OPINION OF MR ADVOCATE GENERAL GULMANN
delivered on 14 September 1993 *

Mr President,
Members of the Court,

1. In this action for failure to fulfil obligations under the Treaty, the Commission is seeking in particular a declaration that the United Kingdom has failed to fulfil its obligations under Community law to ensure that the Milk Marketing Boards do not extend the exclusive right granted to them to purchase milk from milk producers beyond the limits resulting from Article 25 (1) of Regulation No 804/68 of the Council on the common organization of the market in milk and milk products ('the basic regulation'). [1]

The fundamental question in this case is whether the exclusive right of the Milk Marketing Boards to buy milk other than whole milk also covers skimmed and semi-skimmed milk, that is to say, milk from which a greater or lesser part of the fat contained in raw milk has been removed.

The Court will be familiar with the scheme in question and its relationship to Community law from previous cases. The most important of these cases is Case C-372/88 *Milk Marketing Board of England and Wales* v *Cricket St Thomas Estate*, in which the Court delivered its judgment on 27 March 1990. [2] It is sufficient for the purposes of the present case to bear in mind the following matters in respect of the factual and legal background to the Commission's contentions.

2. The Milk Marketing Boards (hereinafter referred to as 'the MMBs') are associations of milk producers. One covers England and Wales, three cover various production areas in Scotland, and one covers Northern Ireland. The MMBs were set up in the 1930s, apart from that in Northern Ireland, which was not set up until 1955.

The MMBs are statutory bodies. Their establishment presupposes the participation of a sufficient number of milk producers. The detailed rules regulating their activities are laid down within the legislative framework by arrangements known as the Milk Marketing Schemes. The adoption of those arrangements and their amendment are subject to

* Original language: Danish.

1 — OJ, English Special Edition 1968 (I), p. 176.

2 — [1990] ECR I-1345. The Court had previously considered various aspects of the scheme in Case 23/84 *Commission* v *United Kingdom* [1986] ECR 3581 and in Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749.

parliamentary approval. The objective of the MMBs is to improve the bargaining position of producers *vis-à-vis* users and in particular to secure for producers the best possible price for their milk.

Producers are in principle obliged to deliver their milk to the MMBs. Conversely, the MMBs are under an obligation to buy producers' milk. An essential aspect of the MMBs' activity is that they resell the purchased milk at prices which vary according to the use to which the milk is to be put. This differentiation in resale prices is of crucial importance for an understanding of the present case. The resale prices are determined on the basis of discussions between the MMB in question and the purchasers which take place within a Joint Committee. It is not disputed that higher resale prices apply to milk intended for direct human consumption than to milk which is processed into other products such as cheese and butter. The MMBs pay to the producers a price which represents the average of the prices realized by the MMBs on resale and the income from the activities of the MMBs is in this way apportioned among the producers.

Under the arrangements, individual producers may be permitted to sell their milk otherwise than to the MMBs. Such permission is given subject to the condition that a special balancing levy is paid to the MMBs. The purpose of this levy is to ensure equal treatment for all producers in order to prevent producers who market their milk otherwise than through the MMBs from having an advantage over producers who are less able to market their milk directly (see paragraph 30 of the judgment in *Cricket St Thomas*).

3. At the time of the United Kingdom's accession to the European Communities, a declaration annexed to the Final Act of the Treaty of Accession stated that the organization of the market in milk would not prevent a producer organization from being '... free by its own decisions to consign milk wherever it chooses in order to get the best return for its members, to pool its financial returns and to remunerate its members as it wishes.' [3] A few years after the United Kingdom's accession, measures were adopted with a view to ensuring that the system of marketing in the United Kingdom could be preserved within the Community system of common organizations of the markets. The first such measure was an amendment to the basic regulation and was introduced by way of Council Regulation (EEC) No 1421/78, [4] the second recital in the preamble to which stated:

'... certain activities of the Milk Marketing Board[s] existing in the United Kingdom have helped to channel the predominant quantity of milk produced in this Member State into direct human consumption; ... the Milk Marketing Boards have certain prerogatives to ensure that they operate effectively;

3 — See the Documents concerning the Accessions to the European Communities, 1987, Volume II, p. 106.

