# OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 1 December 2005 [1]

## I — Introduction

1. The present case, a reference from the Verwaltungsgericht Frankfurt am Main (Frankfurt Administrative Court) (Germany), concerns the validity of certain aspects of Commission Regulation No 2535/2001 laying down detailed rules for applying Council Regulation No 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas. The case raises a number of important questions of principle. First, what is the proper standard of judicial review of Commission legislation in the agricultural field for compliance with higher Community law norms, in particular that of non-discrimination? More specifically, should judicial review in all circumstances be limited in this field? Second, to what extent can the Commission be bound by the Community competition rules, and in particular Article 86(1) EC, in enacting legislative measures? Third, should the Court reconsider its own jurisprudence specifying the circumstances in which Community secondary legislation can be judicially reviewed for compliance with WTO law? This raises again the delicate issue of the interrelation between the Community legal order and WTO law. I will return to these issues after describing the background to the case.

## II — Historical and legal background to the reference

### A — *Historical background*

2. Prior to its accession to the European Economic Community in 1973, the United Kingdom was the traditional export market for New Zealand butter. In order to preserve this market, Protocol 18 to the Act of Accession of Denmark, Ireland and the United Kingdom ('Protocol 18') allowed for fixed quotas for New Zealand butter and

1 — Original language: English.

cheese to be imported into the United Kingdom at reduced custom duties for an initial period of five years. [2] By Article 1(4) of Protocol 18, it was a condition of these reduced levies that products imported into the United Kingdom under the Protocol could not be traded within the Community or re-exported to third countries. The initial restrictions to trade were gradually removed: imported New Zealand butter could be used for processing (not only for direct consumption) in the United Kingdom following Council Regulation No 3667/83, and could be freely traded within the Community (not only within the United Kingdom) following Council Regulation No 3841/92. [3] By a number of Council Regulations adopted on the basis of Article 5(2) of Protocol 18, the import regime provided for in the Protocol was prolonged until 1995.

settlement included tariff concessions for certain milk products, to be imported into the Community at reduced duty, which are set out in the form relevant to the present case in schedule CXL drawn up pursuant to negotiations conducted under Article XXIV(6) of the GATT ('Schedule CXL'). The tariff quotas provided by this settlement for the import of New Zealand butter into the Community were implemented into Community law by Commission Regulations. [4]

B — *Applicable Community law*

Council Regulation No 1255/1999

3. From 1 July 1995, tariff quotas for milk and milk products were governed by the Agreement on Agriculture concluded in the framework of the Uruguay round of multilateral trade negotiations of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO). As regards the European Communities, the

4. Regulation No 1255/1999, adopted on the base of Article 37 EC, sets out the regime governing the common market organisation of milk and milk products. [5] This regime provides for an internal Community market

2 — Protocol 18 on the import of New Zealand butter and cheese into the United Kingdom, OJ 1972 L 73, p. 173, Articles 1 and 2. These duties were originally fixed with a view to enabling New Zealand to realise a price for the butter and cheese representing the average price it obtained on the UK market in the years 1969-1972, without prejudicing the marketing of Community butter and cheese: see Articles 1(3) and 2(2), Protocol 18.

3 — See Council Regulation (EEC) No 3667/83 of 19 December 1983 relating to the continuing of the import of New Zealand butter into the United Kingdom on special terms, OJ 1983 L 366, p. 16; Council Regulation (EEC) No 3841/92 of 17 December 1992 relating to the continued import of New Zealand butter into the United Kingdom on special terms, OJ 1992 L 390, p. 1.

4 — See Commission Regulation (EC) No 1600/95 of 30 June 1995 laying down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products, OJ 1995 L 151, p. 12; Commission Regulation (EC) No 1374/98 of 29 June 1998 laying down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products, OJ 1998 L 185, p. 21.

5 — Council Regulation No 1255/1999 on the common organisation of the market in milk and milk products, OJ 1999 L 160, p. 48, as amended.

of milk and milk products based on an intervention principle (Title I, Regulation No 1255/1999), as well a uniform trading system in these products with third countries (Title II, Regulation No 1255/1999). By recital 17 in the preamble to Regulation No 1255/1999, this trading system is based on the undertakings accepted by the Community under the Uruguay Round of multilateral trade negotiations.

5. Article 26(1) of Regulation No 1255/1999 provides that 'imports into the Community of any of the products listed in Article 1 shall be subject to the presentation of an import licence. Exports from the Community of any such products may be made subject to presentation of an export licence.' By Article 26(2), 'licences shall be issued by Member States to any applicant, irrespective of his place of establishment in the Community and without prejudice to the measures taken for the application of Articles 29, 30 and 31. Import and export licences shall be valid throughout the Community ...'. Article 26(3) of Regulation No 1255/1999 provides that the Commission shall adopt a list of products in respect of which export licences are required, the term of validity of the licences, and other detailed rules for the application of the Article, in accordance with the procedure set out in Article 42. Article 29 (1) of Regulation No 1255/1999 provides that 'tariff quotas for the products listed in Article 1 resulting from agreements concluded in accordance with Article 300 of the Treaty or from any other act of the Council shall be opened and administered in accordance with detailed rules adopted under the procedure laid down in Article 42.' Possible methods for quota administration are set out in Article 29(2), which specifies that these methods 'shall avoid any discrimination between the operators concerned ...'.[6] By Article 44 of Regulation No 1255/1999, the Regulation 'shall be so applied that appropriate account is taken, at the same time, of the objectives set out in Articles 33 and 131 of the Treaty'.

Commission Regulation No 2535/2001

6. Regulation No 2535/2001, adopted on the bases of Articles 26(3) and 29(1) of Regulation No 1255/1999, lays down rules for the implementation of the import arrangements for milk and milk products, as well as for the opening of tariff quotas. Title 2 of Regulation No 2535/2001 provides for specific rules on imports at reduced duty. This Title sets out three alternative import regimes, each of which applies to certain defined products and attracts a reduced duty.

7. The first possible regime (Chapter I of Title 2) provides for a system of imports under quotas opened by the Community made on the basis of an import licence alone,

6 — Three possible quota administration methods are specified in Article 29(2) of Regulation No 1255/1999. An analogous list of methods is contained in Article 30 of this Regulation.

application for which must be made to the Commission via Member State authorities. The second possible regime (Chapter II of Title 2) provides for a system of non-quota preferential imports made on the basis of an import licence alone. The third possible regime (Chapter III of Title 2) provides for a system of imports made under an import licence covered by a so-called 'inward monitoring arrangement' (IMA 1) certificate. This Chapter comprises two separate sections: Section 1, a general section setting out the IMA 1 certificate regime; and Section 2, which applies only to imports of New Zealand butter.

8. By Article 24 of Section 1, the imports to which Section 1 applies extend to those made under the quotas for specified countries of origin listed in the CXL Schedule, which, as detailed in Annex III(A) to Regulation No 2535/2001, includes imports of New Zealand butter. This Annex details the duties to be applied to each category of product listed therein and, where appropriate, the maximum annual quantities to be imported. Article 25(1) of Section 1 provides that 'Import licences for the products listed in Annex III at the rate of duty indicated shall be issued only on presentation of a corresponding IMA 1 certificate, for the total net quantity indicated therein. IMA 1 certificates must meet the requirements laid down in Article 40(1) for butter under quota 09.4589 referred to in Annex III(A) (hereinafter: "New Zealand butter") and in Articles 29 to 33 for other products. Import licences must show the number and date of issue of the corresponding IMA 1 certificate.'

9. Article 30 of Section 1 provides for certain formal requirements to be met by IMA 1 certificates. By Article 30(2), these certificates shall be printed and completed in one of the official languages of the Community, and may also be printed and completed in the official language or one of the official languges of the exporting country. By Article 32(2), IMA 1 certificates shall be valid only if completed and authenticated by an issuing body listed in Annex XII, which, in the case of New Zealand, is the MAF Food Assurance Authority of the New Zealand Ministry of Agriculture and Forestry ('MAF').

10. Section 2 of Chapter III, which applies solely to New Zealand butter, provides by Article 35(2) that 'Import licence applications may be submitted only in the United Kingdom. The United Kingdom shall monitor all IMA 1 certificates issued, cancelled, amended, corrected, or in respect of which copies have been issued. It shall ensure that the total quantity for which import licences are issued does not exceed the quota for any import year.' Article 38 of Section 2 provides for a number of duties for the designated New Zealand issuing body to communicate certain information concerning the IMA 1 certificates issued to the Commission and

the United Kingdom authorities, including the number of such certificates issued and any cancellations or amendments to the certificates. Article 39 of Section 2 provides for a system of monitoring of quantities of New Zealand butter imported, which obliges Member States and the United Kingdom in particular to transmit various data to the Commission concerning such imports.

11. By Title 3 of Regulation No 2535/2001, Member States shall take the necessary measures to check that the system of licences and certificates introduced by the Regulation is operating correctly.

