On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht Baden-Württemberg by order of 3 December 1975 hereby rules:

1. **The combined provisions of Article 1 of Regulation (EEC) No 974/71, Article 1 of Regulation (EEC) No 18/74 and Part 5 of Annex I to that Regulation in the version contained in Regulation (EEC) No 725/74 and applicable to powdered milk under tariff subheading 04.02 A II b 2 of the Common Customs Tariff must be interpreted as meaning that they do not allow the reduction of the monetary compensatory amounts by 2 u.a. or less where the fat content by weight is in excess of 3 %.**

2. **Consideration of the second question has disclosed no factor of such a kind as to affect the validity of Regulation No 725/74.**

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 23 November 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 28 OCTOBER 1976

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Finanzgericht of Baden-Württemberg. The plaintiff in the proceedings before that Court is the Firma Milac GmbH, which describes itself as a 'wholesaler and exporter'. The defendant is the Hauptzollamt of Freiburg.

Between 26 June and 14 August 1974 the plaintiff imported from France into Germany four lots of unsweetened full-cream milk powder with a fat content (by weight) of between 9·6 % and 24·4 %. The Customs Office at Neuenburg-Rheinbrücke classified the goods under subheading 04.02 A II b) 2 of the Common Customs Tariff. That subheading comprises milk and cream, in powder or granules, in packings of a net capacity of more than 2·5 kg and of a fat content by weight, exceeding 1·5 % but not exceeding 27 %. In accordance with the Community legislation then in force, the Customs Office levied monetary compensatory amounts ('m.c.a.'s) on the goods at a basic rate of DM 25·74 per 100 kg with the addition of a further DM 0·91 per 100 kg for each percentage point of fat content.

In the proceedings before the Finanzgericht the plaintiff challenges the validity of the assessments thus made by the Customs authorities on two alternative grounds. First the plaintiff contends that the m.c.a.'s should have been reduced by a 'corrective' of 2 u.a. per 100 kg which was at the time applicable in the case of imports of skimmed milk powder from France into Germany, or at least by a fraction of that corrective proportional to the skimmed milk 'element' in full-cream milk powder. In the alternative the plaintiff contends that the m.c.a.'s prescribed at the time by the Commission for imports of full-cream milk powder into Germany were at least 2 u.a. per 100 kg too high.

In order to explain those contentions, I must refer first to the Community legislation relating to the common organization of the market in milk and milk products, secondly to that relating to the application of m.c.a.'s to those products, and thirdly to that under which for a certain period (which included the period during which the importations here in question were effected) 'correctives' were applied in trade in skimmed-milk powder.

A striking feature of the common organization of the market in milk and milk products, as established by Council Regulation (EEC) No 804/68 of 27 June 1968, is that it provides for a single target price for a single product, namely milk containing 3·7 % fat delivered to dairy, and seeks to secure the attainment of that target price by a system of intervention and of levies and refunds relating, not to that basic product itself, but to certain processed products derived from it. Thus, by virtue of Article 5 of the Regulation, intervention prices are fixed annually for butter, for skimmed-milk powder, and for Grana padano and Parmigiano Reggiano cheeses. The idea behind this is clear. An important use of milk is in the manufacture of butter, of which skimmed-milk powder is a by-product. So by supporting the prices of butter and of skimmed milk powder one supports the price of milk. I imagine that the reason why intervention prices are also fixed for Grana padano and Parmigiano Reggiano cheeses is that, in the parts of Italy where those cheeses are made, their manufacture constitutes a more significant outlet for milk than the manufacture of butter.

