legal instrument as a regulation.

— The binding force also follows decisively from the Community's contribution to the financing of the compensation through the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (Articles 1 (1) and (2) of Regulation No 2464/69). The purpose of the Fund is to finance *common agricultural policy* measures.

Thus the grounds, the content, the wording, the authorization, the legal form and the financing provisions of Regulation (EEC) No 2464/69 have such a marked Community and Community law character that the binding force of the regulation in particular Article 1, is beyond question.

After the Federal Republic had made use of the authorization granted to it under Article 1 (1) of Regulation (EEC) No 2464/69, it was bound not to depart from the wording, the aim and the content of that regulation. The Federal Republic had to confine itself strictly to the framework which the regulation established, because as from 1 January 1970 it no longer had any power to adopt autonomous rules in the field of common organizations of agricultural markets. On this point the plaintiff in the main action refers to the judgment of the Court of Justice of 25 May 1977 in Case 77/76 *Cucchi* [1977] ECR 987.

This shows that when it made use of the enabling provision, the Federal Republic of Germany was bound by the concept of "agricultural producers" within the meaning of Article 1 of Regulation (EEC) No 2464/69 (and consequently within the meaning of Community agricultural law) and, by reference to products and in a way not affecting competition, should have included in the rules all undertakings manufacturing or selling products of which the price is fixed or even influenced by the price machinery of the Community market organizations.

Therefore the plaintiff in the main action proposes the following answer to questions Nos 2 and 3 of the Finanzgericht Münster:

"Article 39 and the second subparagraph of Article 40 (3) of the EEC Treaty, the provisions concerning the aims and functioning of Regulation (EEC) No 805/68 and Article 1 of Regulation No 2464/69 are to be interpreted as meaning that, in the field of stockfarming and by reference to products, each animal receives an abatement under the Aufwertungsausgleichgesetz, so that, in the event of the grant of direct aid by way of compensation for revaluation in respect of agricultural products subject to an organization of the market, they forbid the Federal Republic of Germany to exclude certain classes of agricultural producers from the grant of such aid, regardless of whether the producers qualify as industrial or as agricultural livestock breeders and keepers under German tax law.

The provisions cited are directly applicable in the national sphere so that a trader is entitled to rely upon them before the national courts."

B — Observations submitted by the defendant in the main action

The *defendant in the main action* maintains that on the basis of Regulation (EEC) No 2464/69, the legislature had legislative power to restrict the aid provided for in that regulation in respect of "agricultural producers" to certain producers of agricultural products.

In fact, the regulation merely establishes a framework within which the German legislature can act. This results from the fact that, when it regulated compensation for revaluation, the Council merely made use of a *recommendation*.

It seems that the legal form of a — binding — regulation was chosen solely because Regulation (EEC) No 2464/69 contains certain binding provisions in addition to the — optional — part making recommendations. As appears from the preamble, the binding provision is that grant of aid must be restricted to a certain period of time. The German legislature was not bound either to make any use at all of the power conferred or to use it in all its possible applications. Within the limits of the power conferred, the German legislature was entitled to differentiate both as regards subject-matter and as regards time, as long as such differentiations were not arbitrary.

The discriminatory restriction by the German legislature is based on social and structural policy considerations intended to protect agricultural producers who have agricultural land. That differentiation is not specifically German; on the contrary, the other Member States of the Community also have a national distinction between agricultural undertakings and industrial producers of agricultural products.

C — Observations submitted by the Commission

Preliminary observations

The *Commission* notes that the reference for a preliminary ruling expressly refers to Regulation (EEC) No 2464/69. However, since the authorization granted by that regulation applied only up to and including 1973, and since the dispute in the main action concerns the abatement of value-added tax in 1974, it would be more correct to say that this case does not concern the wording of Regulation (EEC) No 2464/69, but the Council decision of 21 January 1974. However, this does not give rise to any difference in substance, because the decision of 21 January 1974 also referred only to the concept of "agricultural producers".

The first question

According to the Commission the fact that Article 1 of Regulation (EEC) No 2464/68 refers to "agricultural producers" and not, like Articles 38 (1) and 40 (3) of the Treaty, to "producers" of "agricultural products", in itself allows of the view that the rules on aid should not be applied to industrial producers. However, it must be admitted that the wording alone does not allow such a conclusion to be drawn with the necessary degree of certainty.