4 — OJ 1978 L 171, p. 12.

... they have in principle the exclusive right to purchase milk from producers established in their area'.

Article 25 of the basic regulation was amended so as to provide that a Member State could, at its request, be authorized under certain conditions to grant to an organization of milk producers 'the exclusive right ... to buy from producers established in the area in question the milk which they produce and market without processing ...'.

The Council at the same time adopted Regulation (EEC) No 1422/78, [5] which contained, *inter alia*, the detailed conditions governing the operation of the scheme within the framework of Community law. Article 10 (1) thereof provided:

'The United Kingdom shall take the necessary measures for continuing supervision of compliance by the MMBs with Community principles and rules and with the special conditions governing the authorization'.

4. It is apparent from the documents on the case-file that uncertainty has arisen as to whether skimmed milk and semi-skimmed milk are covered by the exclusive right of the MMBs to purchase milk sold in an unprocessed condition. It is also apparent that, so far as the Scottish MMBs are concerned, this uncertainty was resolved in the early 1980s through amendments to their Milk Marketing Schemes which made it clear that the exclusive right also covered skimmed and semi-skimmed milk. It would not appear that this has given rise to any problems in practice.

The United Kingdom argues that the Northern Ireland MMB has consistently administered the scheme in such a way that its exclusive right also covers skimmed and semi-skimmed milk. Although the Commission has disputed this, my view is that it may be assumed that the Northern Ireland MMB, in the individual cases in which problems arose, requested producers who wished to market skimmed and semi-skimmed milk otherwise than through it to pay a balancing levy. [6] The problem apparently first arose in Northern Ireland in a dispute between the local MMB and a dairy concern which led to the institution of proceedings in 1991.

Finally, we were told, up to February 1991 the MMB of England and Wales administered the scheme in such a way that it was accepted that skimmed and semi-skimmed milk could be sold otherwise than to the MMB but that after that date it became the MMB's policy that skimmed and semi-skimmed milk should be sold through it

5 — OJ 1978 L 171, p. 14.

6 — See point 2.2 in the rejoinder.

unless otherwise agreed, such agreement being conditional on payment of a balancing levy. In support of this view, the MMB stated that it is only over the last few years that appreciable quantities of skimmed and semi-skimmed milk have been sold for direct human consumption. It appears that there is a considerable number of producers who wish to market skimmed and semi-skimmed milk otherwise than through the MMB and that those producers have argued that the MMB's exclusive right does not cover those types of milk.

5. The Commission's attention was drawn to the problem and it approached the United Kingdom authorities, pointing out that it was contrary to Article 25 (1) of the basic regulation for the MMBs to administer the schemes in such a way that their exclusive purchasing right also covered skimmed and semi-skimmed milk. Those authorities initially expressed their agreement with that view but subsequently changed their attitude following (as they phrased it) a comprehensive reappraisal of the issues involved.

6. The Commission submits primarily that:

—skimmed and semi-skimmed milk are not covered by the MMBs' exclusive purchasing right and that, by not taking steps to rectify the incorrect legal view of the MMBs as to the scope of their exclusive right, the United Kingdom has failed to fulfil its obligations under Article 25 (1) of the basic regulation;

—the United Kingdom has failed to comply with its obligations of supervision under Article 10 of Regulation No 1422/78 and Article 5 of the EEC Treaty.

In the alternative, the Commission argues (in the event that the exclusive right is held to cover skimmed and semi-skimmed milk) that the United Kingdom is under an obligation to protect the legitimate expectations of those producers who, relying on the authorities' original interpretation of the law, acted in the belief that they were lawfully entitled to sell their skimmed and semi-skimmed milk otherwise than to the MMBs.

7. The United Kingdom has argued that the Court should rule in its favour in respect of the main submissions and declare the alternative submission inadmissible or rule in favour of the United Kingdom.

Does the exclusive right of the MMBs cover skimmed and semi-skimmed milk?