Regulation No 804/68 did not define 'skimmed milk powder', but the Commission's implementing Regulation (EEC) No 1108/68 of 27 July 1968 set out in Annexes standards which skimmed milk powder must comply with in order to qualify for intervention. Those Annexes provided in particular that the maximum fat content of such powder was to be 1·5 %. The plaintiff alleges indeeed that what is known in the trade as 'skimmed-milk powder' is powder with a fat content of less than 1·5 %, though the Commission says that trade usage is in fact more flexible than that. For what it is worth, fat content of 1·5 % is also the dividing line between tariff subheadings 04.02 A II b) 1 and 04.02 A II b) 2 in the Common Customs Tariff, but the expression 'skimmed-milk powder' is not there used.

The system of m.c.a's was, Your Lordships remember, created by Council Regulation (EEC) No 974/71 of 12 May 1971. Your Lordships will also remember that, under Article 1 (2) of that Regulation, the products on which m.c.a.'s may be charged or granted are, so far as here relevant, defined as '(a) products covered by intervention arrangements under the common organisation of agricultural markets 'and' (b) products whose price depends on the price of the products referred to under (a) and which are governed by the common organisation of markets'. Full-cream milk powder is not of course a product covered by intervention arrangements. As I understand it, m.c.a.'s were applied to trade in such powder because its price was regarded as dependent on the price of skimmed-milk powder and, perhaps to a lesser extent, on the price of butter.

Article 2 of Regulation No 974/71 prescribed how m.c.a.'s should be fixed. Paragraph (1) of that Article (as amended, so far at all events as is relevant to this case, by Council Regulation (EEC) No 1112/73 of 30 April 1973) prescribed how they should be fixed for products covered by intervention arrangements, i.e. for products referred to under (a) in Article 1 (2). For products referred to under (b), Article 2 (2) provided:

'For the other products referred to in Article 1, the compensatory amounts shall be equal to the incidence, on the prices of the products concerned, of the application of the compensatory amount to the prices of the product referred to in paragraph 1, on which they depend.' (OJ L 106 of 12. 5. 1971)

For the period during which the plaintiff's importations took place, Commission Regulations (EEC) Nos 725/74, 1692/74 and 2038/74, successively replacing Part 5 of Annex I to Commission Regulation (EEC) No 218/74 of 25 January 1974, fixed the m.c.a.'s to be charged or granted on imports or exports into or out of Germany of milk powder falling within tariff subheading 04.02 A II b) 2 at the same rate, which was the rate in fact charged in the assessments under appeal. As I have mentioned this rate was composed of a basic amount of DM 25·74 per 100 kg and of a supplementary amount of DM 0·91 for each percentage point of fat content per 100 kg.

The 'correctives' that are in question in this case were applied from 1 April 1973, the start of the 1973/74 'milk year', to 7 October 1974, the date when an exceptional mid-year general increase in agricultural prices (with which the Court was concerned in Case 100/74 *C.A.M.* v *Commission* [1975] ECR 1393) took effect.

The origin of those correctives was this.

The Council, when it came to fix the target price for milk and its supporting intervention prices for the year 1973/74, decided, on the one hand, to increase the target price for milk and, on the other hand, to reduce the intervention price for butter in the original Member States. This necessitated a swingeing increase in the intervention price for skimmed-milk powder. In fact the target price for milk was increased from 11·77 u.a. per 100 kg (at which it had been fixed for the previous year by Council Regulation (EEC) No 647/72) to 12·42 u.a. per 100 kg. The intervention price for butter in the original Member States was reduced from 186 u.a. per 100 kg (at which it had been fixed for the period 15 September 1972 to 31 March 1973 by Regulation No 647/72) to 176 u.a. per 100 kg. The intervention price for skimmed-milk powder was increased from 54 to 66 u.a. per 100 kg.

At the same time the Council was faced with proposals from the Commission designed generally to reduce the differences in agricultural prices as between Member States brought about by revaluations and devaluations of currencies, and thus to reduce, if not to

eliminate, the need for m.c.a.'s. Those wide proposals proved to be unacceptable and, instead, a proposal was made that, in certain sectors where heavy increases in prices were envisaged, such increases should be mitigated in those Member States whose currencies had been revalued by the introduction of a system of 'correctives'. In the end this system was introduced only for skimmed-milk powder.

