JUDGMENT OF THE COURT
5 JULY 1977 [1]

Ölmühle Hamburg AG v Hauptzollamt Hamburg Waltershof and Firma Kurt A. Becher v Hauptzollamt Bremen-Nord (preliminary ruling requested by the Finanzgericht Hamburg)

'Skimmed-milk powder'

Joined Cases 119 and 120/76

1. *Agriculture — Common organization of the markets — Community arrangements — Burden of costs — Discriminatory distribution between the various agricultural sectors — Not permissible*
   (EEC Treaty, Article 39 and second subparagraph of Article 40 (3))

2. *Agriculture — Common organization of the markets — Skimmed-milk powder held by intervention agencies — Compulsory purchase — Council Regulation (EEC) No 563/76 — Invalidity*

1. Community arrangements which impose a discriminatory distribution of the burden of costs between the various sectors of agricultural production cannot be justified for the purpose of attaining the objectives of the common agricultural policy.

2. Council Regulation No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs is null and void.

In Joined Cases 119 and 120/76

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg for a preliminary ruling in the action pending before that court between

ÖLMÜHLE HAMBURG AG

and

HAUPTZOLLAMT HAMBURG-WALTERSHOF

1 — Language of the Case: German.

and by the Finanzgericht Bremen in the action pending before that court between

FIRMA KURT A. BECHER, BREMEN

and

HAUPTZOLLAMT BREMEN-NORD

Joined with the Oberfinanzdirektion Bremen,

on the validity of Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (OJ L 67, p. 18)

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

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

I — Facts and procedure

1. The common organization of the market in milk and milk products provides for a system of prices based *inter alia* on a target price for milk as well as on intervention prices fixed mainly for butter and skimmed-milk powder.

Despite this price system the Community is experiencing a surplus of milk which takes the form, in particular, of the accumulation of considerable intervention stocks of skimmed-milk powder.

2. Among the measures which the institutions of the Community have adopted in order to reduce these stocks is Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (OJ L 67, p. 18).

That regulation imposed an obligation to purchase skimmed-milk powder held by intervention agencies for use in feeding-stuffs for animals other than young calves (Article 1).

In order to ensure compliance with this obligation the grant of aid for certain vegetable foods (colza and rape seeds, soya beans etc.) is made subject to the provision of a security or the presentation of a document, of standard Community form, made out by the competent authority of the Member State which is responsible for denaturing, hereinafter referred to as 'attestation of purchase and denaturation' (Articles 2 and 6).

Free circulation in the Community of imported vegetable foods (such as oil seeds, flour from these seeds, certain animal food preparations etc.), is subject to the presentation of a 'protein certificate' (Article 3 (1)).

This certificate is issued by Member States to any applicant. The issue thereof is conditional on the provision of a security or the submission of an 'attestation of purchase and denaturation' (Article 3 (2)).

In the case of contracts concluded before the date of entry into force of the regulation, the successive buyers of the products referred to in Articles 2 and 3 or of protein products processed therefrom are to bear the burden of the costs arising under the arrangements laid down in the regulation (Article 5).

The regulation, which entered into force on 15 March 1976, was applied until 31 October 1976 (Article 11).

3. The plaintiffs in the main action applied on 15 April (Case 120/76) and 11 May (Case 119/76) 1976 for customs clearance into free circulation of, respectively, a consignment of Brazilian broken soya residues resulting from the extraction of oil and coming under tariff heading No 23.04 B and of a consignment of copra for oil extraction coming under heading No 12.01 B.

In their principal applications the plaintiffs in the main actions asked the defendants in the main actions for customs clearance into free circulation without presenting a 'protein certificate' as required by the provisions of Regulation (EEC) No 563/76. The plaintiffs in the main action asked, alternatively, that the said goods should be cleared through customs on presentation of the 'protein certificates' which the import and storage office had previously granted to them.

The customs offices concerned refused the principal applications on the basis of Article 15 of the German customs law. They accepted the alternative applications on condition that the weight of the imported goods was deducted on the 'protein certificates'.

The complaints lodged against the decisions by the plaintiffs in the main actions were unsuccessful and they brought proceedings before the Finanzgericht (Finance Court) Hamburg (Case 119/76) and the Finanzgericht Bremen (Case 120/76) for the annulment of the decisions rejecting the requests for customs clearance without presentation of a 'protein certificate' (in the alternative for a declaration that those decisions were unlawful) and for annulment of the deductions on the said certificates. In support thereof they argued that Regulation (EEC) No 563/76 was null and void.