C — *New Zealand legislative framework*

New Zealand export licence regime

12. The procedure for obtaining export licences for New Zealand butter to the Community is set out in the New Zealand Dairy Industry Restructuring Act 2001 ('DIRA'). DIRA substantially changed the corporate framework of the New Zealand dairy industry, including its export regime. In particular, DIRA authorised the amalgamation of New Zealand's (then) two largest dairy cooperatives — New Zealand Co-operative Dairy Company Ltd and Kiwi Co-operative Dairies Ltd — into a new Fonterra Cooperative Group Limited ('Fonterra Co-operative'). Fonterra Cooperative in turn owns all the shares in the New Zealand Dairy Board ('NZDB'), a former semi-state body converted into a company by DIRA. Subpart 3 of DIRA governs international trade with designated markets, laying down, inter alia, which parties can avail of preferential tariffs on imports into the Community. By Article 21(1) of DIRA, the purpose of subpart 3 is to '(a) maximise the economic benefits to New Zealand arising from tariff quotas maintained by foreign governments controlling access to their domestic markets; (b) provide that the New Zealand dairy industry is the recipient of these benefits; (c) safeguard New Zealand's interests in respect of those tariff quotas; (d) ensure that the administrative and other arrangements made are consistent with New Zealand's international obligations.' Article 21(2) provides that 'The Crown owns the rights to secure the economic benefits deriving from the tariff quotas referred to in subsection (1) ...'.

13. Article 23 of DIRA provides that export licences are necessary in order to export dairy products to certain designated markets (namely, those where preferential tariff quotas apply). By Article 24(1) of DIRA, NZDB has the exclusive right to these licences, initially until 31 December 2007 for all relevant dairy product exports to the Community. By Article 25 of DIRA, these

initial licences shall continue after this date until 31 December 2010 for reduced amounts of dairy products as specified in Article 25(2) of DIRA. Article 26 of DIRA provides that any rights to export licences that become available after 31 December 2007 (i.e., that are not automatically vested in NZDB) revert to the Crown and must be reallocated by the Crown. This reallocation may be to the NZDB.[7] By Article 28 of DIRA, the NZDB may not transfer, sub-license, or otherwise dispose of an initial licence in respect of a designated market to any other person.

### D — *Summary of export procedure for New Zealand butter to the Community at preferential tariffs*

#### New Zealand regime for IMA 1 certificates

14. In conformity with Regulation No 2535/2001, and as outlined above, the sole body competent to issue IMA 1 certificates for exports from New Zealand is the MAF. The issuing of IMA 1 certificates for New Zealand butter, cheddar and certain other cheeses for processing is governed by the Dairy Industry (IMA Certification) Regulations 2000 (the 'IMA Regulations'). Article 5 of the IMA Regulations makes the issuing of an IMA 1 certificate subject to certain conditions, one of which is that the application must be made by a body which regularly has the right to export products which are subject to tariff quotas.[8] As, pursuant to Articles 24 and 25 of DIRA, only NZDB has the right for the time being to obtain an export certificate for New Zealand butter to be exported to the Community under preferential rates, NZDB is likewise the only body that can be granted an IMA 1 certificate.

15. In sum, this procedure begins with the purchase of milk and manufacture of dairy products by Fonterra Co-operative. These products are sold to the NZDB which, in accordance with DIRA, is the only body to receive an export licence for the export of butter at a preferential tariff to the Community. As the sole holder of such export licences, the NZDB is also, pursuant to the IMA Regulations, the sole body eligible to receive IMA 1 certificates from the New Zealand MAF. NZDB sells this butter, along with the IMA 1 certificate, solely to a UK-based indirect subsidiary of Fonterra Co-operative, Fonterra Logistics Limited ('Fonterra Logistics'). As a result, because pursuant to Regulation No 2535/2001 possession of an IMA 1 certificate is a necessary

7 — Article 26(2) and (4) of DIRA.

8 — Article 5(1)(b), IMA Regulations.

condition for granting an import licence for New Zealand butter to the Community, Fonterra Logistics is the only body that can be granted such an import licence. Fonterra Logistics thus is the only body that can import preferential New Zealand butter into the Community. After completion of customs formalities – including payment of preferential tariff — Fonterra Logistic resells the imported butter to 'sister' indirect subsidiaries of Fonterra Cooperative operating in Member States other than the United Kingdom. [9]

## III — Factual background to the reference and questions referred

16. Franz Egenberger GmbH Molkerei und Trockenwerk ('the applicant') is a German company which, inter alia, imports milk products into the Community, including butter, under the WTO-agreed preferential tariff quotas unspecified by country of origin. In 2001, it requested to purchase from Fonterra Logistics preferential New Zealand butter which had not yet passed through the Community customs procedure, which request was turned down on the ground that the Fonterra Group only sold butter at the pre-customs stage for import into the Community to Fonterra Logistics. In August 2003, the applicant requested that the Bundesanstalt für Landwirtschaft und Ernährung (the 'BLE') grant it an import licence for 100 000 kg of New Zealand butter at a preferential tariff, under Article 25 of Regulation No 2535/2001. In October 2003, the BLE decided to reject this request on the bases that (1) pursuant to Article 25(1) of Regulation No 2535/2001, an import licence could only be granted upon presentation of an IMA 1 certificate, which the applicant did not possess; and (2) requests for import licences under the preferential New Zealand butter quota could only be made to the United Kingdom authorities, pursuant to Article 35(2) of Regulation No 2535/2001. In November 2003, the applicant appealed against this decision, which appeal was rejected by the BLE in January 2004. In February 2004, the applicant appealed against this rejection to the Verwaltungsgericht Frankfurt am Main, which stayed the proceedings and referred the following questions to the Court:

'(1) Does Article 35(2) of Commission Regulation No 2535/2001 violate higher-ranking Community law, in particular the prohibition of quantitative restrictions on imports and measures of equivalent effect contained in Article 28 EC, the prohibition on discrimination

9 — These companies are subsidiaries of NZMP (AMP) Ltd, a UK holding company forming part of the Fonterra Group. NZMP (AMP) Ltd is the direct parent company of Fonterra Logistics.

contained in Article 34(2) EC, second paragraph, and Article 26(2) of Council Regulation No 1255/1999, and is it as a result invalid?

(2) Does Article 25(1) of Commission Regulation No 2535/2001 violate higher-ranking Community law, in particular the prohibition on discrimination contained in Article 34(2) EC, second paragraph, and in Article 29(2) of Council Regulation No 1255/1999, Article 28 EC, and Article 82(1) EC, and is it as a result invalid?

(3) Do Articles 25(1) and 35(2) of Commission Regulation No 2535/2001 violate Article XVII(1)(a) of GATT and Article 1(3) of the Agreement on Import Licensing Procedures?'

17. Pursuant to Article 93 of the Rules of Procedure, written submissions in intervention were lodged in the present case by the applicant, the BLE, and Fonterra Logistics, as well as by the French Republic, the Federal Republic of Germany and the Commission.

A hearing was held on 27 September 2005, at which oral submissions were made by each of these interveners with the exception of the French Republic, as well as by the Polish Republic.

## IV — Analysis

### A — *On the first question*

18. By its first question, the Verwaltungsgericht essentially asks whether, in so far as it provides that applications for import licences for preferential New Zealand butter may only be made in the United Kingdom, Article 35(2) of Regulation No 2535/2001 infringes (1) the Article 28 EC principle of free movement of goods; (2) the non-discrimination principle of Article 34(2)(2) EC; and/or (3) Article 26(2) of Regulation No 1255/1999.

#### 1. Article 28 EC

19. The referring court, supported by the applicant, the BLE and the German Government, contends that Article 35(2) of Regulation No 2535/2001 infringes Article 28 EC.

In its view, the requirement that applications for import licences must be lodged in the United Kingdom makes importing New Zealand butter more difficult for non-UK-based potential importers, and thus constitutes a restriction on intra-Community trade.

result, and as confirmed by the Court's judgments in cases such as *Donckerwolcke*, [10] the prohibition on quantitative restrictions contained in Article 28 EC does not apply to this requirement. Article 35(2) of Regulation No 2535/2001 thus falls outside the scope of, and should not be held to infringe, Article 28 EC.

2. Article 34(2)(2) EC

20. This argument, however, fails to take account of the fact that, as provided by Article 23(2) EC, Article 28 EC applies only to products originating in Member States and to products coming from third countries which are in free circulation in Member States. By Article 24 EC, 'products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.' In the present case, the requirement to apply for an import licence in the United Kingdom by definition applies with regard to New Zealand butter which has not yet completed the formalities for import into the Community and for which customs duties have not yet been paid, thus meaning that this butter cannot (yet) be considered to be in free circulation within the Community. As a

21. Article 34 EC sets out the means by which the Community shall attain its objectives in the agricultural sphere, as enumerated in Article 33(1) EC: that is, the establishment of a common organisation of agricultural markets. The scope of this common organisation is defined in Article 34(2) EC. In particular, while the common organisation may include 'all measures required to attain the objectives set out in Article 33, in particular regulation of prices, aids for the production and market of the various products, storage and carry-over arrangements and common machinery for stabilising imports of exports', it is subject to three express limits. First, the common organisation 'shall be limited to pursuit of the objectives set out in Article 33'. Second, it shall 'exclude any discrimination between

10 — Case 41/76 *Donckerwolcke* [1976] ECR 1921, paragraph 16.

producers or consumers within the Community'. Third, in a case where a common price policy is used for a product, this policy 'shall be based on common criteria and uniform methods of calculation.'