The target price for milk and the intervention prices for butter, skimmed milk powder and Grana padano and Parmigiano Reggiano cheeses for 1973/74 were fixed by Article 1 of Council Regulation (EEC) No 1188/73 of 8 May 1973. Article 2 of that Regulation introduced the 'corrective' and did so expressly by way of dergoation to Article 7 (1) of Regulation No 804/68 (which envisaged a single intervention price for the whole Community). Article 2 was in these terms:

'1. By way of derogation to Article 7 (1) of Regulation (EEC) No 804/68, the price at which the intervention agencies in Belgium, Germany, Luxembourg and the Netherlands buy in skimmed-milk powder shall be equal to the intervention price, less a corrective of 2 u.a. per 100 kilogrammes.

2. The corrective mentioned in paragraph 1 shall be applied, for the product in question, in the trade of each of the Member States referred to in paragraph 1 with other Member States and third countries, the Benelux countries being considered as one Member State.

For this purpose, the amounts levied at importation and those granted at exportation within the framework of the common agricultural policy, shall be reduced by the amount of the corrective.

3. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 30 of Regulation (EEC) No 804/68.' (OJ L 122 of 9. 5. 1973)

Article 30 of Regulation No 804/68 prescribed the 'Management Committee procedure' with which Your Lordships are familiar. Following that procedure, the Commission adopted Regulation (EEC) No 1267/73 of 14 May 1973 'setting out the methods of application of the corrective amount for skimmed-milk powder'. Article 2 of that Regulation provided that the m.c.a.'s fixed in accordance with Regulation No 974/71 should be reduced by the amounts prescribed in an Annex. That Annex in fact listed corrective amounts for two kinds of product: first milk in powder or granules of a fat content not exceeding 3 % falling within tariff subheading 04.02 A II b) (the effect of referring to that subheading being to include only powder or granules in packings of a net capacity of more than 2·5 kg) and secondly certain animal feeding stuffs falling within tariff sub-heading 23.07. In the case of the first kind of product, the full amount of the corrective was to be applied. In the case of the second the corrective amount was dependent upon the percentage of skimmed-milk powder (here meaning powder having a fat content of less than 1·5 %) contained in the preparation.

The legislation relating to those correctives was re-enacted the following year. Article 2 of Council Regulation (EEC) No 663/74 of 27 March 1974 fixed the target price for milk and the relative intervention prices for 1974/75. In so doing it again increased the target price for milk, from 12·42 to 13·41 u.a. per 100 kg; it held the intervention price for butter in the original Member States steady at 176 u.a., but it increased the intervention price for skimmed-milk powder from 66 to 79 u.a. per 100 kg. Article 3 of the Regulation re-enacted the provisions of Article 2 of Regulation No 1188/73, which I have read. Article 3 was implemented by Commission Regulation (EEC) No 712/74 of 29

March 1974, the Annex to which listed the same two groups of products for which 'correctives' were to be applied as the Annex to Commission Regulation No 1267/73.

Two questions are referred to the Court by the Finanzgericht, reflecting the two main contentions of the plaintiff, which I mentioned at the outset. They are in these terms:

'1. Are the monetary compensatory amounts under Article 1 of Regulation (EEC) No 974/71 in conjunction with Article 1 of Regulation (EEC) No 218/74, Annex I, Part 5 as amended by Regulation (EEC) No 725/74, for milk powder under subheading 04.02. A II b) 2 of the Common Customs Tariff, to be reduced by the amount of two or less units of account even where the fat content is in excess of 3 % by weight and the remaining conditions of Regulation (EEC) No 712/74 are fulfilled?

2. Were the rates of the monetary compensatory amounts under Regulation (EEC) No 725/74 referred to in question 1 compatible with the basic enabling provision between 25 June and 15 August 1974?'

Strictly the questions should have referred to Regulations Nos 1692/74 and 2038/74 as well as to Regulation No 725/74, but this is of no moment.

