1. The provisions of Regulations Nos 804/68, 625/78 and 1725/79 must be interpreted as meaning that skimmed-milk powder which meets the conditions as to composition and quality that are required for intervention in the form of public storage under Regulation No 625/78 must also be regarded as eligible for the aid provided for by Regulation No 1725/79 for skimmed-milk powder intended for use as feed.

   However, if the application of the method of analysis which is described inAnnex IV to Regulation No 625/78 and is compulsory in connection with the aid system established by that regulation reveals, having regard to the tolerance margin laid down therein, that no whey is present in skimmed-milk powder which has been analysed, that does not mean that the skimmed-milk powder must be regarded as free of whey for the purposes of the grant of aid under Regulation No 1725/79 unless it is identical, in terms of composition and quality, to skimmed-milk powder eligible for intervention. When applied to milk powder other than first-quality milk powder eligible for intervention, that method does not offer every guarantee of reliability and the Member States are free to apply, in order to ensure compliance with the conditions laid down by Regulation No 1725/79, any other methods which they consider appropriate and reliable, since no method is imposed by that regulation.

2. The fact that, in connection with the controls designed to ensure compliance with the conditions for the grant of aid for skimmed-milk powder intended for use as feed, the Community legislature has not required, for the analysis of skimmed-milk powder which has neither the composition nor the quality of the product eligible for intervention, the use of the method provided for in Annex IV to Regulation No 625/78, to the exclusion of other control methods, does not, having regard to the limited practical utility of the method provided for in Annex IV, exceed the bounds of what is appropriate and necessary for ensuring that Community aid is not paid in respect of products that are ineligible for it. Accordingly, the fact that that method is inapplicable to skimmed-milk powder which has neither the composition nor the quality of the product eligible for intervention is not contrary to the principle of proportionality.

REPORT FOR THE HEARING
delivered in Case 182/85 *

I — Relevant legislation, facts and written procedure

1. *Relevant legislation*

On 15 July 1968 the Council adopted, on the basis of the power conferred upon it by Article 10 (2) of Regulation No 804/68, Regulation (EEC) No 986/68 laying down general rules for *granting aid* for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260). According to o02077|Article 2 (1) (d) thereof, aid may be

* Language of the Case: German.

granted, *inter alia*, for skimmed-milk powder used in the manufacture of compound feedingstuffs. Article 1 (d) of the regulation, as amended by Council Regulation (EEC) No 876/77 of 26 April 1977 (Official Journal 1977, L 106, p. 24), defines skimmed-milk powder as 'powdered milk and buttermilk with a maximum fat content of 11% and a moisture content not exceeding a maximum to be fixed, unless such skimmed-milk powder comes from public stocks'. According to Article 1 (a), milk means 'the milk-yield of one or more cows, to which nothing has been added and which has, at the most, been only partially skimmed'.

In Article 1 (2) (a) and (3) (a) of its implementing regulation, No 1725/79, the Commission laid down that, in order to qualify for the aid provided for the manufacture of compound feedingstuffs, skimmed-milk powder must correspond to the definitions set out in Article 1 of Regulation No 986/68 'without anything having been added' to it. Article 9 (3) of Regulation No 1725/79 provides that where the analysis of a sample shows that the conditions for the grant of aid have not been satisfied, aid which has already been paid must be recovered and payment of aid which has been applied for must be suspended. Failure to comply with the provisions of the regulation is presumed to relate to the *whole* of the skimmed-milk powder used by the person concerned during the whole of the period between the date of the last inspection giving rise to no observations and the date of the inspection indicating that the person concerned is again complying with the Community rules. Article 10 (2) (a) of that regulation provides that the Member States are to adopt measures for the supervision of the undertakings concerned with particular regard to 'the composition of the skimmed milk and skimmed-milk powder used as such, with a view to ensuring compliance with the provisions of Article 1 (2) and (4)'. The checks are intended to establish that certain products listed in Article 10 (2) (a) are not contained in the skimmed-milk powder used. Whey, however, is not included in that list.