Repeating the line of argument which led it in its observations in Case 85/77, *Avicola*, to deny that there was any Community definition of an "agricultural holding", the Commission considers that the concept of an "agricultural producer" can be defined only according to the aim pursued by a particular set of rules and in the light of the whole context within that set of rules.

The aim of Regulation (EEC) No 2464/69 was as far as possible to provide compensation for the net losses of income which the revaluation of the German mark had caused German agriculture. At the extraordinary meeting of the Council on 27 October 1969 in Luxembourg, according to the final communiqué it had been a question only of aid for German "farmers". In addition, since it was a matter only of compensation for net losses of income suffered, account was also taken of the positive effects of revaluation, including the reduction in the price of fodder, fertilizer and other imported farming stock.

Furthermore, in the Commission's submission, the compensation at issue has a specific *social connotation:* it was necessary to prevent a sudden decrease of about 10 % (the rate of the revaluation was 9.29 %) in the income of a class of society consisting largely of small-scale or medium-scale farmers which could adapt only very slowly to a sudden fall in agricultural production prices, owing to its structure and its dependence on the yield of the soil and on the weather.

Similarly, the evolution of Regulation (EEC) No 2464/69 shows that the Community considered that the concept of an "agricultural producer" had to be given a strict interpretation, analogous to that which it has under German tax law. The Federal Republic of Germany made it clear from the outset that it intended the aid to be restricted to agricultural undertakings within the meaning of German tax law. The estimate of the losses suffered by German agriculture which appears in the preamble to the regulation takes account only of agricultural undertakings which fulfil that condition. This was stated by Mr Mansholt, the competent member of the Commission in answer to questions on this point, according to the minutes of the 93rd meeting of the Council (on 9 December 1969).

It can thus be concluded from the wording, the evolution and the aim of Regulation (EEC) No 2464/69 that the concept of an "agricultural producer" used in Article 1 of the said regulation is to be interpreted strictly in the proper sense of the word, that is to say that the concept *does not include* industrial livestock breeders and keepers.

The second question

According to the Commission, this question is asked only in the event of the first question's being answered in the affirmative. Even in that event, neither Article 1 of Regulation (EEC) No 2464/69 nor Articles 39 and 40 (3) of the Treaty forbid the Federal Republic of Germany to *exclude* specific classes of agricultural producers from the grant of aid.

On the one hand, the regulation merely confers a power and in no way provides that the aid is mandatory.

Consequently, assuming that the first question is answered in the affirmative, if the Federal Republic did not make the maximum use of the power which had been conferred on it, it did not thereby do anything contrary to Community law.

On the other hand, if Article 40 (3) of the Treaty imposed an obligation on the Federal Republic to extend the grant of aid to industrial livestock keepers, an analogous obligation was incumbent upon the Community institutions, and therefore it would be more correct to consider whether the Council decision to restrict the scope of the power to grant aid solely to "agricultural" producers constitutes an infringement of Article 40 (3).

The Commission challenges the plaintiff's attempt to set up on the basis of Article 40 (3) a concept of equal treatment of producer within a single Member State which is different from the concept based on Article 3 of the Grundgesetz (Basic Law) (and thus to repudiate the decision of the Bundesverfassungsgericht of 8 December 1970 — BVerfGE 29, p. 337 — relating to the Aufwertungsausgleichgesetz). In the Commission's submission, the prohibition on discrimination laid down in Article 40 (3) of the Treaty contains nothing different from Article 3 of the Grundgesetz, namely that equivalent or comparable situations must not be treated differently.

According to the Commission, the revaluation affected farmers more than industrial livestock keepers. In general a farmer farming his own land meets his fodder requirements at least partly with his own produce, and thus can less easily turn to imported fodder made cheaper by revaluation.