8. The parties agree that this question depends on an interpretation of Article 25 (1) (a) of the basic regulation, which provides that the MMBs are to have 'the exclusive right ... to buy from producers established in the area in question the *milk* which they ... market *without processing*' (my emphasis).

In the *Cricket St Thomas* judgment, the Court held that the pasteurization of milk did not cause it to fall outside the MMBs' exclusive right. In other words, pasteurization did not amount to processing within the meaning of Article 25 (1). In the present case the Court must determine whether the removal of fat from raw milk during the skimming process means that the resulting product does not come within the MMBs' exclusive right. The practical significance of that question, as I have already pointed out, is attributable primarily to the fact that the sale of milk for direct human consumption attracts higher prices than does the sale of milk for other purposes. Producers who sell otherwise than to the MMBs obtain higher prices for milk intended for direct human consumption, while producers who sell through the MMBs obtain only the average price which the MMBs pay to producers.

The parties have produced many and various arguments of greater or lesser force for their conflicting interpretations of Article 25 (1). I believe we may reasonably refrain from examining a number of those arguments. An initial basis for an answer lies, in my view, in the *Cricket St Thomas* judgment, which means that the Court's decision can be based on relatively few and simple considerations.

9. Before I examine these, however, I must mention that in my opinion no decisive signifi-cance can be attached to the facts that at one time the MMB of England and Wales tolerated the sale of skimmed and semi-skimmed milk otherwise than to itself and that the original view of the United Kingdom authorities was that the Community rules were to be interpreted as meaning that producers of skimmed and semi-skimmed milk could sell otherwise than to the MMBs. The relevant Community rules must be interpreted on the basis of their wording, their context and their objectives and that process cannot be dictated by the manner in which the MMBs and national authorities concerned may have interpreted them at a certain time.

There may be more substance to the Commission's argument that the disputed provision on the extent of the MMBs' exclusive purchasing right must be given a restrictive interpretation on the ground that it forms an exception to the general principles of free competition and those expressed in the common organization of the market. But I would not attach decisive importance to this argument in view of the fact that the Council, when amending the common organization of the market in 1978, ensured precisely that the exclusive right would not disrupt the effects of the market organization on the common market.

10. In its judgment in *Cricket St Thomas*, the Court addressed a number of the arguments which have been put forward in the present

case. The Court's examination thereof led to a result which in my opinion is wholly transposable to the present case. The Court held that the distinguishing criterion established by the Community rules as regards the scope of the exclusive right 'is based on the main characteristics of the product in question and its intended commercial use'. From that the Court concluded that the question was therefore 'whether the product concerned may still be regarded as milk or whether it is a different product, derived from milk' (paragraph 21 of the judgment). The Court, which held on that basis that 'the pasteurization process ... does not essentially alter the nature of the product, which remains milk for consumption', found that conclusion borne out by 'the objectives of the Community legislation' inasmuch as 'if the Board's exclusive right to buy milk did not extend to pasteurized milk, producers would be able to refuse to supply their milk to the Board, and to pasteurize it and sell it directly on the market'. The Court pointed out that that result 'would mean the creation of a second marketing channel jeopardizing the effectiveness of the system operating under the Milk Marketing Scheme' (paragraphs 22 and 23 of the judgment).

11. It may be appropriate in this connection to refer to the opinion of Advocate General Tesauro in that case. He found that 'the MMBs' monopoly applies to liquid milk in so far as it may be intended for human consumption (to which milk the higher administered price applies) and cannot be restricted on account of particular treatments which have no effect on that intended use' (point 11).

In support of that result, he made, *inter alia*, the following observations: 'The MMBs' monopoly is recognized in so far as it is necessary to ensure the effectiveness of the policy of price differentiation and equalization which they pursue ... But if this is the economic justification for recognizing the MMBs' monopoly, it follows that that exclusive right must be able to be exercised in relation to any type of milk which may be marketed for human consumption ...' (points 10 and 11).