According to Article 10 (3), the checks are to be carried out on the basis of 'analysis reports' and 'inspection reports', specimens of which are set out in Annexes I and II to Regulation No 1725/79. Heading A.2 of the specimen analysis report contained in Annex I states that the checks are to be carried out for the 'detection of extraneous substances as provided for by the national authorities'. Those substances include not only those referred to in Article 10 (2) (a) but also those referred to under heading A.2 (g) of the specimen analysis report, namely

'others and especially whey as far as its detection is required by the national authorities'.

The Council adopted Regulation (EEC) No 1014/68 of 20 July 1968 laying down general rules for the public storage of skimmed-milk powder (Official Journal, English Special Edition 1968 (I), p. 277) within the framework of the *intervention system* for skimmed-milk powder, as provided for by Regulation No 804/68. Article 1 of Regulation No 1014/68 provides that the intervention agencies are to buy in only first-quality skimmed-milk powder manufactured by the spray process. According to Article 1 (1) (b) and (c) of the Commission's implementing regulation, No 625/78, skimmed-milk powder offered for sale to intervention agencies must meet the conditions laid down in the annexes to that regulation with regard to quality, packaging and marking, must not contain other products such as buttermilk or whey and must be manufactured from skimmed milk without the addition of other products.

Whey is defined in Article 1 (2) (b) as 'the by-product of cheese or casein manufacture obtained by the action of acids, rennet and/or chemico-physical processes'.

No 1 (m) of Annex I to Regulation No 625/78 provides that the 'detection of whey' must be 'negative' and No 2 (b) lays down a control method for detecting whey. It follows from Article 1 (1) of Commission Regulation (EEC) No 2188/81 of 28 July 1981 (Official Journal 1981, L 213, p. 1), which amended Regulation No 625/78, that that method applies only to *rennet whey* whilst no control method is expressly laid down for *acid whey.* No 2 (b) of Annex I to Regulation No 625/78, as amended by Commission Regulation (EEC) No 2549/83 of 12 September 1983 (Official Journal 1983, L 252, p. 5) with effect from 1 January 1984, provides in relation to the detection of *acid whey* that the tests are to be laid down by the Member States.

With regard to the detection of rennet whey, it is stated in footnote (2) of Annex I to Regulation No 625/78, as amended by Article 1 (b) of Regulation No 2188/81, that the method of analysis applicable as from 1 January 1982 is to be that laid down in Nos 1 to 7 of Annex IV thereto, whilst No 8 enables the presence of whey in the skimmed-milk powder to be quantified. No 8.3 of Annex IV is worded as follows:

'Allowing for errors in the method and natural variations in the composition of the sample it may be concluded that whey is absent when the value obtained in 8.2 is 2.0 or less.

In cases where higher values are obtained the presence of whey is confirmed and is quantified according to the formula given in 8.2.'

2. *Facts and written procedure*

Alfons Lütticke GmbH, the plaintiff, is a trader in skimmed-milk powder. Denkavit Futtermittel GmbH, the defendant, manufactures compound feedingstuffs containing a high level of milk products. The defendant receives aid subject to certain conditions under the provisions of Community law. For the manufacture of its products the defendant uses skimmed-milk powder which it purchases from the plaintiff. A standard agreement concluded between the parties provides, *inter alia,* that the plaintiff is required to take back free of charge and subject to repayment of the purchase price any consignments of skimmed-milk powder delivered to the defendant in so far as they are not eligible for aid under the relevant provisions of Community law, at the time primarily Regulations Nos 986/68 and 1725/79.

On 14 July 1983 the plaintiff delivered to the defendant within the framework of their business relationship a consignment of spray skimmed-milk powder which was shown, after it had been subjected to chemical analysis at the defendant's laboratory, to have a whey powder content of 0.5%, according to the method provided for by Regulation No 2188/81 and of 1 to 1.5%, according to microscopic analysis (and a glycomacropeptides content equivalent to 3% whey powder). As a result, the plaintiff took the goods back at the defendant's request and claimed reimbursement of the costs of transport and analysis.