However, there is no doubt that the Council took account of the fact that industrial undertakings were in an advantageous situation for still other reasons than the reduced price of animal feeding-stuffs and consequently had no need to receive aid. In that connexion, the case of the plaintiff is a classic example. The plaintiff's economic activity depends only in part on the keeping of livestock. It can develop or reduce that additional source of income according to market and price conditions, much more easily than a farmer dependent on the soil and the weather. Thus the plaintiff can organize its economic activities more flexibly, and is therefore less affected by an event, such as revaluation of a currency, which influences the prices of agricultural products.

It may be that not all industrial undertakings enjoy a competitive position as favourable as that of the plaintiff. None the less, at the time when Regulation (EEC) No 2464/69 was adopted it could be assumed that industrial livestock keepers had a certain number of market advantages which, taken together with the reduction in the price of imported fodder, showed that in general they had no need of aid. If the aid had been extended to that category of producers as well, industrial producers in other Member States, not benefiting from a reduction in prices due to revaluation, might even have seen that measure as discrimination.

Thus in the Commission's submission, it was lawful, or at least it was not arbitrary, to exclude industrial livestock breeders and keepers in general from the grant of the aid provided for in Regulation (EEC) No 2464/69. Accordingly, Article 40 (3) of the EEC Treaty has not been infringed.

The third question

According to the Commission, this question is purely hypothetical. However is should be answered in the negative because, as the Court of Justice has already held in Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753 (judgment of 19 October 1977),

the incompatibility of Community rules on agriculture with the principle of equality does not necessarily enable the person concerned to enforce against the national authorities a direct right to the granting of the advantages from which the said Community rules excluded him. In such a case, it is for the institutions of the Community to adopt the measures necessary to eliminate that incompatibility.

The Commission proposes that the questions of the Finanzgericht Münster should be answered as follows:

"1. The concept of 'agricultural producers' appearing in Regulation (EEC) No 2464/69 of the Council of 9 December 1969 does not include industrial livestock breeders or keepers.

Should the Court of Justice find it necessary also to answer Questions 2 and 3, the answers should be more or less in the following terms:

2. Neither the provisions of the Treaty nor Article 1 of Regulation (EEC) No 2464/69 or Article 1 of the decision of the Council of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial livestock breeders or keepers from the aid intended to compensate for the losses caused to German agriculture by the revaluation of the German mark on 29 October 1969.

3. In the situation in the present case, Article 40 (3) of the EEC Treaty cannot be interpreted as meaning that it confers upon individuals a right to the grant of tax abatements which can be directly relied upon before the national courts."

III — Oral procedure

At the hearing on 13 April 1978 the plaintiff in the main action, represented by Dr D. Ehle, Advocate of Cologne, and the Commission, represented by its Legal Adviser, Peter Karpenstein, submitted their oral observations.

The Advocate General delivered his opinion at the hearing on 11 May 1978.

Decision

1 By an order of 26 September 1977 which was received at the Court on 16 November 1977 the Finanzgericht Münster submitted, pursuant to Article 177 of the EEC Treaty, a series of questions on the interpretation of the concept of an "agricultural producer" as well as of Article 39 and the second subparagraph of Article 40 (3) of the Treay and of certain provisions of Regulation No 2464/69 of the Council of 9 December 1969 on measures to be taken in agriculture as a result of the revaluation of the German mark (Official Journal, English Special Edition 1969 (II), p. 527).

2 It emerges from the case file that the main action originates in the refusal by the Finanzamt Warendorf, the defendant in the main action, to allow the application for aid under the German law adopted pursuant to the said regu-

lation which was submitted by the company, the plaintiff in the main action, which engages in producing feeding-stuffs and in fattening calves on substitute milk-based fodder which it produces itself.

The defendant in the main action based its refusal to grant the aid applied for by the plaintiff company on the fact that, since the company did not have any agricultural land for the purpose of fattening its calves, it constituted not an agricultural undertaking within the meaning of German tax law, to which the previously mentioned law refers, but rather an industrial undertaking.

3 In order to answer the questions asked, it is necessary first to consider the origin and content of the Community rules and, to the extent to which it appears from the case file, of the national legislation at issue.

4 By a decision of 24 October 1969 the Government of the Federal Republic of Germany revalued the German mark as from 27 October 1969 by 8.5 % in relation to its official parity.