4. The Finanzgericht Hamburg considered that the case raised questions concerning the interpretation of

Community law and, in Case 119/76, by order of 2 December 1976, stayed the proceedings and referred the matter to the Court of Justice under Article 177 of the EEC Treaty for a preliminary ruling on the following question:

'Are the provisions introduced by Council Regulation No 563/76 of 15 March 1976 and the implementing regulations based thereon on the compulsory purchase of skimmed-milk powder invalid in so far as they make free circulation of the goods mentioned in Article 3 (1) of Regulation (EEC) No 563/76 subject to the presentation of a protein certificate the issue of which is conditional on the provision of a security or the submission of the document referred to in Article 6 of the regulation?'

In Case 120/76 the Finanzgericht Bremen referred to the Court a question in the following terms by order of 8 November 1976:

'Is Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs void (unlawful) because of this obligation, and may a 'protein certificate' be required in connexion with the customs clearance into free circulation of goods coming under tariff subheading 23.04 B of the Common Customs Tariff?'

5. (a) The *plaintiffs in the main action* argued *inter alia* as follows before the courts making the reference:

The obligation to purchase conflicts with the objectives of *Article 39 (1)* of the Treaty.

It reduces agricultural productivity (Article 39 (1) (a) of the Treaty). In particular, such an obligation runs contrary to technical progress and to the principle of rational development: first of all, through high intervention prices and subsidies for milk production plants, it encourages uneconomic production of animal protein for which there is no requirement in order subsequently to compel agriculture to use this protein instead of the vegetable protein traditionally used and available in sufficient quantities.

Nor does the obligation to purchase ensure a fair standard of living for the agricultural community (Article 39 (1) (b) of the Treaty). There are two reasons for this, the first being that the contested measure enables payment of the intervention price to be continued for the benefit of one section of agriculture at the expense of another section thereof; but, above all, because it is clear from the wording of Article 39 (1) (b) ('thus to ensure ...') that its objective must be attained by measures taken under (a), that is to say, be increasing productivity.

Nor, finally, does the obligation to purchase skimmed-milk powder make it possible to stabilize markets (Article 39 (1) (c) of the Treaty). An excessively high intervention price for skimmed-milk powder militates against stabilization. In fact it results in over-production.

In even more obvious conflict with the objective of stabilization is the fact that the obligation to purchase overrides the laws of the market (supply and demand as well as the regulating effect of price) and replaces them by State control. Until now intervention by the market organizations has made use of measures based on market methods ('marktkonforme Mittel') which, in particular, affect price.

As consequential effects of the obligation to purchase which disturb the market, the applicants draw particular attention to the fact that the processing of skimmed-milk powder in feeding-stuffs factories gives rise to considerable technical problems and that denaturing with the help of additives involves ingredients which are to some extent in conflict with national rules and Community directives.

(b) Moreover the obligation to purchase skimmed-milk powder breaches the *principle of proportionality* which is enshrined in Article 40 (3) of the Treaty and recognized by the Court of Justice.

It is neither conducive to nor necessary for the attainment of the objectives pursued by Regulation (EEC) No 563/76.

It is not conducive to the attainment of the objective, laid down in the preamble to Regulation (EEC) No 563/76, namely, to increase the utilization of skimmed-milk powder, which is an important source of protein, in feeding-stuffs. In the case of most animals, with the exception of calves, skimmed-milk powder has no greater value from the dietary standpoint than substances of vegetable origin such as, for example, soya meal.

The real reason for the obligation to purchase is indicated in the first recital in the preamble to Regulation (EEC) No 563/76, which is to reduce intervention stocks of skimmed-milk powder. The charge on the budget of the Community was to be reduced as a result.

The obligation to purchase does not enable this objective to be attained; the stocks continued to increase after the regulation came into force.

Nor does the obligation to purchase represent for those concerned the least onerous means of reducing intervention stocks. It has substantially the same effect as a tax. In consequence, the objective in view could equally well be attained by imposing a tax on those responsible for over-production. There are, furthermore, other measures which would enable over-production to be avoided.