12. It may in my opinion reasonably be assumed on the basis of the information before us that skimmed and semi-skimmed milk have the same main characteristics as whole milk and that these 'low-fat' milks have essentially the same commercial uses as whole milk. This view is reinforced when one considers that the grounds for Community recognition of the marketing schemes in question apply just as much to skimmed and semi-skimmed milk as to whole milk and that the objective of the common organization of the market would be jeopardized if the Commission's interpretation of Article 25 (1) were to be accepted.

13. It can be held at the outset that skimmed and semi-skimmed milk are types of

drinking milk in the same way as is whole (full cream) milk. [7]

14. It should next be pointed out that in the so-called standardization procedure whole milk is subjected to treatment which basically corresponds to that applied in the production of skimmed and semi-skimmed milk. Through standardization whole milk is given a uniform fat content and this in turn means that a small amount of fat must normally be removed from the raw milk. It is also significant that the production of whole milk with the correct blend of cream and skimmed milk does not appear to cause problems.

15. The Commission has stressed that when skimmed and semi-skimmed milk are produced, cream is produced at the same time, and that it is undisputed that cream is not covered by the MMBs' exclusive right. That, in my opinion, is not a decisive point as it does not necessarily follow that the product which remains when cream is removed from raw milk cannot be milk which comes within the exclusive right of the MMBs.

16. It would not be reasonable to assume that skimmed and semi-skimmed milk do not essentially have the same characteristics as whole milk. [8] Like whole milk, these 'low-fat' types of milk are produced from raw milk and their colour, consistency and smell are almost identical.

This view is reinforced in large measure by the fact that they have the same commercial use in all essential respects. As already pointed out, it is not disputed that they are sold for direct human consumption. They are sold in competition with each other through the same commercial outlets in the same cartons or bottles at prices which are the same or almost the same. The products in question are essentially substitutable.

In my view, crucial significance in the examination of the problem in the present case attaches to the fact that the increasing consumption of the two types of 'low-fat' milk

7 — Article 3 of Regulation (EEC) No 1411/71 of the Council of 29 June 1971 laying down additional rules on the common organization of the market in milk and milk products for products falling within tariff heading No 04.01 (OJ, English Special Edition 1971 (II), p. 412) provides the following definitions:

'...

(b) "Drinking milk" means the following products for delivery as such to the consumer;

— raw milk: milk ...

— full cream milk: milk which has been subject to at least one heat treatment or an authorized treatment of equivalent effect by a milk processor and whose fat content is either at least 3.50% naturally or has been brought to at least 3.50%;

— semi-skimmed milk: milk which has been subject to at least one heat treatment or an authorized treatment of equivalent effect by a milk processor and whose fat content has been brought to at least 1.50% and at most 1.80%

— skimmed milk: milk which has been subject to at least one heat treatment or an authorized treatment of equivalent effect by a milk processor and whose fat content has been brought to not more than 0.30%'.

8 — The variable fat content of cheese obviously does not affect the product's inherent character as cheese.

directly reflects a corresponding decline in the consumption of whole milk.

17. There can also in my opinion be no reasonable doubt that restriction of the MMBs' exclusive right to the purchase of whole milk alone could jeopardize the objectives of the national milk marketing schemes. As has already been pointed out, the preamble to Regulation No 1421/78 makes it clear that the reason behind the Community's recognition of those schemes was that they led to a reduction in intervention on the United Kingdom market in line with the wishes of the Community. It was pointed out that through the schemes the predominant quantity of milk produced in the United Kingdom was channelled into direct human consumption.

It may at the same time also be assumed that acceptance of the Commission's interpretation of the law would involve the creation of a second marketing channel, within the meaning given to that term in the judgment in *Cricket St Thomas*, and that present sales of skimmed and semi-skimmed milk in the United Kingdom represent such a significant share of the market for drinking milk that a second marketing channel of this kind would imperil the entire system. The information supplied demon-strates that skimmed and semi-skimmed milk today represent close to 50% of the United Kingdom market in drinking milk and that serious attempts are being made to increase this market share on health grounds.