22. The question here is whether the requirement to apply for an import licence for New Zealand butter in the United Kingdom infringes the second of these limits, that is, the duty not to discriminate between producers or consumers within the Community. The Court has consistently held that this duty is a specific expression of the requirement of equal treatment, meaning that comparable situations are not to be treated differently and that different situations are not to be treated alike unless such treatment is objectively justified. [11] Thus, differentiation between producers and consumers in taking measures under the Common Agricultural Policy (CAP) must only be carried out on the basis of objective criteria. [12] However, 'the fact that a measure adopted within the framework of the common organisation of the market may affect producers in different ways, depending upon the particular nature of their production, does not constitute discrimination if that measure is determined on the basis of objective rules, which are formulated to meet the needs of the general common organisation of the market'. [13]

23. As an initial point, although it is true that not all applicants for import licences under Article 35(2) of Regulation No 2535/2001 may qualify as direct 'producers' within the Community, which is the term used by Article 34(2) EC, this should not in my view affect our analysis. This follows from the requirement to interpret the prohibition on discrimination, as a fundamental Community law principle, in a broad manner. Further, both of the regulations at issue in the present case use the broader concept of non-discrimination between 'operators' or 'importers'. [14]

24. The first question here is thus whether the requirement that applications for import licences must be made in the United Kingdom amounts to a difference in treatment for potential importers in comparable positions. While the referring court, the applicant, the BLE, the Commission and the French and German Governments contend that this requirement favours potential importers of

11 — Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25; Case C-117/99 *Unilet* [2000] ECR I-6077, paragraph 23; judgment of 17 March 2005 in Case C-91/03 *Spain* v *Council*, [2005] ECR I-2267, paragraph 43; judgment of 13 January 2005 in Case C-126/04 *Heineken Brouwerijen* [2005] ECR I-331, paragraph 16.

12 — Case 203/86 *Spain* v *Council*, footnote 11 above, paragraph 25.

13 — See Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301, paragraph 34; Case C-311/90 *Hierl* [1992] ECR I-2061; Case C-56/99 *Gascogne Limousin viandes* [2000] ECR I-3079, paragraph 44.

14 — See Regulation No 1255/1999, Article 29(2): '[methods of administration of tariff quotas] shall avoid any discrimination between the operators concerned'; Regulation No 2535/2001, recital 2: 'Articles 26 and 29 of Regulation (EC) No 1255/1999 stipulate that the Commission is to ensure that import licences are issued to all applicants irrespective of where in the Community they are established and that all discrimination between importers must be avoided ...'.

New Zealand butter who are established in the United Kingdom over those established in other Member States, Fonterra Logistics denies that this amounts to a relevant difference in treatment in the sense of the non-discrimination principle. In particular, Fonterra Logistics argues that there is no proof that non-UK-based applicants would be subject to greater difficulties and higher costs than UK-based applicants.

25. I cannot accept Fonterra Logistic's arguments on this point. It is clear that, as the referring court observes, applying for a licence in the United Kingdom will entail more difficulties for non-UK importers in comparison with UK-based importers. In the first place, it is easier for an importer to make an application in its 'mother tongue'. Although it is true that for very large companies making an application in English may be normal procedure not resulting in any extra cost or inconvenience, for smaller companies the requirement may well result in, for example, additional translation costs. In addition, should any litigation arise, the fact that such litigation would take place in a foreign legal system amounts to a disadvantage for non-UK companies. In my view, these potential extra difficulties for non-UK importers are sufficient to comprise a difference in treatment in the sense of the non-discrimination principle. It is not enough to argue that these difficulties are, in practice, unlikely to be considered substantial by the majority of companies seeking to engage in international commerce: no de minimis rule applies to the assessment.

26. Having established that Article 35(2) of Regulation No 2535/2001 treats UK and non-UK importers differently, the second question is whether this difference can be objectively justified. In this regard, the Commission contends that the difference in treatment is objectively justified in that it is proportionate to the aim pursued by the provision. It relies principally on the argument that, as the Commission has a wide discretion in exercising its powers in the sphere of the CAP, judicial review of this exercise should be limited to examining whether it has manifestly exceeded its powers. Further, the object of the requirement to apply for import licences in the United Kingdom is to enable this Member State efficiently to check all IMA 1 certificates lodged, annulled or modified and to ensure that the total quantity of butter imported does not surpass the quota for that year.

27. I do not find these arguments convincing, for the following reasons.

28. To begin, both the Commission and Fonterra Logistics base their contentions here to a large extent on the premiss that the standard of judicial review of Commission legislative measures in the agricultural sphere should per se in all cases be limited. I do not agree with this proposition. It is in my view essential to distinguish here between, on the one hand, Commission activity of a legislative nature, involving difficult policy choices where the Commission must strike a balance between the different objectives of the CAP set out in Article 33 EC, and, on the other hand, Commission activity entailing none of these policy choices where it is purely specifying the practical execution and administration of a scheme or policy.

29. In the former case, it is clear that judicial review is confined to verifying that the legislative measure is not vitiated by any manifest error or misuse of powers and that, in taking the measure, the Commission did not manifestly exceed the limits of its power of assessment having regard to the objective it sought to pursue. [15] In the Court's constant case-law, the limited nature of judicial review here reflects the fact that, 'the Community legislature has a broad discretion in matters concerning the common agricultural policy, which corresponds to the political responsibilities given to it by Articles 34 EC and 37 EC.' As a result, 'the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate, having regard to the objective which the competent institution is seeking to pursue.' [16] Examples of decisions taken pursuant to this political responsibility include those taken in reaction to sudden developments in the agricultural markets. Thus the Court has held that, 'the Commission alone is in a position constantly to keep a close watch on agricultural market trends and to act quickly when necessary. Therefore, according to the settled case-law of the Court, the Council may confer on it wide powers of discretion and action in this sphere. When it does so, the limits of those powers must be determined in the light of the essential general aims of the market organisation.' [17] For example, the Court has held that the decision of the Commission to choose a policy of banning vaccination, combined with slaughter of contaminated animals, in order to combat foot-and-mouth disease, fell within the Commissions's decision-making discretion under the CAP. [18]

30. In the latter case, however – that is, Commission measures of a non-policy essentially administrative or executory nature — there is, to my mind, no reason why

15 — Case C-14/01 *Molkerei Wagenfeld Karl Niemann* [2003] ECR I-2279, paragraph 39. See also Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 80; Case C-375/96 *Zaninotto* [1998] ECR I-6629, paragraph 64; Case C-56/99 *Gascogne Limousin*, footnote 13 above; Case C-328/00 *Weber* [2002] ECR I-1461, paragraph 32; Case C-63/00 *Schilling and Nehring* [2002] ECR I-4483, paragraph 39; judgment of 12 May 2005 in Case C-347/03 *ERSA* [2005] ECR I-3785.

16 — Case C-347/03 *ERSA*, footnote 15 above, paragraph 131; see also Case C-331/88 *Fedesa* [1990] ECR I-4023, paragraph 8; Case C-354/95 *National Farmers' Union* [1997] ECR I-4559, paragraph 50; Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 74; Case C-63/00 *Schilling and Nehring*, footnote 15 above, paragraph 39; Case C-14/01 *Molkerei*, footnote 15 above, paragraph 39.

17 — Case C-14/01 *Molkerei*, footnote 15 above, paragraph 38. See also Joined Cases 133/85 to 136/85 *Rau and Others* [1987] ECR 2289, paragraph 31; Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* [1987] ECR 1155, paragraph 14; Case C-359/89 *SAFA* [1991] ECR I-1677, paragraph 16; Case C-311/90 *Hierl*, footnote 13 above, paragraph 14.

18 — See Case C-189/01 *Jippes*, footnote 15 above.

the scope of judicial review of such measures should be limited – or, indeed, any different to the standard of review of Member State measures putting the details of the CAP into execution. In such cases, the rationale for restricting review — that is, the fundamental separation of function between legislator and judiciary, meaning that it is not the role of the judiciary to 'second-guess' legislative policy choices — is absent. This reasoning is implicit in the Court's jurisprudence I have cited above: the Court should not closely review Community legislative measures carried out pursuant to the latter's 'political responsibilities' under Articles 34 and 37 EC; the scope of judicial review of Commission measures should be limited only in cases where the Council has conferred upon it wide powers of discretion in acting. The arguments for closer judicial review of Commission agricultural measures of an executory nature are all the more strong where the review is for compliance with the principle of non-discrimination, which forms by virtue of Article 34(2) EC an express Treaty limit to the means of attaining the Community's objectives in the agricultural sphere, as I point out above. Likewise, the Council's mandate for the administration of tariff quotas, as set out in Article 29 of Regulation No 1255/1999, expressly limits the discretion to carry out this task: all methods of quota administration 'shall avoid any discrimination between the operators concerned.'