The German Government and the Community then faced the problem of compensation for the losses of income resulting for German agriculture — in particular for German producers of agricultural products for which there was an intervention system, such as cereals and milk products — from the fact that European agricultural prices were expressed in a common unit of account which, following the revaluation, was devalued in terms of the national currency.

Following a meeting of the Council on 9 December 1969, the Council adopted Regulation No 2464/69 of that date.

5 In the words of the first recital in the preamble to the said regulation, "the revaluation of the German mark and the present unaltered value of the unit of account entail a reduction in agricultural prices expressed in German marks ... from 1 January 1970; ... German agriculture will thereby suffer a loss of income".

In the second and third recitals in the preamble to the regulation it is stated that, "on the basis of current data on the value of the unit of account and on the prices and quantities of the agricultural products in question, such loss of income can be estimated at DM 1 700 million a year", and that "provision should be made for the Federal Republic of Germany to grant aid by way of compensation for such losses in the form of direct aid to agricultural producers".

On the basis of these recitals, Article 1 of the regulation provides as follows:

"1. Aid granted to German agricultural producers under the conditions set out below shall be considered to be compatible with the Common Market.

2. Such aid may be granted up to the amount of DM 1 700 million for each budgetary year from 1970 to 1973 inclusive. The Community shall contribute to the financing of such aid on a decreasing scale as provided by Article 2.

3. Aid may be granted in the form of direct aids to agricultural producers in so far as they are not calculated on the basis of the price or the quantity of the product.

Aid may be granted partly in the form of an advance to the agricultural producer when he sells his products, subject to a maximum of 3 % of the selling price, to be paid either by the buyer or by an agency to be appointed by the competent national authorities.

4. The Federal Republic of Germany shall take appropriate structural or social measures to offset the decreasing financial support from the Community.

5. The procedural provisions of Article 93 of the Treaty shall apply to the aid referred to in this article."

By a decision of 21 January 1974 — which was notified to the Federal Republic of Germany on 24 January 1974, but not published — the Council prolonged and amended Article 1 (3) of the regulation inasmuch as the Federal Republic was "provisionally authorized to grant aid to agricultural producers in the form of compensation, paid to the producer when he sells his products, subject to maximum of 3 % of the selling price".

It emerges from the said decision that the aid as thus amended may be paid by one of the two methods provided in Article 1 (3) of the regulation.

6 On 23 December 1969 the German legislature, basing itself on Regulation No 2464/69, enacted the Aufwertungsausgleichgesetz (a law on compensation for the effects of revaluation, Article 4 of which authorized agricultural and forestry undertakings, within the meaning of Article 24 (2) of the Umsatzsteuergesetz (Law on turnover tax), to reduce the amount assessable to turnover tax by 3 %.

Under Article 24 (2) of the Umsatzsteuergesetz, establishments breeding and keeping livestock are deemed to be agricultural and forestry undertakings in so far as their livestock satisfies the criteria of agricultural use under Article 51 of the Bewertungsgesetz (Law on valuation).

It emerges from the provisions of Article 51 of the Bewertungsgesetz that livestock satisfies the criteria of agricultural use if in any financial year the head of livestock reared or kept per hectare of land regularly put to agricultural use does not exceed certain limits.

7 The first question asks whether the expression "agricultural producers" appearing in Article 1 (1) and (3) of Regulation No 2464/69 includes industrial livestock breeders and keepers within the meaning of German tax law.

8 The second question asks whether Article 39 and the second subparagraph of Article 40 (3) of the Treaty, Article 1 of Regulation No 2464/69 or any other provisions of Community law forbid the Federal Republic of Germany, as a State to which the said regulation was addressed, to exclude specific classes of agricultural producers — in this case, industrial livestock breeders and keepers within the meaning of German tax law — from the grant of the aid in question.

9 For the purpose of giving an answer to the national court, the two questions should be dealt with together.

10 The plaintiff in the main action has submitted that the expression "agricultural producers" designates a concept the content of which must be defined by Community law.

It has been submitted that this concept includes all producers of agricultural products within the meaning of Article 38 of the Treaty and of Annex II thereto, which do not make any distinction between breeders running an agricultural undertaking and industrial breeders.