Finally, the obligation to purchase is in breach of the basic economic rules of the Community because it takes the first step on the road from a liberal economic system towards that of a planned economy controlling consumption.

(c) The selection of the means designed to attain the objective pursued by the Council and the Commission is, furthermore, unlawful in that it is a *linked transaction.* What, under Article 85 (1) (e) and Article 86 (d) of the Treaty, is prohibited in the case of private undertakings which occupy a dominant position on the market cannot be permitted in the case of a State. For this reason the considerations which led the contracting States to prohibit linked transactions in the private sector make operations of the same kind equally illegal in the relationship between the State and its subjects.

(d) Finally, the obligation to purchase infringes the *prohibition of discrimination* contained in the second subparagraph of Article 40 (3) of the Treaty. It does so by charging all breeders in their capacity as users of feeding-stuffs and by giving preferential treatment to milk producers. For example, the price of soya meal, which is the most important vegetable protein substance in feeding-stuffs, went up by about 14 % after the contested rules entered into force.

Over-production in one particular sector of agriculture is financed by means of a pecuniary charge and by an obligation imposed on another sector. This discrimination cannot be justified on the basis of the actual situation in the various branches of the industry. In particular, the Oberfinanzdirektion is wrong in stating that the costs incurred as a result of the obligation to mix skimmed-milk powder with feeding-stuffs are borne in equal measure by the milk sector. If that were true the question would arise why the intervention prices were not fixed at a sufficiently low level to avoid the need to impose compulsory purchase. The obligation to purchase proves that its detrimental effects must fall upon groups of consumers other than milk producers.

(e) The regulation is also unlawful in that, in the case of contracts concluded

before the date of its adoption and of its entry into force, it made no provision for transitional arrangements exempting them from the obligation to purchase and to provide a security. *Article 5 of the regulation* does not make good this deficiency but, because it affects existing contracts, aggravates it. The Treaty does not empower the organs of the Community to amend contracts of sale. Furthermore, the fact that Article 5 is null and void means that the whole purchase-and-security system is also null and void. In cases where importers cannot pass on the burdens at subsequent stages, this has the effect of an encroachment resembling expropriation since the costs are several times greater than the importer's profit margin. In circumstances where (even if only in the case of existing contracts) the importer has to bear these costs himself, he will be financially ruined.

(f) The obligation to purchase infringes the *financial provisions of the Treaty.*

This compulsion constitutes an illegal charge imposed on consumers in order to produce revenue for the Community. This is unlawful; the Council cannot impose a new tax on traders. Articles 200 and 201 of the Treaty do not cover such action. Nor can it be justified by reference to the general financial system of the Community. The Community has no general power to impose charges. Power to do so was transferred to it in the Treaty by the Member States only by stages and under clearly specified conditions. Its financial powers were defined in express terms. It is inconceivable that the Member States should have wished, in addition, to vest the Community with special, concealed powers to impose charges otherwise than in accordance with the procedure provided for under Article 201 of the Treaty. For this reason the Community's financial powers can be extended only by an amendment of the Treaty and not by stealth in the guise of an obligation to purchase skimmed-milk powder.

Again, there is also an infringement of the budgetary provisions laid down in Article 199 of the Treaty. The income produced by the obligation to purchase skimmed-milk powder at excessive prices is not entered in the Community budget, and rightly so. It involves an infringement not of a mere formal rule but of the principle of transparence of the budget and of equality with regard to charges imposed by the State. The function of re-distribution which the European Community undertakes under the agricultural policy must not be discharged in an arbitrary and secret manner. The secret taxation, referred to above as arising from the obligation to purchase at excessive prices, also infringes the principle of legal certainty and the principle of the rule of law, which also apply in Community law.

(g) Finally, the provisions concerning the obligation to purchase skimmed-milk powder and to provide a security are invalid on *grounds of form.* The amount of the selling price for skimmed-milk powder from intervention stocks, the amount of the security and the rules establishing a connexion between the skimmed-milk powder to be purchased and products imported or put on the market with the help of a subsidy are an integral part of the very structure of substantive rules and are not implementing measures. For this reason the Council should have adopted them under the third subparagraph of Article 43 (2) of the Treaty. The Commission had no power to do so. The powers conferred on the Council by the Treaty cannot be transferred unconditionally to the Commission; under Article 155 of the EEC Treaty the Commission can exercise the powers conferred on it by the Council only for the implementation of rules laid down by the latter. If the provisions at issue are invalid because the Commission did not have the power to adopt them, skimmed-milk powder rules as a whole can logically no longer be applied.