18. As already mentioned, an essential element in the schemes is precisely the possibility for the MMBs to differentiate resale prices. [9] If major restrictions are placed on that possibility, then, so far as I can see, a significant part of the *raison d'être* of the schemes approved by the Community will disappear.

The significance of the MMBs' price policy for the interpretation of the provision on their exclusive purchasing right was also stressed by Advocate General Tesauro in his opinion in *Cricket St Thomas*, in which, *inter alia*, he stated that:

'Conversely, as the Commission's expert stated at the hearing, it is logical that the MMBs' monopoly should not cover milk used directly in order to be converted into other products. Each producer is in fact completely free not to consign his milk to the MMBs if, for instance, he wishes to use it to manufacture butter or cheese. This is because the MMBs sell milk intended for such uses at lower prices, as we have observed: direct use of the milk to manufacture such products is therefore not liable to

9 — See Article 9 of Regulation No 1422/78, which provides that 'with regard to the selling prices applied by the MMBs to milk sold by them, the following shall apply:
1. Prices shall be identical for all buyers concerned and may be differentiated only:
(a) on the basis of the use intended by the buyer ...'.

jeopardize the MMBs' price policy. Instead, it must be considered that normally it will be to milk producers' advantage to deliver the milk to the MMBs at the intermediate equalized price and then buy it back, again from the MMBs, at the MMBs' lower price in order to make it into other products' (point 12).

19. It is probable that the present marketing system will be amended in 1994 to discontinue the MMBs' exclusive purchasing right. It was pointed out during the case that a decision has been taken to put draft legislation to that end before Parliament.

It would in my view not be right to force an amendment to the present marketing system as currently administered by the MMBs by accepting the restrictive interpretation of the MMBs' exclusive purchasing right advocated by the Commission. That interpretation is wrong if the scope of the exclusive right is determined on the basis of the criteria relied on by the Court in its judgment in *Cricket St Thomas*. The Court ought for that reason to rule in favour of the United Kingdom in respect of the forms of order sought by the Commission on that question, that is to say, heads (a), (b), (d) and (e). [10]

Agreements by producers concerning contract processing

20. The Commission has raised the question in these proceedings of the degree to which the possibility for producers to enter into agreements concerning contract processing has been restricted in a manner contrary to Community law.

21. The scope of permissible contract processing would be a matter of considerable practical importance if the Commission were

10 — Those heads of claim are as follows:

'1. (a) declare that, by failing to ensure that the Milk Marketing Boards do not exceed the exclusive rights granted to them only in relation to whole milk, the United Kingdom has failed to fulfil its obligations under Article 25 (1) of Regulation (EEC) No 804/68;

(b) declare that, by failing to prevent the Milk Marketing Boards from restrict-ing the possibilities of producers to legally produce and market milk products outside the exclusive rights of the Milk Marketing Boards, the United Kingdom has failed to fulfil its obligations under Regulation (EEC) No 804/68;

(c) ...

(d) declare that, by failing to ensure that competition is not affected more than is absolutely necessary, the United Kingdom has failed to fulfil its obliga-tions under Article 25 (3) of Regulation (EEC) No 804/68;

(e) declare that, by extending the Milk Marketing Schemes in Scotland to low-fat milk, the United Kingdom has failed to fulfil its obligations under Article 25 (1) of Regulation (EEC) No 804/68;

(f) ...

So far as head (d) is concerned, the Commission, with the agreement of the United Kingdom, amended it to relate, not to a breach of Article 25 (3) of Regulation No 804/68, but to a breach of Article 10 of Regulation No 1422/78. But that does not alter the fact that head (d) presupposes that the Court accepts the Commission's primary view regarding the scope of the exclusive right.

correct in its contention that skimmed and semi-skimmed milk are not covered by the MMBs' exclusive purchasing right. This is due to the fact that the large number of producers who might wish to sell skimmed and semi-skimmed milk otherwise than to the MMBs would be obliged on practical grounds to enter into agreements with dairies regarding the production of skimmed and semi-skimmed milk.