31. Turning to the present case, the Commission seeks to justify the Article 35(2) requirement that all import licence applications be lodged in the United Kingdom on the grounds of ease of and efficiency in control and verification of applications, and ensuring that the overall quota for import of New Zealand butter is not surpassed. This justification does not suffice in my opinion. Although the aim of proper supervision, verification and control of import licence applications is in principle a valid one, obliging all importers to apply in the United Kingdom is a disproportionate means of achieving this aim. In particular, it is highly questionable how appropriate and effective such an obligation is in accomplishing this objective. There is no evidence that the United Kingdom authorities enjoy an inherent advantage in supervising the administration of import licences. As I set out above, under Regulation No 2535/2001 the only product for which such a requirement applies is New Zealand butter. [19] In the case of other products for which an IMA 1 certificate is required in addition to an import licence (i.e., those covered by Section 1 of Title 2, Chapter III of Regulation No 2535/2001), [20] such licences may be issued by any competent licence-issuing body in the Community. I can see no objective reason, nor has any been put forward in argument, why a similar regime could not in principle be equally effective in the case of imports of New Zealand butter. Indeed, it bears mention that Regulation No 2535/2001 itself already makes authorities in each Member State responsible for controlling the weight and fat content of

19 — Section 2 of Title 2, Chapter III of Regulation No 2535/2001, in which Article 35(2) is to be found, applies only to New Zealand butter: see above.

20 — That is, (1) importers under the quotas for specified countries of origin listed in the CXL schedule, with the exception of New Zealand butter; (2) imports under the quotas provided for in the Community's Agreement with Norway; and (3) imports under the Community's Agreement with Cyprus (Article 24, Regulation No 2535/2001).

imported New Zealand butter to check that this tallies with that given on the relevant IMA 1 certificate. [21]

32. On the contrary, in my view it is evident that the real reason for the presence of Article 35(2) in Regulation No 2535/2001 is historical. As the Commission has recognised in its submissions, the original reason why all import licence applications for New Zealand butter had to be made in the United Kingdom was that, in accordance with Protocol 18 of its Act of Accession, this was the only country in which such butter could be marketed. Although, following Regulation No 3841/92, this restriction was lifted and preferential New Zealand butter could be freely traded within the Community, the obligation to apply for an import licence in the United Kingdom was simply left untouched, despite the fact that its rationale had in the meanwhile become wholly defunct. In my opinion, Article 35(2) is thus in no meaningful sense a policy measure amenable only to limited judicial review.

33. This leaves us today with only one possible argument for maintaining this state of affairs – namely, that it is easier to preserve the status quo. One could imagine that proponents of such an argument might point to the historical experience of the United Kingdom authorities in handling import licence applications for New Zealand butter. They might also point to the fact that the various obligations to notify certain information, as set out in Articles 38 and 39 of Regulation No 2535/2001, at present refer only to the United Kingdom authorities. These arguments are not, however, compelling. As I have already stated, other Member States' authorities are at present competent to deal with import licence applications for all other products for which an IMA 1 certificate is required. In any event, the interest in avoiding disadvantage to non-UK traders in my view outweighs any marginal practical benefit of experience that the UK authority may have here. Further, while it is true that in their present form other articles in Regulation No 2535/2001 refer to the United Kingdom authority as the 'contact point' for New Zealand butter, I see no necessary reason why alteration of these articles to refer to Member States' competent licence-issuing bodies should present a problem, or indeed, as I mention below, why the United Kingdom could not continue its statistical functions with the aid of cooperation between issuing bodies.

34. For these reasons, I am of the opinion that Article 35(2) of Regulation

21 — Annex IV to Regulation No 2535/2001.

No 2535/2001 infringes the principle of non-discrimination set out in Article 34(2)(2) EC, and should in consequence be annulled.

3. Article 26(2) of Regulation No 1255/1999

35. The referring court's final question as regards Article 35(2) of Regulation No 2535/2001 raises its compatibility with Article 26(2) of Regulation No 1255/1999.

36. While, in view of the above conclusion, it is not strictly necessary to answer this point, I would observe that, in my view, the two articles are perfectly compatible. Article 26(2) of Regulation No 1255/1999 simply provides that licences (including import licences) shall be issued by Member States to any applicant, irrespective of his place of establishment and without prejudice to the measures taken for the application of Articles 29, 30 and 31. However, it is not disputed that, under Article 35(2) of Regulation No 2535/2001, import licences can (in theory) be issued to applicants established in any Member State. The point is rather, as explained above, that these applicants are in practice likely to be at a disadvantage in applying for such licences. The fact that Article 26(2) refers to licences issued by 'Member States' in the plural is not in my view determinative, as this forms part of a general provision to the effect that imports into the Community are subject to licence, and exports from the Community may be subject to licence. I do not see that the use of the plural here was intended necessarily to exclude the possibility – where necessary and justified — of making one Member State competent to receive licence applications for a given product. [22]

B — *On the second question*

37. By its second question, the Verwaltungsgericht essentially asks whether, in so far as it provides that import licences for certain products, including preferential New Zealand butter, can be issued only on presentation of an IMA 1 certificate to the issuing authority, Article 25(1) of Regulation No 2535/2001 infringes (1) the non-discrimination principles of Article 34(2) EC, second paragraph, and Article 29(2) of Regulation No 1255/1999; (2) Article 28 EC; and/or (3) Article 82(1) EC, and should as a result be declared invalid.

22 — Further, the provision that licences shall be issued 'without prejudice to the measures taken for the application of Articles 29, 30 and 31' in my view simply indicates that, in issuing licences, Member States must have regard to the methods for administration of (import and export) quotas laid down by the Commission under these articles.

1. Prohibition of discrimination

38. The first issue is whether the requirement that import licences for certain products, including preferential New Zealand butter, can be issued only on presentation of an IMA 1 certificate to the issuing authority infringes the principles of non-discrimination set out in Article 34(2) EC and Article 29(2) of Regulation No 1255/1999. I will deal with these articles together as, in my view, they express the same principle; namely, as I have described above, the imperative of equal treatment, meaning that comparable situations are not to be treated differently and that different situations are not to be treated alike unless such treatment is objectively justified. Article 29(2) of Regulation No 1255/1999 simply enunciates this principle in the specific context of the administration of tariff quotas.

39. There are, in theory, two possible senses in which a provision of Commission legislation can infringe the prohibition of non-discrimination.

40. The first is the sense I have discussed above; that is, where the wording of the provision itself uses a criterion which leads to discriminatory treatment between operators, in the present case in awarding import licences. Article 25(1) of Regulation No 2535/2001 is not discriminatory in this sense. It is true that the article results in a difference of treatment on its face: in making the grant of such licences subject to possession of an IMA 1 certificate, the article distinguishes between those operators possessing an IMA 1 certificate and those not possessing such a certificate. However, this difference in treatment is in my view justified. In the present case, the aim of the requirement to possess an IMA 1 certificate in order to be issued an import licence is set out in recital 9 in the preamble to Regulation No 2535/2001. According to this recital, the essential aim of the requirement is facilitation and simplification of the import procedure, by making it easier for import authorities to verify that imported products comply with the description of the goods concerned and with the tariff quota. This is because the IMA 1 certificate, which is granted by the exporting country, represents an assurance that the exported products conform with their description.

41. In principle, this justification is perfectly acceptable. By Articles 26(1) and 29(1) of Regulation No 1255/1999, which form the legal basis for Regulation No 2355/2001, the Council granted the Commission a mandate, inter alia, to lay down detailed rules for the application of the import arrangements for milk and milk products set out in those articles. The Commission's decision to impose an additional certification requirement — the IMA 1 certificate — for certain products in the interest of facilitating the verification of imported products for compliance with the goods' description and with the tariff quota, is a classic example of a policy choice falling within the bounds of its

discretion. Indeed, the applicant expressly states that it does not object in principle to the concept of requiring an IMA 1 certificate. As a result, it cannot be said that Article 25(1) of Regulation No 2535/2001 itself discriminates between operators on its face. In this sense, it is not discriminatory.

42. However, there is in my view a second, separate sense in which a provision of Commission legislation can infringe the principle of non-discrimination. This concerns the scenario where the Commission has an express duty to ensure the equal treatment of operators within the Community, and where it delegates to a third state one of the administrative duties that, under its legislative mandate from the Council, it was obliged to perform in enacting the legislation. In such a scenario, the Commission has an obligation to ensure that the non-discrimination principle is, likewise, respected by the third state to which it has delegated its administrative duty. If the Commission fails to do this, and if this leads to discrimination between operators within the Community, responsibility for the breach of the principle of non-discrimination must be attributed directly to it.

43. The reasons for attributing this kind of delegated discrimination to the Commission are strong. In the first place, where the Commission is charged by the Council with carrying out a task in compliance with the principle of non-discrimination, the Commission cannot be absolved from this duty by the mere fact that it has chosen to delegate (part of) this task to a third state. Not only would this subvert the intention of the Council as expressed in its mandate, [23] but it would also compromise the effectiveness of the fundamental prohibition on discrimination set out in the Treaty. In the second place, seen from the Community operator's point of view, the damage is precisely the same whether the discriminatory rules are implemented by the third state or by the Commission.

44. In the present case, it is clear that the Council's mandate to the Commission to lay down detailed rules for applying Regulation No 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas was made expressly subject to the requirement to comply with the principle of non-discrimination between operators within the Community. Thus, Article 29(1) of Regulation No 1255/1999 provides that the methods adopted for administering tariff quotas for milk and milk products shall 'avoid any discrimination between the operators concerned.' Likewise, recital 2 in the preamble to Regulation No 2535/2001, the 'daughter' regulation, recalls the conditions of the Commission's mandate here: 'Articles 26 and 29 of Regulation No 1255/1999 stipulate that the Commission is to ensure that import licences are

23 — See by analogy, Case C-14/01 *Molkerei*, footnote 15 above, paragraph 35: 'The Court observes that, according to the fourth indent of Article 211 EC, in order to ensure the proper functioning and development of the common market, the Commission is to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.'

issued to all applicants irrespective of where in the Community they are established and that all discrimination between importers must be avoided, whilst taking into account all the relevant provisions.'