In the forefront of its case on the first question the plaintiff put the submission that Article 3 of Regulation No 663/74, on its true interpretation, authorized the Commission to prescribe 'correctives' for products other than skimmed-milk powder itself and that the Commission acted unlawfully in not prescribing them for full-cream milk powder. In the alternative the plaintiff submitted that, if Article 3 of Regulation No 663/74 did not authorize the Commission to do this, it was itself unlawful.

The plaintiff's case in that respect is based on the allegation that in fact the reduction effected by the 'correctives' in the prices on the German and Benelux markets for skimmed-milk powder, as compared to the prices ruling for that product on the French market, had an adverse impact on the competitiveness in the former markets of full-cream milk powder. The plaintiff's customers for full-cream milk powder (mostly manufacturers of chocolates, of ice-cream and of baby-foods) had found it cheaper to turn to skimmed-milk powder mixed with melted butter, the latter being also fairly cheap owing to the relatively low intervention price of butter. In support of that allegation the plaintiff produced a wealth of statistics and other material, in particular statistics showing a decline in German imports of full-cream milk powder from France.

The Commission contests those facts. It asserts that the reduction effected by the correctives in German and Benelux prices for skimmed milk powder was too marginal to have made any appreciable difference to the competitiveness of full-cream milk powder in those markets, and it ascribes the drop in German imports of French full-cream milk powder to other causes. In its written observations it offered to produce export evidence in support of its view.

At the close of the written procedure the Court decided to defer ordering any measures of inquiry to resolve that issue of fact until it had heard the parties on the law, and so could determine whether the issue was material.

I have come to the conclusion that it is not. In my opinion, even if the facts were as the plaintiff alleges, its contention must fail.

According to the plaintiff that contention is founded on two superior rules of Community law.

(1) Article 40 (3) of the EEC Treaty in so far as that provision forbids, in the common organisation of agricultural markets, 'any discrimination between

producers or consumers within the Community', and

(2) the 'principle of equality of treatment'.

No doubt, my Lords, the 'principle of equality of treatment', or as I prefer to express it in English, the principle that people should be treated fairly, is recognised in Community law. It has in particular been applied in staff cases (see for instance Case 48/70 *Bernardi* v *Parliament* (Rec. 1971 (1) at p. 185). But I do not think that, in the sphere of the common organization of agricultural markets, it can apply in addition to or in parallel with the express provision against discrimination in Article 40 (3) of the Treaty. It is but a general principle which, in that sphere, is given particular and specific effect by that provision. Nor indeed do any of the authorities cited by the plaintiff suggest otherwise. The Judgments of the Court in Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675 and Case 51/74 *Hulst* v *Produktschap voor Siergewassen* [1975] ECR 79, rested expressly, so far as material, on Article 40 (3), whilst those in Case 34/70 *S.N.C.* v *O.N.C.* [1970] ECR 1233 and Case 31/74 *Galli* [1975] ECR 47 turned on considerations quite foreign to this topic.

The question here is therefore, in my opinion, simply whether the measures of which the plaintiff challenges the validity were compatible with Article 40 (3) of the Treaty.

So I come to the plaintiff's submission that Article 3 of Regulation No 663/74 authorized the Commission to prescribe correctives for products other than skimmed-milk powder.

In my opinion, it did not. It seems to me quite clear, as a matter of language, that the reference to 'the product in question' in paragraph 2 of that Article is a reference to the product mentioned in paragraph 1, namely 'skimmed-milk powder', and to that alone. A consideration of the relevant recitals in the preamble to the Regulation confirms that that must be so. Those recitals say simply this:

'Whereas the particular situation obtaining in certain Member States at present does not permit the application of a uniform intervention price for skimmed-milk powder; whereas it is therefore necessary to apply a corrective factor to the aforesaid price;

Whereas in order to ensure that this corrective factor affects market prices in the said Member States without leading to distortions of competition it is necessary to compensate for price differences occurring in trade in skimmed-milk powder.' (OJ L 85 of 29. 3. 1974)

Nor is any other conclusion suggested by a consideration of the wording of Article 3 in the different official languages of the Community.