22. In view of the fact that the applicable Community rules must be understood as meaning that skimmed and semi-skimmed milk (even after being produced pursuant to a contract processing agreement) are covered by the MMBs' exclusive purchasing right, it is not necessary to consider how far contract processing might be lawful.

Was there a failure to comply with Article 10 (1) of Regulation No 1422/78 or Article 5 of the EEC Treaty, or with both?

23. The Commission has requested the Court to 'declare that, by failing to supervise the Boards, the United Kingdom has failed to fulfil its obligations under Article 10 of Regulation (EEC) No 1422/78'.

24. A key element in the Commission's argument is that Article 10 of Regulation No 1422/78 imposed a duty on the United Kingdom authorities to ensure that the *status quo* was maintained after the MMB of England and Wales, contrary to previous practice, began in 1991 to enforce its alleged exclusive right to purchase skimmed and semi-skimmed milk.

25. The Commission's contention is primarily based on its legal conception of the scope of the exclusive purchasing right.

If the Court should not accept those views, an essential part of the basis supporting the Commission's contentions will collapse. In addition, the reaction of the United Kingdom authorities was, in my view, appropriate to maintain the *status quo* until the Court delivers its judgment in this case. Reference may in this regard be made to the order of the President of the Court of 22 May 1992 made pursuant to the Commission's application for interim measures. [11]

26. There is, however, one key element in this case that may prompt the Court to uphold, at least in part, the Commission's contention that the United Kingdom has failed to fulfil its obligation to ensure that the MMBs complied with the conditions governing their exclusive right.

11 — Case C-40/92 R *Commission* v *United Kingdom* [1992] ECR I-3389.

That element is the undisputed fact that until June 1991 the United Kingdom authorities dealing with the Commission took the view that the exclusive purchasing right did not cover skimmed and semi-skimmed milk. This interpretation of the position in law was expressed to the Commission as late as March 1991. In contrast to this, the legal position in Scotland had been specified in the early 1980s, following parliamentary approval, as being that the exclusive purchasing right did cover skimmed and semi-skimmed milk. Also in contrast thereto, it would appear that no challenge was made to the view of the law underlying the administration of the scheme by the MMB of Northern Ireland.

Having regard to the importance of the United Kingdom complying scrupulously with its obligations under Article 10 of Regulation No 1422/78, I take the view that the United Kingdom has breached Article 10 by accepting the changes to the arrangements in Scotland and by failing to take steps against the administrative practice in Northern Ireland. It is contrary to Community law for authorities in a Member State, on which duties of supervision have been imposed, to fail to ensure that the relevant Community rules are administered uniformly throughout the territory of that Member State in accordance with the interpretation of the Community rules which they consider to be correct.

It is less clear whether the authorities' reaction to the problems which arose in England and Wales amounts to a breach of Article 10. As has already been mentioned, the MMB in question accepted, at least until the beginning of the 1990s, that producers could sell skimmed and semi-skimmed milk otherwise than to it and it was consequently at a relatively late point in time (in relation to the adoption of the Government's present legal view in June 1991) that it was prompted to intervene. However, it seems to me appropriate to hold that, with regard to England and Wales, the United Kingdom authorities also failed to treat their supervisory duties with sufficient seriousness. They ought to have been ready to take clear and unambiguous action as soon as problems arose. By reason, *inter alia*, of their changing views as to the position in law, the authorities contributed to the problems underlying this case becoming as serious as they did.

As a condition for Community recognition of the national marketing schemes, Council Regulation No 1422/78 imposed a duty of supervision on the United Kingdom authorities. Failure to comply with that duty cannot be excused on the ground that the legal position was unclear (after all, the Government did have one legal view until it came round to the opposite view) or on the ground that it was not possible for the authorities to intervene with the MMBs. In the first place, the United Kingdom has failed to demonstrate conclusively that the authorities lacked sufficient possibilities of intervening and, secondly, the United Kingdom was in all circumstances under a duty to ensure that there were sufficiently effective possibilities of intervening.