11 Although in certain respects Article 38 and the related provisions allow the scope of the agricultural provisions of the Treaty to be defined, in other respects, particularly as regards the type of undertakings subject to the provisions in question, the concept of agriculture is not precisely defined in the Treaty.

Consequently, for the purposes of the agricultural rules derived from the Treaty, it is for the competent authorities where necessary to define the scope of such rules in relation to persons and in relation to subject-matter.

Therefore the scope of Regulation No 2464/69 is to be deduced from its terms and its objectives.

12 The purpose of the regulation at issue is to provide compensation for losses caused by the reduction in prices for agricultural products, and it makes no distinction between methods of production, even if the losses weigh more heavily on certain classes of producers.

Since neither the context nor the objectives of the regulation demand a restrictive interpretation, it is not out of the question that the relatively broad expression "agricultural producers", which is used in the wording of the regulation, may include production of agricultural products by any method whatever.

13 It should be pointed out that the third recital in the preamble to Regulation No 2464/69 makes provision "for the Federal Republic of Germany to grant aid by way of compensation for" the losses in question "in the form of direct aid to agricultural producers".

Under Article 1 (1) of the regulation, aid granted to German agricultural producers under the conditions set out in the following paragraphs of that article "shall be considered to be compatible with the Common Market".

It follows that the regulation at issue does not place a duty on the Federal Republic of Germany to grant the aid, but merely empowers it to do so, always however within the limits imposed by Community law and in particular by the regulation itself.

14 Accordingly, it should be considered whether the Federal Republic of Germany exceeded those limits by excluding industrial livestock breeders and keepers within the meaning of German tax law from receiving the aid referred to in the regulation.

15 In providing in paragraph 1 that the objectives of the common agricultural policy shall be *inter alia* to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, Article 39 does not exclude the possibility of

differences of treatment between the various sectors of agricultural activity, always provided that such differences of treatment are not arbitrary and are based on objective criteria.

The need for different treatment of various classes of the agricultural community, in appropriate cases, is acknowledged in Article 39 (2), which provides that "In working out the common agricultural policy ... account shall be taken of: (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions".

Although Article 40 (3) of the Treaty prohibits any discrimination between producers within the Community, and even within a single country of the Community, different treatment could be regarded as constituting prohibited discrimination only if it appears to be arbitrary.

16 Accordingly, it must be considered whether the differentiation, for the purposes of German tax law, made by the Aufwertungsausgleichgesetz between agricultural breeders and keepers on the one hand and industrial breeders and keepers on the other, is discriminatory within the meaning of Article 40 (3) of the Treaty.

17 It appears from the case file *inter alia* that, because they use fodder which is mostly their own farm produce, agricultural livestock breeders and keepers within the meaning of German tax law are subject in particular to the risks inherent in working the soil.

On the other hand, industrial livestock breeders and keepers within the meaning of German tax law are not exposed to the same risks, as they buy the feeding-stuffs needed for their animals mostly on either the national or the international market, and if their national currency is revalued they are able to obtain them abroad at advantageous prices.

Accordingly, the distinction between agricultural livestock breeders and keepers and industrial livestock breeders and keepers, which German tax law makes by laying down a ratio between the head of livestock and the utilized agricultural area and which the Government of the Federal Republic of Germany adopted as an objective, albeit unmodulated, criterion as regards the granting of the aid which it is empowered to grant by the provisions of Regulation No 2464/69, cannot be classified as discriminatory.

18 It follows from the foregoing considerations that the answer to the national courts should be that neither the provisions of the Treaty nor Article 1 of Regulation No 2464/69 nor the provisions of the Council decision of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial livestock breeders or keepers from the aid referred to in the said regulation.

19 Consequently, the third question has become purposeless.

Costs

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

As 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 submitted to it by the Finanzgericht Münster by an order of 26 September 1977, hereby rules:

Neither the provisions of the EEC Treaty nor Article 1 of Regulation No 2464/69 of the Council nor the provisions of the Council decision of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial livestock breeders or keepers from the aid referred to in the said regulation.

Kutscher Sørenson Donner

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 13 June 1978.

A. Van Houtte
Registrar

H. Kutscher
President