The Commission put forward an argument to the effect that the conclusion that Article 3 applied only to skimmed-milk powder was also confirmed by a comparison between the wording of an unpublished intermediate draft of Regulation No 663/74 (Annex II (a) to the Commission's Observations) and the wording of the final version of that Regulation. For my part, I doubt whether it would ever be appropriate to look at 'travaux préparatoires' as an aid to the interpretation of a Council Regulation. The Members of the Council may agree on a text without necessarily having the same views as to its meaning. I do not however think it necessary to pursue that question here, because, whatever may be the answer to it, there is in my opinion no doubt that, at all events, resort cannot be had to unpublished working papers. If and in so far as working papers are to be used as an aid to the interpretation of Community Regulations, everyone, and in particular practitioners and Courts in the Member States, must have access to them.

If I am right in my view as to the interpretation of Article 3 of Regulation No 663/74, the next question is whether, in omitting to authorize the Commission to prescribe 'correctives' for products other than skimmed-milk powder, the Council was in breach of Article 40 (3) of the Treaty.

In approaching that question it is, I think, important to bear in mind that what Article 40 (3) forbids is discrimination between (producers' or 'consumers' within the Community. Article 40 (3) does not preclude the Council from adopting a policy that involves treating different products, as such, differently. Indeed, if it did, much of the Community agricultural legislation would be invalid. So, if the plaintiff is to succeed in its submission on this part of the case, it must show, not only that skimmed-milk powder and full-cream milk powder were treated differently by Article 3 of Regulation No 663/74, but that that different treatment resulted in discrimination between producers or consumers within the Community. In saying that I do not overlook the recent Judgment of the Court in Case 95/75 *EFFEM* v *Hauptzollamt Lüneburg* [1976] ECR 361 which might seem at first sight inconsistent with it. The foundation of the Court's decision in that case was, however, the failure of the Commission correctly to give effect to Article 14 of Council Regulation No 120/67/EEC, which required appropriate levies to be fixed for all the derived products to which it applied. Article 40 (3) of the Treaty was in no way in point.

The whole weight of the plaintiff's argument on this part of the case was directed to the fact that full-cream milk powder and skimmed-milk powder had been treated differently, with the result (so the plaintiff said) that competition between those two products had been distorted. There was no real attempt on the part of the plaintiff to show that this had entailed discrimination between particular producers or particular consumers in the Community. The nearest the plaintiff came to that was in a suggestion that purchasers of full-cream milk powder could obtain it about 2 u.a. per 100 kg cheaper in Belgium, the Netherlands or Germany than in France. But this was a purely theoretical deduction from the contents of the legislation itself. It was not based on any comparison of actual market prices in the light of actual exchange rates. There was also a hint that traders in the plaintiff's position were placed at a disadvantage when it came to selling full-cream milk powder imported from France. But this point was not developed. In particular there was not even a suggestion that such traders could not switch to importing full-cream milk powder from Belgium or the Netherlands or to importing skimmed-milk powder from France.

Of course, one can see, though the plaintiff made no reference to this, that, if the plaintiff is right on the facts, there was 'discrimination' between French producers of full-cream milk powder and French producers of skimmed milk powder, in the sense that their respective products were treated differently. I do not go so far as to say that such discrimination could never constitute discrimination of a kind forbidden by Article 40 (3). It clearly could, if arbitrary. But in the absence of any argument from the plaintiff (or anyone else) on that aspect of the matter, I do not think that I can pursue it.

In the result I am of the opinion that the Court cannot hold that Article 3 of Regulation No 663/74 was in any way invalid.