45. As set out above, for certain milk products, the Commission chose to adopt a method of quota administration and import arrangement that required, as a precondition to grant of a licence to import into the Community, possession of an IMA 1 certificate for the products in question. Responsibility for granting these certificates was entrusted solely to certain third country 'issuing bodies', as designated by the Commission in Annex XII to Regulation No 2535/2001. [24] Section 1 of Chapter III, Title 2 of Regulation No 2535/2001 contains a variety of obligations with which issuing bodies must conform in granting IMA 1 certificates, for example as regards the form of the IMA 1 certificates, their validity and contents. [25] In the case of New Zealand butter, Annex IV to Regulation No 2535/2001 sets out detailed rules to be followed by the New Zealand MAF in completing IMA 1 certificates and in monitoring the weight and fat content of the butter. [26] However, the Commission does not include in these requirements an obligation to respect the principle of non-discrimination between operators in granting IMA 1 certificates. In the case of the grant of IMA 1 certificates for the import of New Zealand butter into the Community, it is abundantly clear that this failure has enabled the New Zealand authorities to discriminate between operators, in the sense of Article 29(2) of Regulation No 1255/1999, in the way in which it grants IMA 1 certificates. In the first place, there is no doubt that the New Zealand IMA 1 certificate regime leads to a difference in treatment between operators. As I have described above, it is pursuant to New Zealand legislation only possible for one operator, NZDB, to obtain an IMA 1 certificate for such import into the Community. In the second place, such difference in treatment is not objectively justified within the meaning of the Community law principle of non-discrimination. As I have described above, the express motivation underlying the New Zealand legislative regime here is to maximise the economic benefits of export of New Zealand butter to the Community and to ensure that these benefits revert, so far as possible, back to the New Zealand dairy industry via Fonterra. This does not amount to a valid justification under Community law for discrimination, in particular such extreme discrimination as is evident here; that is, the total exclusion of all other operators from the possibility to import New Zealand butter into the Community.

24 — As such, this import regime contrasts with the regimes for other milk products under Chapters I and II, Title 2, of Regulation No 2535/2001, where imports are made on the basis of import licences alone, responsibility for which lies with Community import authorities.

25 — See Articles 25 and 29 to 31 of Regulation No 2535/2001.

26 — Article 40(1) of Regulation No 2535/2001.

46. For these reasons, therefore, the Commission has failed in its obligation to ensure that the non-discrimination principle is

respected by a third state to which it delegated its administrative duty imposed by the Council's mandate. The resulting discrimination between operators must, in my view, in consequence be attributed to the Commission. I would add that the inclusion of a condition or duty of respect for the principle of non-discrimination between operators would not seem to me to impose undue practical difficulties. To begin, as regards monitoring of compliance with such an obligation by the Commission, the IMA 1 regime applies only in a limited number of countries. Further, issuing bodies are already subject to various obligations to keep the Commission informed about how their IMA 1 regimes are working,[27] to which could easily be added, for example, a duty to undertake that IMA 1 certificates are being awarded in a non-discriminatory manner, or to include a list of operators to which IMA 1 certificates have been awarded in that quota year. Further, as regards possible consequences of breach of this duty, one could imagine that this could take a number of forms, ranging from informal discussions between the Commission and the relevant issuing body, to formal alteration of the system of issuing bodies in the third state.[28]

47. The answer to this part of the referring court's question should thus be that Article 25(1) of Regulation No 2535/2001 infringes the principles of discrimination set out in Article 34(2) EC and Article 29(2) of Regulation No 1255/1999, and should thus be declared invalid.

2. Article 28 EC

48. The referring court also raises the question whether the requirement to possess an IMA 1 certificate in order to apply for an import licence, as set out in Article 25(1) of Regulation No 2535/2001, infringes the Article 28 EC prohibition on restrictions on free movement of goods. The classic response to this question would be negative, for the same reasons as I discussed in my response to Question 1 above; namely, the requirement concerns products that have not yet been placed in free circulation within the Community, and that therefore fall outwith the scope of Article 28 EC.

49. None the less, I would observe that I am not entirely satisfied with this response. As I have discussed above, the effect of the way in which the Commission has chosen to carry out its mandate to lay down rules for import arrangements means that only one company has the right to import New Zealand butter into the Community. As a matter of economic reality, the fact that only one such importer exists, enabling it for example to charge higher prices upon resale, will have

27 — See, for example, Articles 33 and 38 of Regulation No 2535/2001.

28 — This has already occurred, for example, when there was a quota overrun in Norway, as a result of which Norway's two issuing bodies were replaced with a single body answering directly to the Norwegian Ministry of Agriculture: see recital 15 in the preamble to Regulation No 2535/2001.

restrictive consequences for inter-state trade of the butter once in free circulation as I explain further below. For this reason, to my mind, recognition of a Commission duty under Article 28 EC to have regard to and minimise these restrictions, in performing its executive and administrative duties as mandated, would accord with the economic rationale and effectiveness of that article. However, in view of my conclusion on the first and third elements of the referring court's second question, I find it unnecessary for the purposes of the present case to explore this issue further.

## 3. Article 82(1) EC

50. The final issue raised by the referring court in its second question is whether Article 25(1) of Regulation No 2535/2001 infringes Article 82(1) EC, which prohibits the abuse by one or more undertakings of a dominant position within the common market or a substantial part of it.

51. Plainly, as Article 82(1) EC applies only to the activities of undertakings engaged on their own initiative,[29] this article cannot in itself form the basis for review of a provision of a Commission Regulation. The question in the present case is rather whether Article 25(1) of Regulation No 2535/2001 infringes Article 82(1) EC in conjunction with Article 86(1) EC. This article provides that, 'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for by Article 12 and Articles 81 to 89.' The Court has held this article to mean that, notwithstanding the fact that Article 82 EC is directed at undertakings, the Treaty 'imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness.'[30] Thus, Member States may not adopt or maintain measures creating 'a situation in which [an undertaking] cannot avoid infringing [the Treaty].'[31]

52. In principle, there are three stages in analysing whether this doctrine applies to the present case. First, does the Article 86(1) EC prohibition apply not only to Member State measures, but also to Commission legislative measures in the agricultural sphere taken

29 — See Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20; Case C-202/88 *France* v *Commission* [1991] ECR I-1223.

30 — Case 13/77 *INNO* [1977] ECR 2115, paragraph 31.

31 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 27. See, also, Case 13/77 *INNO*, footnote 30 above, paragraph 33, which refers to the enacting of 'measures enabling private undertakings to escape from the constraints imposed by Articles [81 to 89] of the Treaty.'

pursuant to a Council mandate? Second, if so, can the Commission be said to, by Article 25(1) of Regulation No 2535/2001 or by another measure, have granted NZDB special or exclusive rights? Third, if so, does Article 25(1) of Regulation No 2535/2001 create a situation in which the Fonterra Group, or part of it, cannot avoid infringing Article 82 EC?

53. On the first point, although Article 86(1) EC only refers expressly to Member State measures, there are in my view convincing reasons why this article should, in principle, be held to extend to Commission measures enacted pursuant to a Council mandate. Foremost among these reasons is the Commission's duty, as bound by Article 10 EC, to facilitate achievement of the Community's tasks and to abstain from any measure which could jeopardise attainment of the objectives of the Treaty. [32] A further compelling reason is the Commission's Article 211 EC mission to help ensure the proper functioning and development of the common market, which evidently includes the Article 3(g) EC aim of ensuring that competition in the common market is not distorted.

54. In addition, the fact that the Commission measure at issue was taken in the agricultural sphere adds further weight to this approach. By Article 33 EC, one of the express aims of the CAP is ensuring that supplies reach consumers at reasonable prices. [33] As this is also one of the primary aims of the Treaty rules on competition, including Articles 86(1) EC and 82(1) EC, it is in the interest of the effectiveness of both Article 33 and the competition rules that, in principle, Commission measures in the agricultural sphere could fall within the scope of Article 86(1) EC. In this regard, I find the Court's judgment in *Milk Marque* instructive. In that case, the Court held that, in pursuing the various aims of the common agricultural policy laid down in Article 33 EC, the Community institutions have a permanent duty to reconcile these individual aims. [34] As regards the Treaty competition rules in particular, the Court held that, 'the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy and the common organisation of the relevant markets.' [35] In discussing the effect of Article 36 EC in *Milk Marque*, the Court

32 — See, holding that the Community institutions are also bound by Article 10 EC, Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 37; Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 16; Case C-319/97 *Kortas* [1999] ECR I-3143, paragraph 35; Case C-29/99 *Commission* v *Council* [2002] ECR I-11221, paragraph 69; and Declaration No 3 annexed to the Treaty of Nice on Article 10 of the EC Treaty.

33 — See, also, judgment of 26 May 2005 in Case C-283/03 *A. H. Kuipers* v *Productschap Zuivel* [2005] ECR I-4255.

34 — Case C-137/00 *Milk Marque* [2003] ECR I-7975.