6. (a) In the grounds for the order of reference the *Finanzgericht Hamburg* made, *inter alia,* the following comments:

The assumption that the only way in which the earnings of persons engaged in agriculture can be increased is by increasing productivity does not appear to accord with the meaning and purpose of the Treaty. Having regard to the particular nature of agricultural activity, which is defined in Article 39 (2) (a) of the Treaty, the objective of increasing earnings must nevertheless be accorded an importance of its own.

In view of this the Finanzgericht inclines to the view that the obligation to purchase skimmed-milk powder is covered by the objectives of Article 39 (1) (b) of the Treaty.

According to the Finanzgericht the available stock can in the short term be reduced as a result of the obligation to purchase and the objective of stabilizing markets (Article 39 (1) (c) of the Treaty) may thus be partly achieved.

(b) The Finanzgericht does, however, express doubt whether the measure adopted is compatible with the *prohibition of* discrimination in Article 40 (3) of the Treaty. Compulsory purchase places a burden on other breeders to the advantage of milk producers. It is also clear that, owing to the limited period during which the regulation is applicable, milk producers are less burdened than other producers even though, as the defendant states, concentrated feeding-stuffs are fed to dairy cows.

In any case there is nothing to prohibit the adoption, among the said restrictive conditions, of measures which burden certain groups of traders on the market to the advantage of others.

The question whether compulsory purchase is desirable owing to the public need for an efficient agricultural market and whether individual trade interests requiring protection have been arbitrarily damaged can be decided only on the basis of precise knowledge of the agricultural market. The submissions so far made by the parties do not enable the Finanzgericht to come to a decision.

(c) The question whether, as the defendant claims, the *principle of proportionality* has been infringed also depends on precise knowledge of the situation on the market. This question is related to the question whether the basic right to freedom to engage in a trade or profession has been infringed. This principle is a product of the right freely to develop one's personality and as such is part of the unwritten law of the Community: judgment of the Court of 14 May 1974 in Case 4/73 *Nold* v *Commission* ([1974] ECR 491).

The principle of proportionality is infringed only if the means chosen are clearly inappropriate and the legislature's grounds are so manifestly erroneous that they can afford no reasonable basis for legislative measures.

(d) The Finanzgericht considers the defendant's other objections to be without relevance. The contested obligation to present a 'protein certificate' represents a duty which has financial consequences and is dependent on certain conditions but does not constitute a charge within the meaning of the Council Decision of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities' Own Resources (OJ English Special Edition 1970 (I) p. 224) and of Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ English Special Edition 1970 (I), p. 218) and, accordingly, does not infringe the sovereign rights of the Member States by encroaching on their power to levy charges.

(e) Nor does the Finanzgericht consider the objection that there is a *defect of form* affecting the whole of the regulation to be well founded. The Council can delegate to the Commission responsibility for the adoption of provisions implementing the regulations which the Council has promulgated. Community law does not require that the content, purpose and extent of the power be determined in the regulation of the Council. The enabling regulation of the Council is, accordingly, not null and void because it does not cover all the substantive matters coming within the main field of the rules. It is sufficient if, as in the present case, it provides the basis for a set of rules.

(f) The Finanzgericht does not regard it as necessary to consider the question whether *Article 5 of the regulation* is invalid. The plaintiff does not appear from its statements to be affected by its provisions.

7. The question of the validity of Regulation (EEC) No 563/76 is also the central one in the actions for compensation in Joined Cases 83 and 94/76 and 4 and 15/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co., KG and Others* v *Council and Commission* and of the references for a preliminary ruling in Cases 114/76, *Bela Mühle Josef Bergmann KG* v *Grows-Farm GmbH & Co., KG,* and 116/76, *Granaria BV* v *Hoofdproduktschap voor Akkerbouwprodukten and Produktschap voor Margarine, Vetten en Oliën.*

8. The orders referring the matter to the Court were entered in the Court Registry on 16 December (Case 119/76) and 17 December (Case 120/76) 1976.

By order of 14 April 1977 the Court decided to join these two cases for the purposes of procedure and judgment.