The dispute between the parties turns on the question whether or not the aforementioned consignment of skimmed-milk powder is eligible for aid. In order to clarify the legal basis of the business relationship between the parties, the Amtsgericht Köln decided, by an order dated 7 December 1984 which was received at the Court Registry on 4 June 1985, to stay the proceedings and to refer to the Court, under Article 177 of the EEC Treaty, the following questions for a preliminary ruling:

'1. Is the intervention system laid down for the milk sector under basic Regulation No 804/68 on the common organization of the market in milk and milk products to be interpreted as meaning that skimmed-milk powder which meets the quality requirements for intervention storage in accordance with Article 5 of Regulation No 804/68, taken in conjunction with Regulation No 625/78, must therefore be regarded as being eligible for aid under Article 10 of Regulation No 804/68, taken in conjunction with Regulation No 1725/79?

2. If, upon application of the method of analysis provided for in Annex IV to Regulation No 625/78, it may be concluded, having regard to the tolerance margin specified in that provision, that whey is absent, does that mean that the skimmed-milk powder in question may also be regarded as free of whey for the purposes of the grant of aid under Regulation No 1725/79?

3. If Question 2 is answered in the affirmative:

(a) does the fact that the method of analysis provided for under the intervention rules in Annex IV to Regulation No 625/78 allows for a tolerance margin of 2% mean that the same tolerance margin is to be applied to the results of analyses carried out by the Member States, using other methods not laid down by Community law, in the procedure for the grant of aid under Regulation No 1725/79?

(b) if it may be concluded on the basis of the results of an analysis taking into account the relevant tolerance margin that whey is absent from a consignment of skimmed-milk powder, does that mean that the recipient of aid under Regulation No 1725/79 has an absolute defence to a claim for repayment of the aid even if the competent authority establishes on the basis of other findings (for example following an inspection at the premises of the manufacturer of the skimmed-milk powder in question) that whey powder has been added to the consignment of skimmed-milk powder?

4. Does Article 1 (2) of Regulation No 1725/79 contravene the principle of proportionality in Community law, in so far as skimmed-milk powder is not eligible for aid because whey is found to be present even though the same product must be held to be eligible for sale to the intervention agency on the basis of Annex IV to Regulation No 625/78?'

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiff, represented by Axel Mittelstaedt, Rechtsanwalt, Cologne, by the defendant, represented by Ehle, Feldmann and Schiller, Rechtsanwälte, Cologne, and by the Commission of the European Communities, represented by Dierk Booss, acting as Agent.

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. By decision of 17 December 1986 the Court assigned the case to the Second Chamber.

II — Written observations submitted to the Court

1. *First and second questions and first part of the third question*

(a) The *plaintiff* proposes that these questions should be answered in the affirmative.

(aa) In the plaintiff's view, an affirmative answer to the first question follows from a systematic interpretation of Regulations Nos 625/78 and 1725/79, that is to say of the close relationship between the aid system and the intervention system. According to the Court's judgment of 18 October 1979 in Case 5/79 *Procureur Général* v *Buys* [1979] ECR 3203, the two systems constitute intervention measures which complement each other within the framework of the common organization of the market in milk and milk products. The purpose of granting aid for the processing of skimmed milk into feedingstuffs is to enable the intervention agencies to avoid having to buy skimmed-milk powder at the intervention price as that would place a much greater financial burden on the Community. However, such relief can have full effect only if the skimmed-milk powder eligible for sale to the intervention agency is also eligible for aid for processing.

According to the plaintiff, it follows from Regulation No 625/78 and from the combined provisions of Regulations Nos 1725/79 and 986/68 that the quality requirements with which the skimmed-milk powder must comply for intervention purposes include at the very least the quality requirements laid down for the grant of aid. It emphasizes that, according to Article 1 (1) of Regulation No 625/78, only first-quality skimmed-milk powder may be purchased for intervention purposes. In some respects the requirements laid down for skimmed-milk powder eligible for intervention are even stricter. There is therefore all the more reason to conclude that a product which complies with the requirements of Regulation No 625/78 is eligible for aid.