Although the point is not, on the view I take, directly material, I think it right to say that I would not, for my part, accept the argument of the plaintiff that the Commission acted inconsistently in prescribing correctives for milk powder having a fat content of up to 3 % and for animal feeding stuffs into which skimmed-milk powder had been

incorporated, whilst refusing to prescribe correctives for full-cream milk powder.

I do not think that, in implementing Article 3 of Regulation No 663/74, the Commission was bound to adopt the definition of skimmed-milk powder that it had adopted previously for other purposes, i.e. to adopt a limit of fat content of 1·5 %. Moreover it seems to me that the reasons given by the Commission for opting for the higher limit of 3 % are convincing. Had it opted for the lower limit, exporters of milk powder from the countries with revalued currencies could have rendered themselves entitled to receive higher m.c.a.'s by the device of increasing the fat content of that powder by a trivial amount, e.g. by making it 1·6 %.

As regards the animal feeding stuffs in question it seems to me perfectly legitimate to have regarded skimmed milk powder incorporated into them as still being skimmed milk powder. Full-cream milk powder on the other hand is a different product. It is not, as I understand, manufactured, at least normally, by mixing skimmed-milk powder with something else, but by drying full-cream milk.

So I turn to the second question asked by the Finanzgericht, which reflects the plaintiff's second main contention, i.e. the contention that the m.c.a.'s fixed by the Commission for full-cream milk powder by Regulations Nos 725/74, 1692/74 and 2038/74 were too high.

The plaintiff's attack on the level of those m.c.a.'s was two-pronged, one prong being narrow, the other broad.

The broad prong consisted in a submission to the effect that the m.c.a.'s applicable at the frontiers of the Federal Republic of Germany had from the start been fixed at too high a level and that they should have been lowered long since. In support of that submission the plaintiff referred to the views of, among others, certain German experts. All that, my Lords, may well be correct, but it seems to me to be in terms too general to constitute a legal submission.

The narrow prong consisted in a submission, if I have unterstood it correctly, that, the Council having, by Regulation No 663/74, fixed divergent intervention prices for skimmed milk powder in Germany and the Benelux countries on the one hand and the other Member States on the other hand, that divergence should, by virtue in particular of the provisions of Articles 1 (2) and 2 (2) of Regulation No 974/71, have been reflected in the m.c.a.'s fixed for products whose prices 'depended' on that of skimmed milk powder, including full-cream milk powder.

To that submission the Commission answered that, by the terms of Regulation No 663/74, the Council had deliberately refrained from fixing 'divergent intervention prices' for skimmed milk powder. It had fixed a single intervention price and, separately, introduced a system of 'correctives' applicable in the Benelux and in Germany. It would therefore have defeated the intention of the Council if the Commission had taken those correctives into account in fixing the m.c.a.'s for products whose prices depended on the intervention price for skimmed milk powder.

I confess that I find those arguments finely balanced. But, at the end of the day, I think that the solution of the problem must lie in seeking to ascertain, from the wording of the relevant legislation of the Council what, objectively, the intention of its authors was, and I agree with the Commission that, if their intention had been that the differences in the effective intervention prices applicable for skimmed-milk powder in the Benelux and in Germany on the one hand and in the other Member States on the other should be reflected in the m.c.a.'s for, if I may so call them, 'dependent products', Regulation No 663/74 would have been worded differently.

I am therefore of the opinion that Your Lordships should answer the questions referred to the Court by the Finanzgericht by declaring that:

(1) The monetary compensatory amounts applicable between 25 June and 15 August 1974 by virtue of Regulation (EEC) No 974/71 and Regulation (EEC) No 218/74, as amended, to milk powder comprised in subheading 04.02 A II b) 2 of the Common Customs Tariff were not subject to reduction by any corrective of the kind referred to in Regulation (EDC) 712/74 where the fat content of such powder was in excess of 3 % by weight; and

(2) Consideration of the question has disclosed no factor of such a kind as to affect the validity of the rates of those monetary compensatory amounts.