35 — Ibid., paragraph 57.

observed that, whilst this article 'has conferred on the Council responsibility for determining the extent to which the Community competition rules are applicable to the production of and trade in agricultural products, in order to take account of the particular position of the markets for those products that provision nevertheless establishes the principle that the Community competition rules are applicable in the agricultural sector.' [36]

55. Although the Court also held in that case that, in case of conflict, Article 36 EC gave precedence to the objectives of the common agricultural policy over those in relation to competition policy, this is not in my view a case in which a conflict between these two policies arises. I could imagine that such a conflict could arise if the object of the present proceedings were to eliminate completely the requirement to present an IMA 1 certificate in applying for a Community import licence for New Zealand butter. However, as the applicant has confirmed, this is not the object of its case; rather, it seeks (non-discriminatory) access to the market for import of New Zealand butter into the Community. This relates solely to the Commission's choice of conditions upon which to delegate its responsibilities in administering tariff quotas, and does not in my view entail a conflict between CAP and competition policies.

56. This brings us to the second and third points. These can be considered together, as in reality the measure allegedly 'granting special or exclusive rights' and the measure allegedly creating a situation where Article 82 EC will inevitably be infringed are one and the same — Article 25(1) Regulation No 2535/2001. [37] Can Article 25(1) of Regulation No 2535/2001 be said to grant the Fonterra Group, or part of it, special or exclusive rights creating a situation where they cannot avoid infringing Article 82 EC?

57. First, on the question of special or exclusive rights, once again, on its face, Article 25(1) of Regulation No 2535/2001 of course contains no express designation of NZDB as the sole operator entitled to an IMA 1 certificate, and does not directly enable NZDB to act in a way contrary to Article 82(1) EC. Rather, this results from the provision of New Zealand law awarding the right to an IMA 1 certificate solely to NZDB, by virtue of the fact that NZDB holds the exclusive export licence for New Zealand butter to the Community. As I have outlined above, however, it is my view that, in organising and administering the regime for

36 — Ibid., paragraph 58.

37 — See, for example, Case C-202/88 *France* v *Commission*, footnote 29 above, in which the Court confirmed that the grant of special or exclusive rights can itself be a 'measure' in the sense of Article 86(1) EC, without a need for two separate measures.

distribution of IMA 1 certificates, third countries act under powers delegated by the Commission by virtue of the regime set up by Article 25(1) of Regulation No 2535/2001, in pursuance of the Commission's mandate to lay down arrangements for and administer import arrangements for milk and milk products. As a result, although the exclusive attribution of IMA 1 certificates for importing New Zealand butter into the Community to NZDB is the result of an act of the New Zealand legislation, the burden of the consequences of this act within the Community must lie with the Commission. The Commission should be considered to bear responsibility for New Zealand's grant of special or exclusive rights.

58. The next issue is whether NZDB's exclusive right to IMA 1 certificates here is such that, in merely exercising the exclusive right, the Fonterra Group, or part of it, cannot avoid abusing its dominant position. Logically, the first question here is: has there been an abuse of a dominant position by the Fonterra Group, or part of it, within the sense of Article 82(1) EC? As Fonterra Logistics point out, the determination of the relevant market, and the extent of the Fonterra Group's market power on that market, would necessitate detailed economic and factual analysis. The information available to the Court on the basis of the present preliminary reference procedure is not sufficient to enable the Court to carry out this analysis, nor is it appropriate in a preliminary reference procedure to decide this issue of fact. This is an issue for the referring court to decide. If, after this analysis, the referring court were to conclude that the Fonterra Group, or part of it, occupied a dominant position on a relevant market — for example, the market for export of New Zealand butter to the Community, or the market for import of New Zealand butter into the Community — the second question would be whether it has abused this position. Again, without defining the relevant market, the Court is not in a position to give a definitive analysis on this point.[38] I would make the following additional observation in this regard. The referring court should, in evaluating whether an abuse of dominant position has taken place, take into account what, in my view, amount to seriously detrimental anti-competitive effects within the Community of the present import regime. The key damage caused by the

38 — However, on the hypothesis of a finding that (part of) the Fonterra Group is dominant on a market for export of (New Zealand) butter (to the Community), I would refer, as a potential point of departure, to the Court's judgment in Case C-18/88 *GB-Inno-BM*, footnote 29 above. In this case, the Court held that measures assisting the dominant undertaking to extend its market power into a neighbouring market are contrary to Article 86(1) read together with Article 82(1) EC. This principle would also, it would seem to me, apply in the case of extension of market power into a downstream market, such as that for import into the Community. Again, depending on the market definition adopted, a further possible point of reference could be the doctrine of refusal to supply for new customers in circumstances where supply is indispensable to the customer's ability to compete. See, by analogy, Case 311/84 *Télémarketing* [1985] ECR 3261.

monopoly over New Zealand butter import licences, which is felt principally in the Community, is twofold.

59. First, Community consumers pay more for the product, and for downstream products for which the product forms an input. As competition is possible only once the product enters into free circulation, the monopolist importer is free to act independently of competitors, customers and ultimately of consumers [39] in setting its prices for resale following completion of customs formalities. These higher prices are in turn passed on to consumers. Second, only one company reaps the benefit of the monopoly rent upon resale of the product. In the present case, as I have described above, this is the express motivation underlying the New Zealand legislation; that is, to maximise the economic benefits of export of New Zealand butter to the Community and to ensure that these benefits revert, so far as possible, back to the New Zealand dairy industry via Fonterra. This means not only that all other potential importers are excluded completely from importing the product, but also that Fonterra Logistics (and potentially its sister distribution companies within the Community) have a major advantage on the downstream resale market(s) for New Zealand butter, as other resellers must pass on their raised costs resulting from Fonterra Logistic's high resale price. In sum, the damaging (direct and indirect) consequences for Community consumers of this absolute monopoly are potentially grave.

60. If the referring court were to conclude that (part of) the Fonterra Group had abused its dominant position, for example by extending its dominant position into a downstream market, or by abusively refusing to sell butter to the applicant pre-import, the final issue would be whether this abuse was an inevitable consequence of the New Zealand legislation. On this point, it is true that, in theory, it would be open to NZDB to sell its butter destined for the Community, together with the applicable IMA 1 certificates, to importers other than Fonterra Logistics. Thus, as the referring court has noted, the applicant's request that NZDB sell it such butter was rejected simply on the ground that the Fonterra Group's policy was only to sell butter at the pre-customers stage for import into the Community to Fonterra Logistics. As such, one could argue that any infringement of Article 82 EC resulting from NZDB's actions was not an inevitable result of the attribution of exclusive rights to NZDB by New Zealand legislation. [40] This argument is, however, artificial. In particular, it fails to take account of the purpose of the New Zealand legislation constructing the regime for the grant of IMA 1 certificates; that is, the maximisation of the economic benefits to New Zealand of its butter exports

39 — See the classic definition of dominance in, inter alia, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 65.

40 — See Case C-323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I-5077.

under tariff quotas, and the passing on of these benefits to the New Zealand dairy industry. As such, it would seem that the express intention of the regime is that NZDB should continue to sell its butter for import into the Community solely to Fonterra Logistics. As a result, the refusal by NZDB to sell to any operator other than Fonterra Logistics should realistically be seen as an inevitable consequence of the New Zealand legislative regime.

C — *On the third question*

61. By its third question, the Verwaltungsgericht seeks to know whether Articles 25(1) and 35(2) of Regulation No 2535/2001 should be declared invalid as in breach of (1) the non-discrimination principle for government-controlled enterprises contained in Article XVII(1)(a) of the GATT; and/or (2) the obligation of neutrality and fairness in administering import licensing procedure rules contained in Article 1(3) of the GATT Agreement on Import Licensing Procedures. As the GATT 1994 and the GATT Agreement in Import Licensing Procedures form part of the agreements annexed to the WTO agreement, this question once again raises the issue of the extent to which Community legislation can be reviewed for compliance with WTO provisions.

1. Principles applicable

62. In this regard, the Court has held that, in principle, having regard to their nature and structure, the WTO agreements are not among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.[41] There are, however, two exceptions to this principle. The first is where the Community measure challenged expressly refers to the particular GATT provision (the so-called '*Fediol*' exception).[42] As recognised by the interveners to the present proceedings, this exception is not applicable in the present case. Regulation No 2535/2001 does not refer at any point to Article XVII(1)(a) of the GATT, or indeed Article 1(3) of the GATT Agreement on Import Licensing Procedures. The second is where, in passing the contested legislation, the Community intended to implement a particular obligation assumed in the context of the WTO (the so-called '*Nakajima*' exception).[43] This is the exception invoked in the present case.

41 — See, for example, Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47.

42 — See Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22.

43 — See Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31

2. Should the Court revisit *Nakajima*?

63. Prior to examining whether this exception applies here, I note that the Commission has asked the Court in the present case to revisit its jurisprudence, cited above, defining the circumstances in which Community legislation can be reviewed for compliance with provisions of WTO law. In particular, the Commission argues that the rationale behind the Court's jurisprudence on the '*Nakajima*' exception can be better put into effect by a principle of 'consistent interpretation' of Community legislation in conformity with international law.[44] The Commission observes that the unilateral nature of the *Nakajima* exception contradicts the balance of reciprocity inherent in the WTO legal framework, and warns that the practical consequences of the *Nakajima* exception are that the Community legislator would, in an attempt to avoid falling within the scope of the exception, avoid reference to WTO law in the preambles to Community legislation.