(bb) With regard to the second question, the plaintiff proposes that it too should be answered in the affirmative in view of the affirmative answer given to the first question. The unity of the whole intervention system created by the common organization of the market in milk and milk products cannot be ensured unless a single method of analysis for detecting whey is used. The application of different methods would be contrary not only to the spirit and purpose of the intervention system but also to the principle of equal treatment. As the aid system provided for by Regulation No 1725/79 does not indicate which control method is applicable, the method provided for by Annex IV to Regulation 625/78 should be applied.

According to the plaintiff, the application of that method to the aid system by analogy also corresponds to the current practice of public research institutes. In support of that contention it produces two analysis reports of the Landwirtschaftskammer Rheinland (Chamber of Agriculture for the Rhineland). In addition, no method exists at present for detecting the addition of whey with absolute certainty, hence the acceptance of a tolerance margin of 2% is consistent with scientific and practical needs. It is for the Community, in its dealings with undertakings under the intervention system, to place appropriate means at their disposal so as to enable them to protect themselves against unacceptable risks arising in their commercial activities.

(cc) With regard to the first part of the third question, the plaintiff states that, in the absence of Community rules expressly laying down within the framework of the aid system a mandatory method of analysis for detecting whey, it is absolutely essential to recognize similar tolerance margins for all methods of analysis that are similar,

otherwise the undertakings concerned will be subject to unacceptable legal and economic risks in view of the fact that a degree of uncertainty is inherent in every method of analysis (see the Court's judgment of 6 February 1973 in Case 42/72 *Alfons Lütticke GmbH* v *Hauptzollamt Passau* [1973] ECR 57). That analogy is therefore consistent with the specific requirements of the market and the principles of equal treatment and proportionality.

(b) *The defendant's point of view*

(aa) The *defendant* maintains that the first question can be answered in the affirmative only if the Court gives an affirmative answer to the second part of the third question. Otherwise, manufacturers of feedingstuffs would be exposed to very serious risks. According to Article 1 of Regulation No 1725/79, skimmed-milk powder containing substances other than those expressly listed is not eligible for aid *in its totality*, in accordance with the strict presumption raised by Article 9 (4) of that regulation. In the defendant's opinion, Article 9 (5) of Regulation No 1725/79 entails the further risk that aid may have to be repaid if subsequent detailed inspections of commercial documents and of the accounts reveal that the provisions relating to aid have not been complied with.

The defendant also refers to the fact that, in a letter dated 2 May 1985, the competent authority of the Federal Republic of Germany, namely the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry), expressed the view that aid may still be reclaimed even after an inspection giving rise to no objections has been carried out if it subsequently appears, for whatever reason, that the conditions for the grant of aid were not met and that, in the absence of specific provisions, an action to recover the aid is barred only after 30 years have elapsed.

According to the defendant, no method of analysis exists at present by which it can be established with absolute certainty whether or not extraneous substances, in particular whey, have been added to the skimmed-milk powder purchased. In that regard it refers in particular to the situation which arose in Joined Cases 205 to 215/82 in which the Court gave judgment on 21 September 1983 (*Deutsche Milchkontor* v *Federal Republic of Germany* [1983] ECR 2633). Serious instances of fraud involving the use of whey were discovered in the Federal Republic of Germany, as evidenced by that case. The rules on aid, however, make no distinction between the addition of extraneous substances either deliberately or negligently or in good faith, and any recourse against the seller generally has no chance of success.

Finally, the defendant states that aid is granted exclusively in the general interest simply in order to avoid public storage of skimmed-milk powder by the intervention agencies. The Commission has recognized in its answers to several written questions from the European Parliament that surplus milk products can be disposed of only as animal feed. The entire amount of the aid granted to manufacturers must be passed on in the price charged to the final purchaser. The purpose of the aid is therefore to adjust the price of the product and thereby to improve the functioning of the organization of the market in milk.

(bb) With regard to the second question, the defendant acknowledges in the first place that it is entirely consistent with the system that skimmed-milk powder which is eligible for intervention is also eligible for aid in so far as no whey is detected when the method of analysis provided for by Annex IV to Regulation No 625/78 is applied.