27. The Commission has also claimed that the Court should declare that, by failing to notify the Commission of the changes to the Scottish schemes to ensure that their exclusive right covered skimmed and semi-skimmed milk, the United Kingdom has failed to fulfil its obligations under Article 5 of the EEC Treaty.

28. It is not disputed that no such notification was ever made.

29. If account is taken of the importance of those changes and the contrary legal views which must have existed at the time among the various competent authorities with regard to the legality of those changes under Community law, I consider that there should be no doubt that the United Kingdom should have notified the Commission of the changes contemplated. In my view, Article 5 of the Treaty places a duty on Member States, in situations where they are required to supervise compliance with Community rules, to notify the Commission of significant amendments to national rules whenever there exist doubts as to whether the amendments in question are consistent with Community law.

The Commission's alternative submission concerning the legitimate expectations of producers

30. Finally, the Commission has claimed that the Court should declare that, in the event of its being held that skimmed and semi-skimmed milk fall within the scope of the MMBs' exclusive purchasing right, the producers and/or processors who relied upon the interpretation of Community law accepted by the United Kingdom until its change of position in June 1991, to the effect that low-fat milk fell outside the scope of the Milk Marketing Schemes concerned, enjoy a legitimate expectation to carry on trading in low-fat milk outside the exclusive purchasing rights of the MMBs of England and Wales and of Northern Ireland for a reasonable period and at least up to the date of the judgment of the Court.

31. The United Kingdom has argued primarily that that submission should be declared inadmissible and in the alternative that it should be dismissed.

32. In support of the argument that the submission is inadmissible, it contends on the one hand that it was not made in the letter of formal notice or in the reasoned opinion and on the other that such a submission cannot be considered in proceedings under Article 169 of the Treaty, in which the Court may address only the question whether a Member State has failed to fulfil its obligations under Community law.

33. There are no grounds, in my opinion, for the Court to rule on the issue whether the submission was sufficiently expounded in the letter of formal notice or the reasoned

opinion — a question which is not entirely free from doubt, even though I am inclined to agree with the United Kingdom on this particular point. For there cannot, in my view, be any reasonable doubt that it is not the function of the Court, in Treaty infringement proceedings, to determine the legal position of private undertakings which began to market skimmed and semi-skimmed milk otherwise than through the MMBs and which did so on the basis of the interpretation accepted by the United Kingdom up to June 1991.

In this regard, it is not disputed by the United Kingdom that there may to some extent at least be reason to afford protection to the undertakings in question. Proceedings for failure to fulfil Treaty obligations, however, are not an appropriate context in which to consider whether there is a duty to protect the legitimate expectations in question. It will first be necessary to see how far the parties involved succeed in resolving the problems which arise for the undertakings concerned after the legal position has been elucidated by the judgment of the Court in the present case and it will then be the task of the national courts to resolve those points of disagreement which cannot be settled amicably by the parties themselves. In the course of such proceedings, it may prove to be necessary or appropriate to refer to the Court questions for a preliminary ruling regarding, *inter alia*, the extent to which Community law, in a situation such as that of the present case, imposes an obligation to protect the legitimate expectations in question and, if so, the scope of that obligation.

Costs

34. Although the United Kingdom has in my view been successful on the main issues in this case, I have found that two of the Commission's submissions should be upheld in full or in part. In view of this and in the light of the fact that the United Kingdom contributed to the bringing of the action by the Commission through its changing views on the legal position, I propose that each of the parties should bear its own costs, including those in connection with the Commission's application for interim measures.

Conclusion

35. In the light of the foregoing, I propose that the Court:

1. rule that the United Kingdom of Great Britain and Northern Ireland breached Article 10 of Council Regulation No 1422/78 through its failure to exercise

correctly its powers of supervision and Article 5 of the EEC Treaty through its failure to notify the Commission of the changes made in 1982 and 1984 to the Milk Marketing Schemes applicable in Scotland;

2. for the rest, rule in favour of the United Kingdom in respect of the Commission's main submissions;

3. declare the Commission's alternative submission inadmissible; and

4. order each of the parties to bear its own costs, including those in connection with the application for interim measures.