64. On this point, however, I would observe that the Commission has not, in my view, given any convincing reasons why the Court should review (or remove) the longstanding *Nakajima* exception in the present case. To begin, it is clear that the Court was fully aware of, and considered, the implications of the reciprocal nature of the WTO agreements in its leading judgments setting out the circumstances in which WTO rules may form a ground of review of Community measures. Thus, for example, in *Portugal* v *Council*, the Court recalled that the WTO agreement is 'still founded, like GATT 1947, on the principle of negotiations with a view to "entering into reciprocal and mutually advantageous arrangements ..."'.[45] In all such cases, however, the Court has none the less confirmed the *Fediol* and *Nakajima* exceptions to the general principle that Community measures may not be reviewed for compliance with WTO law. Moreover, the existence of these exceptions does not, to my mind, conflict with what was a primary rationale for the general principle; namely, that according direct effect to WTO rules would 'deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.'[46] In a case where it is clear that a Community measure was specifically intended to implement a particular obligation of WTO law, the Community legislature has essentially chosen to limit its own scope of manoeuvre in negotiations by itself 'incorporating' that obligation into Community law.

44 — That is, the principle that, when the wording of secondary Community legislation is open to more than one interpretation, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements. See Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52.

45 — See, for example, Case C-149/96 *Portugal* v *Council*, footnote 41 above, paragraphs 42 to 43, where the Court expressly noted that, 'some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.'

46 — Ibid., paragraph 46.

65. As regards the Commission's other argument in favour of removal of the *Nakajima* exception — namely, that in practice it could lead the Community legislator to avoid reference to WTO law in its legislation — this is, in my view, both unattractive and irrelevant. Unattractive, because it suggests a deliberate attempt by the Community legislator to circumvent the judicial enforceability of binding WTO obligations in a situation where the conditions for direct effect are otherwise made out, which would amount to an attempt to bypass the principle of legality. Irrelevant, because, as I will explain below, evaluation of whether the *Nakajima* exception applies is not confined, in a purely formalistic manner, to checking the text of the measure for express reference to WTO law.

66. I would add that the mere fact that the scope of the *Nakajima* exception may not, in the Court's case-law to date, be wholly clear — as I discuss below — is not in itself a reason to deny its existence in principle. For these reasons, the Commission's request that the Court revisit its case-law and remove the *Nakajima* exception should be rejected.

3. Application of *Nakajima*: Scope of the exception

67. The next issue to consider is whether the *Nakajima* exception applies to the present case. Were Articles 25(1) or 35(2) of Regulation No 2535/2991 intended by the Community legislator to implement a particular obligation assumed in the context of the WTO? This question requires careful examination of the proper scope of the *Nakajima* exception.

68. I would begin by observing that the Court's case-law in this area is, in my view, rather ambiguous. To date, the Court has not set out a clear, consistent and defensible principle distinguishing those cases in which the *Nakajima* exception applies, from those cases in which it does not. I consider this to be an unacceptably uncertain state of affairs, particularly as what is at stake here is the scope of the direct effect doctrine itself. Prior to applying the exception to the present facts, therefore, I will focus on identifying this principle.

69. The first step is to identify in which situations the Court has, to date, applied the exception. In the main, these consist of anti-dumping cases, including *Nakajima* itself and *Petrotub*, each decided by the Court of Justice, [47] as well as numerous similar cases

47 — Case C-69/89 *Nakajima* v *Council*, footnote 43 above; Case C-76/00 *Petrotub* [2003] ECR I-79. I note that, in the case of *Petrotub*, the Court referred not only to the *Nakajima* exception, but also to the principle of consistent interpretation.

decided by the Court of First Instance.[48] Each of these cases concerned the validity of Community anti-dumping legislation in the light of specific provisions of the WTO Anti-Dumping Code.[49] A further case in which the Court applied the exception is Case C-352/96 *Italy* v *Council*.[50] In that case, the Court reviewed the legality of Council Regulation No 1522/96 opening and providing for the administration of certin tariff quotas for imports of rice and broken rice, in the light of Article XXIV(6) of the GATT and paragraph 5 onwards of the Understanding on the Interpretation of Article XXIV of the GATT. As the Regulation had been adopted pursuant to agreements concluded with non-GATT member countries following negotiations conducted on the basis of Article XXIV(6) of the GATT,[51] the Court concluded that, in conformity with the *Nakajima* exception, its legality should be reviewed for compliance with this Article. Advocate General Mischo observed that, although the applicant had not alleged infringement of other GATT articles in that case, there was nothing to prevent this in principle.[52] Finally, in Case C-377/98 *Netherlands* v *Parliament*, Advocate General Jacobs applied the *Nakajima* exception to find that Directive 98/44 on the legal protection of biotechnological inventions can be reviewed for compliance with the TRIPs agreement and the Agreement on Technical Barriers to Trade.[53] The Court did not consider the issue expressly in its judgment.[54]

70. In contrast, the Court has rejected the application of the *Nakajima* exception in a number of cases.[55] Many of these cases concerned the validity of Community measures taken in the framework of the common organisation of the market in bananas in the light of WTO rules. Most recently, in *Van Parys*, the Court held that the Community had not intended to assume a particular WTO obligation in amending, following a decision of the WTO Dispute Settlement Body ('DSB'), a section of a Regulation setting up a common system of trade with third States in the banana sector. Despite the fact that the amendment had been made, as stated in the recital to the amended Regulation, so as to comply 'with the Community's international commitments' under the WTO, the Court reasoned that to accord

48 — See, for example, Case T-256/97 *BEUC* v *Commission* [2000] ECR II-101; Case T-162/94 *NMB France* [1996] ECR II-427.

49 — That is, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, OJ 1994 L 336, p. 103.

50 — Case C-352/96 *Italy* v *Council* [1998] ECR I-6937.

51 — These articles provided for negotiations to be held with non-member countries to agree upon certain compensatory adjustments required as a result of the increase in certain customs duty rates.

52 — Opinion of Advocate General Mischo, Case C-352/96 *Italy* v *Council*, footnote 50 above, paragraphs 24 to 25.

53 — Opinion of Advocate General Jacobs, Case C-377/98 *Netherlands* v *Parliament* [2001] ECR I-7079.

54 — The Court reformulated the rationale for judicial review of the Directive for compliance with WTO law in a different and original manner in paragraph 55: '[the plea for review] should be understood as being directed, not so much at a direct breach by the Community of its international obligations, as at an obligation imposed on the Member States by the Directive to breach their own obligations under international law ...'.

55 — An obvious example is Case C-149/96 *Portugal* v *Council*, footnote 41 above. See also, Case C-301/97 *Netherlands* v *Council*, footnote 16 above.

direct effect to a decision of the DSB could undermine the Community's negotiating position in attempting to reach a mutually acceptable solution to a dispute. [56]

71. Just prior to this judgment, the Court of First Instance had come to a similar conclusion in *Chiquita*. It held that a Commission Regulation laying down detailed rules for the implementation of banana imports into the Community could not be reviewed for compliance with, inter alia, Article XIII of the GATT (Non-discriminatory application of quantitative restrictions). Article XIII of the GATT was essentially general in character, in contrast to the detailed rules of, for example, the Anti-Dumping Code. In addition, while the Community intended to comply with its WTO obligations in adopting the Regulation at issue, it did not intend to implement or transpose into Community law rules arising from a WTO agreement for the purpose of maintaining the balance of the rights and obligations of the parties to that agreement. [57]

72. It is not easy to discern coherent boundaries to the *Nakajima* doctrine from this precedent. [58] However, I would make the following observations.

73. First, on the meaning of the requirement that the measure should implement a 'particular' GATT obligation, in my view this requirement refers simply to implementation of one specific, or a specific group of, GATT provisions. I do not agree with the interpretation of the Court of First Instance in *Chiquita* that a distinction should be made between GATT provisions that are 'general' (in that case, the Article XIII of the GATT obligation of non-discriminatory application of quantitative restrictions) and 'particular' in nature. Aside from the fact that it seems very difficult to draw a consistent line between types of obligation in this manner (the Court of First Instance did not define how this should be done), it seems to me that the rationale of the *Nakajima* exception would equally apply to an obligation implemented into Community but, for example, not confined to just one individual field such as anti-dumping.

74. Second, the principal difficulty with defining the scope of the *Nakajima* exception is setting out how to assess whether the

56 — Judgment of 1 March 2005 in Case C-377/02 *Van Parys* [2005] ECR I-1465, paragraph 51. See, also, Order of the Court in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159; and Case T-52/99 *T. Port* [2001] ECR II-981, paragraphs 44 to 60.

57 — Judgment of 3 February 2005 in Case T-19/01 *Chiquita* [2005] ECR I-315, paragraphs 156 to 171. See also Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, where Advocate General Gulmann took the view that it was 'decisive ... that in [*Fediol and Nakajima*] the Court based [its decision to review Community measures in the light of WTO law] on the fact that by reason of references to the relevant GATT rules there were special reasons for undertaking such a review' (paragraph 147). In his opinion, as the Community banana Regulation at issue in that case did not refer to the GATT in this way, the *Nakajima* exception did not apply. At paragraph 111 of the judgment, the Court came to the same result, although it did not give any reasoning on this point.