However, it maintains that, in view of the risks involved in processing skimmed-milk powder into compound feedingstuffs and the practice applied by the competent authorities in Germany, the tolerance margin laid down by the aforesaid provision cannot be extended to the system of aid. It is therefore not possible to answer the second question in the affirmative unless the Court gives an affirmative answer to the second part of the third question.

(cc) If the Court answers the second question in the affirmative, the defendant also suggests that the answer to the first part of the third question should be that the tolerance margin allowed for in the method of analysis laid down in Annexes IV and V to Regulation No 625/78 must also be applied to the results of analyses carried out by the Member States in connection with the grant of aid under Regulation No 1725/79. Any other conclusion would be contrary to the principles of proportionality and equal treatment.

(c) The *Commission* states in the first place that the order for reference does not indicate clearly whether the plaintiff excludes the addition of *any* whey to skimmed-milk powder. The Commission therefore proposes to answer the questions referred to the Court in a different order, that is to say starting with the second part of the third question, then the first and second questions and the first part of the third question and finally the fourth question.

With regard to the substance of the case, the Commission observes that the first question starts from the somewhat unrealistic premise that skimmed-milk powder used in the manufacture of compound feedingstuffs is in all respects *identical* to skimmed-milk powder intended for public storage. In reality, however, the products are completely different as regards their composition, their fat content, their age, their method of manufacture and their quality. Storage and the grant of aid therefore constitute completely different intervention measures. Consequently, it is hardly conceivable that a producer or seller of skimmed-milk powder eligible for intervention would have it processed into compound feedingstuffs instead of offering it for sale to the intervention agency. The Commission therefore proceeds on the assumption that the first question is based on identical quality requirements only so far as the presence or absence of whey is concerned.

If the Court were to reject that restrictive interpretation of the first question, the Commission observes that it considers the method for detecting *rennet whey* set out in Annex IV to Regulation No 2188/81 to have been the only reliable method at the material time and that its application by the national authorities is justified within the framework of Regulation No 1725/79 in the case of skimmed-milk powder which satisfies all the requirements laid down in Regulation No 625/78.

With regard to the whey content of milk powder held in public storage, the Commission is of the opinion that a distinction must be made between rennet whey and acid whey. Although Annex IV to Regulation No 625/78, as amended by Regulation No 2188/81, laid down a Community method for detecting whey, no accepted objective method for detecting *acid whey* existed in 1981 or exists now. Consequently, it is for the Member States to apply the method of detection which they consider to be most appropriate.

Next, the Commission observes that although it is possible to conclude, in accordance with Annex IV to Regulation No 625/78, that rennet whey is absent when the value obtained is 2.0 or less, that is certainly not equivalent to a whey content of 2%. That figure does not represent a

given percentage but is, instead, a ratio expressing the content in sialic acid of the sample, which serves to detect the presence of whey, that is to say it is just a tolerance margin in relation to the results of the analysis. The control methods for the detection of rennet whey therefore serve only to verify the *absence* of that substance. Conversely, they do not allow for a genuine tolerance margin with regard to its presence. In any event, so far as acid whey is concerned, any tolerance margin would be incompatible with Article 1 (1) (c) of Regulation No 625/78.

In addition, the Commission rejects any systematic extension of the method of analysis provided for by Annex IV to Regulation 625/78 for the detection of rennet whey (or the tolerance margin relating to the results of the analysis) to the analysis of acid whey in connection with the grant of aid. In the Commission's view, such an extension is excluded by the aforementioned substantial differences between skimmed-milk powder intended for sale to the intervention agency and skimmed-milk powder used in the manufacture of compound feedingstuffs. It is therefore for the Member States to apply their own methods.

2. *Second part of the third question*

The *plaintiff* suggests that this question should also be answered in the affirmative. It maintains that the purpose and aim of any analysis is to determine expressly whether the product is in conformity with the provisions of Community law and therefore to provide the trader concerned with the certainty he needs in order to take his commercial decisions. It would be contrary to that aim, and therefore to the principle of legal certainty, if the results of the analysis could subsequently be called in question on the basis of more recent information — all the more so since at present there is no absolutely precise method of measuring the whey content and the traders concerned would therefore be exposed to unacceptable risks.

The *defendant* proposes that, in the event of the Court answering the first and second questions in the affirmative, the answer to the second part of the third question should be that a recipient of aid under Regulation No 1725/79 is protected against a refusal to grant aid or a claim for repayment of aid even if it is established on the basis of further analyses that whey has been added to the consignment of skimmed-milk powder. In view of the considerable risks to which manufacturers of feedingstuffs are exposed, the Community is under a duty to protect them by ensuring that their eligibility for aid is definitive once it has been established that the product contains no whey, in accordance with the principles of legal certainty and proportionality.

In contrast, the *Commission* takes the view that a tolerance margin applicable to whey can in no way justify waiving a claim for repayment of aid in cases where Community law expressly makes the absence of whey a condition for the grant of aid. Contrary to the view expressed by the Amtsgericht Köln, no tolerance margin whatever for whey is provided for either by Regulation No 625/78, for skimmed-milk powder intended for public storage, or by Regulation No 1725/79.

3. *Fourth question*

According to the *plaintiff*, the answer to the fourth question must be in the affirmative if the answer to the first, second and third questions is in the negative. If skimmed-milk powder were eligible for intervention notwithstanding a whey content of 2% or less, it would be contrary to the *principle of proportionality* for the same product not to be eligible for aid. Article 1 (2) of Regulation No 1725/79 should therefore be declared void.

The *defendant* accepts that the validity of Article 1 (2) of Regulation No 1725/79 is not beyond doubt. However, on account of the aforementioned risks and the practice of the competent German authorities, it takes the opposite view to the effect that Article 1 (2) is not contrary to the principle of proportionality.

The *Commission* accepts that, in so far as this question presupposes that skimmed-milk powder intended for sale to the intervention agency and skimmed-milk powder intended for processing into feedingstuffs are absolutely identical — which in its view is purely hypothetical — it is logical to apply the same method of analysis. However, it considers that the Amtsgericht Köln assumed that the products in question were identical only so far as the presence of whey was concerned and that Question 4 must be interpreted in a narrow sense. In that respect the issue of proportionality does not arise with regard to the question whether the national inspection procedures are suitable for ascertaining that whey is absent. However, the application of different methods of analysis for detecting whey in connection with the grant of aid is not incompatible with the principle of equal treatment either, because in this case the situations involved are not comparable. They are, however, comparable in so far as no Community rules exist either for the detection of acid whey within the framework of the intervention system or for the detection of whey generally within the framework of the system of aid. Those situations, which are comparable, are treated in the same manner inasmuch as national procedures are applicable in both cases.

III — Oral procedure

At the hearing on 18 March 1987, the plaintiff, represented by Mr Mittelstaedt, the defendant, represented by Mr Schiller, and the Commission, represented by its Legal Adviser, Mr Booss, assisted by Mr Sadini, a former official of the Commission with responsibility for milk and milk products, acting as expert, presented oral argument and answered questions put to them by the Court.

On that occasion, the Commission stated, in particular, that, from a scientific point of view, the method of analysis provided for in Annex IV to Regulation No 625/78 for detecting the presence of rennet whey was conceived specifically for skimmed-milk powder which was eligible for intervention and satisfied all the strict conditions laid down in that regard, whilst that method was unreliable for skimmed-milk powder eligible for aid, which was generally of lesser quality for economic reasons. In view of the presence in skimmed-milk powder eligible for aid of buttermilk, a higher moisture or fat content and so on, the method in question could not be used in connection with the inspections referred to in Regulation No 1725/79. Notwithstanding the research carried out by a group of chemists at the Commission, who have sought since 1978 to establish a method of analysis which may be incorporated in Regulation No 1725/79, no such method has yet been found.

With regard to the inspections referred to in Regulation No 1725/79, the national authorities enjoy, according to the Commission, a very broad discretion. They can use certain methods which the Commission may not impose at Community level. Thus the national authorities are free even to apply, in connection with those inspections, the method of analysis provided for in Annex IV to Regulation No 625/78, but with a degree of latitude that is not permissible for the Commission and is unsuited, as the official method, to the system of aid.

K. Bahlmann
Judge-Rapporteur