58 — See, similarly, the comments of Advocate General Tizzano in *Van Parys*, footnote 56 above, paragraphs 84-105.

Community legislator's 'intention' in taking the contested measure was to implement a particular GATT obligation. On this point, while it may seem initially attractive to interpret this test as simply requiring an assessment of the legislator's subjective intention, this approach is in my view inherently flawed. In the first place, it is almost impossible for the Court – and, even more so, individuals seeking to ascertain the scope of their rights — to be certain what the legislator's subjective intention was at the time of passing legislation. Although the preamble to the relevant legislation is clearly an indication of subjective intention, it is not in all cases comprehensive: one can imagine almost boundless sources of evidence being adduced, not all of which might be freely available to the public, if a subjective intention test were adopted. In the second place, the Court has itself to date been inconsistent in assessing the relevance of direct evidence of the Community legislator's subjective intention. Thus, in cases such as *Van Parys*, it rejected the applicability of the *Nakajima* doctrine in circumstances where the subjective intention of the Community legislator was, as expressed in the preamble and in comments of the Commissioner at the time, to implement a WTO obligation.

75. For these reasons, it would be artificial and contrary to legal certainty to hold that the sole test of applicability of the *Nakajima* exception is the legislator's subjective intention.[59] Rather, the assessment should be confined to examining the aim of the Community legislation based on a purely objective reading of the contested provision. While recourse to the legislation's preamble is evidently a relevant factor in this regard, express reference to the aim of implementing a WTO obligation in the preamble is in my opinion neither conclusive (as the *Van Parys* case demonstrates) nor necessary (in contrast to the arguments of the Commission and Fonterra Logistics).

76. In particular, even where no such reference appears in the preamble, the *Nakajima* test is in my view satisfied where it is clear from a comparison of the content of the contested Community provision, on the one hand, and a particular WTO obligation, on the other, that the provision effectively results in the implementation or incorporation of the WTO obligation into Community law. In such a case, it is sufficiently clear, on an objective analysis, that the Community legislator chose to incorporate its WTO commitments into the Community legal system, meaning that the Community provision can be reviewed for compliance with WTO law.

59 — I would add that this conclusion concords, by analogy, with the approach taken to assessing intention in the context of the doctrine of misuse of Community law: see, for example, Case 53/81 *Levin* [1982] ECR 1035, and my Opinion in C-109/01 *Akrich* [2003] ECR I-9607, paragraphs 102 and 174.

4. Application of *Nakajima* to the present case

77. Applying this test to the present case, the question is whether the objective aim of Articles 25(1) and/or 35(2) of Regulation No 2535/2001 is to implement Article XVII(1)(a) of the GATT and Article 1(3) of the Agreement on Import Licensing Procedures into Community law.

78. It is clear that these articles form part of the Community's rules governing the regulation of imports into the Community of milk products at reduced duty under the tariff concessions set out in schedule CXL, which schedule was, as specified in the preamble to Regulation No 2535/2001, drawn up following negotiations under Article XXIV(6) of the GATT.[60] In this sense, there is a clear parallel with Case C-352/96 *Italy* v *Council*, which I have already discussed. As in that case, it is therefore evident that Regulation No 2535/2001 puts into effect within the Community an agreement reached under Article XXIV(6) of the GATT. It follows that, for the same reasons as cited in that case, the Community intended to implement its WTO obligations by enacting Articles 25(1) and 35(2) of Regulation No 2535/2001 and so the *Nakajima* exception should be held to apply here. I note that, although in the present case what is alleged is not breach of Article XXIV(6) of the GATT itself, but other GATT provisions, I agree with Advocate General Mischo's observation, quoted above, that this does not change the assessment. To confine review to compliance with Article XXIV(6) of the GATT alone would, in my opinion, amount to an unsatisfactory assessment of the objective aim of the Community legislator in enacting the contested articles, and would seriously compromise the effectiveness of the *Nakajima* exception in this case.

79. For these reasons, Articles 25(1) and 35(2) of Regulation No 2535/2001 must be reviewed for compliance with Article XVII(1)(a) of the GATT and Article 1(3) of the Agreement on Import Licensing Procedures.

5. Article XVII(1)(a) of the GATT

80. By Article XVII(1)(a) of the GATT, each contracting State 'undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports

60 — See recital 4(a) in the preamble to, and Article 24(1) of, the Regulation.

or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.'

81. As regards Article 25(1), in the present case, for the reasons that I have already explained above, it is plain that the way in which the Commission has set up the import regime for New Zealand butter effectively grants to the Fonterra group the exclusive right to import this butter into the Community. It is also plain, for similar reasons to those I discussed above in the context of the Community law principle of non-discrimination, that the Commission has failed to ensure that the Fonterra group act in a non-discriminatory manner in the sense of Article XVII(1)(a). I would refer here in particular to subparagraph (b) of this article, which specifies that 'the provision of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall ... afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.' [61] Suffice to say that, in the present case, no other party has any opportunity to compete whatsoever for the right to import New Zealand butter into the Community. [62] For this reason, in my view, Article 25(1) of Regulation No 2535/2001 should be declared invalid as contrary to Article XVII(1)(a) of the GATT.

82. However, I am not of the opinion that Article 35(2) of the Regulation falls foul of this provision. In contrast to Article 25(1), this article does not in itself, by the grant of an exclusive right, enable the Fonterra Group to act in a discriminatory manner, but confines itself to designating that import licences must be applied for in the United Kingdom.

6. Article 1(3) of the GATT Agreement on Import Licensing Procedures

83. Article 1(3) of the Agreement on Import Licensing Procedures provides that, 'the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.' In this regard, the WTO Appellate Body has held that the Agreement does not govern import licensing

61 — See, further, Appellate Body report Canada — Wheat Exports and Grain Imports, WT/DS276/AB/R, 2004.

62 — See further, for example, Panel report Korea — Various Measures on Beef, WT/DS161/R, WT/DS169/R, 2000.

rules as such, but the procedures by which they are applied and administered. [63] Examples of cases that have been held to concern 'rules' rather than procedures include the application of a different licensing system to certain Members, [64] as well as measures giving priority in licence allocation to importers that were also exporters. [65] While this may be a difficult distinction to apply in some instances, in the present case it seems to me that both Article 25(1) and Article 35(2) of Regulation No 2535/2001 must be considered 'rules' governing the licensing of imports into the Community, and not merely procedures for the administration of rules. For this reason, I am of the view that these articles do not infringe Article 1(3) of the Agreement on Import Licensing Procedures.

D — *Temporal effect*

84. As is clear from the above, I am of the view that Articles 25(1) and 35(2) of Regulation No 2535/2001 are contrary to Community law and should therefore be declared invalid. The final issue to consider is the temporal effect of such a finding. As the Court has consistently held, Article 231(2), applied by analogy to preliminary reference procedures, allows the Court discretion to decide, where justified by overriding considerations of legal certainty, which specific effects of Community law provisions which have been declared void must be maintained. [66]

85. As regards Article 25(1) of Regulation No 2535/2001 — and in particular the requirement to possess an IMA 1 certificate upon application for an import licence in the case of New Zealand butter — it is clear that immediate removal of this requirement would have unacceptable consequences, in terms of certainty of import regime as well as product quality assurance. As a result, it is my view that the effect of this article should be maintained until the entry into force of a replacement provision adopted by the Commission which does not infringe the Community non-discrimination and competition rules. As regards Article 35(2) of Regulation No 2535/2001, however, I see no reason why the temporal effect of this provision should be limited. The removal of this provision has the effect that, as with other products covered by IMA 1 certificates, applications for import licences may be made to any Member State import license issuing body. The fact that the United Kingdom issuing authority has, pursuant to the second sub-

63 — Report of the Appellate Body on European Communities — Regime for the importation, sale and distribution of bananas, WT/DS27/AB/R, 1997, paragraphs 196 onwards.

64 — Ibid.

65 — Panel report on European Communities — Measures affecting the importation of certain poultry products, WT/DS699/R, 1998, paragraph 254.

66 — See, for example, Case 112/83 *Société de Produits de Maïs* v *Administration des Douanes* [1985] ECR 719, paragraphs 16 to 18; Joined Cases C-38/90 and C-151/90 *R* v *Lomas and Others* [1992] ECR I-1781, paragraph 23; Case C-228/99 *Silos e Mangimi Martini* [2001] ECR I-8401, paragraph 35.

paragraph of Article 35(2) and Article 38 of Regulation No 2535/2001, certain ancillary monitoring obligations of IMA 1 certificates for statistical purposes, is not, in my view, a sufficiently strong reason for altering this conclusion. Moreover, there would seem, subject to cooperation between issuing authorities, no necessary obstacle to the continued performance of this function by the United Kingdom authority.

## V — Conclusion

86. For the above reasons, I am of the view that the Court should give the following response to the questions referred by the Verwaltungsgericht:

(1) Articles 25(1) and 35(2) of Commission Regulation (EC) No 2535/2001 laying down detailed rules for applying Council Regulation (EC) No 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas ('Regulation No 2535/2001') are invalid;

(2) The effect of Article 25(1) of Regulation No 2535/2001 is maintained until the entry into force of a replacement provision which does not infringe the Community non-discrimination and competition rules.