In accordance with Article 20 of the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main action, represented by Rechtsanwälte F. Modest, A. Heemann, J. Gündisch, G. Rauschning, K. Landry, W. Röll, B. Festge, H. Heemann and P. Wegemer, by the Council, represented by its Agent Bernhard Schloh, and by the Commission, represented by its Agent Peter Gilsdorf.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II – Written observations submitted to the Court

1. (a) The representatives of the *plaintiffs in the main actions* refer first to their applications before the courts making the references and to their observations in Case 83/76, *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG* v *Council and Commission.*

In addition to the aforementioned observations the plaintiffs in the main actions state that they see no conflict between, on the one hand, the recapitulation in Article 40 (3) of the Treaty of the measures, consisting of regulation of prices and aids and, on the other hand, the restriction to the pursuit of the objective of increasing agricultural productivity laid down in *Article 39 (1) (a) and (b)* of the Treaty. In principle, regulation of prices and aids can perfectly well help to increase agricultural productivity.

The plaintiffs in the main actions agree that the institutions of the Community must be left considerable freedom in determining whether a given measure conforms with the objectives of Article 39 (1) of the Treaty. But when, in a given sector, agricultural policy has for years been in conflict with the objectives of agricultural rationalization and the stabilization of the markets and when the

Council has for years taken no account of the warnings forthcoming from expert opinion, it deserves to be condemned by the Court.

(b) With regard to the *principle of proportionality,* the plaintiffs in the main actions point out that the Finanzgericht Hamburg rightly stated that this issue must be considered in accordance with German law in the light of the basic right consisting of the freedom to practise a trade, occupation or profession: Article 12 (1) of the German basic law. This basic right is a product of the right freely to develop one's personality and as such is, according to the judgment in Case 4/73 *Nold* v *Commission,* part of the unwritten fundamental law of the Community.

In assessing the gravity of the obligation to purchase, attention should not be confined to the circumstances of the plaintiffs in the main proceedings. As traders in cereals and feeding-stuffs or as factories processing oil-producing substances, they are in a position to avail themselves of the provisions laid down in Article 5 of the regulation and to pass on the financial burden of the obligation to purchase imposed upon them. However, the whole impact of the measure falls in the end upon the feeding-stuffs sector which, in order to ensure maximum alleviation of the financial burden, is bound in practice to mix in skimmed-milk powder, and also upon breeders. Apart from the financial consequences and the technical problems involved in the mixing process, the root cause of the burden weighing on the animal feeding-stuffs sector is the fact that those in it are compelled to apply to breeders who are their customers a complicated system of security which disturbs their business relations with those customers.

By means of the eight cases now pending before the Court, the group of industrialists representing the different stages of trade and production affected by the compulsory incorporation of skimmed-milk powder, namely, the import trade, the oil-processing undertakings, the animal feed sector and the animal husbandry sector, wished to show how intolerable they found this serious encroachment on their freedom to practise a trade.

(c) With regard to the comments of the Finanzgericht Hamburg concerning the *prohibition of discrimination* the plaintiffs in the main actions consider that there were no overriding Community interests requiring these steps. It is necessary to give preferential treatment unilaterally to milk producers as compared with other breeders not in order to make the common agricultural market function properly but, on the contrary, because the balance of the said market had been disturbed as a result of the mistaken policy followed for many years by the Council and the Commission as regards milk and milk products. Consequently, the only effect of this discriminatory charge is to make good, in an incomplete and inappropriate manner, the errors committed by the institutions of the Community.

Nor is such discrimination justified by the fact that it applies only for a transitional period: over-production of milk and unusable skimmed-milk stocks have been notorious for years.

The plaintiffs in the main actions refer *inter alia* to specific examples of discrimination: fish meal was not covered by the rules governing the security; oil-cakes producing a large or small financial return were all charged at the same rate.

(d) The plaintiffs in the main actions consider that the Court should, in both cases, go into the issue raised by Article 5 of the regulation even although the Finanzgericht Hamburg did not deal with the question. On the basis of the question which was referred to it for a

preliminary ruling, the Court ought to consider whether Regulation (EEC) No 563/76 and the implementing regulations are null and void inasmuch as they require the presentation of a 'protein certificate'. If the regulation is as a whole in contravention of the Treaty owing to the validity of one of its other provisions, the obligation to present a 'protein certificate' must in that case also be invalid.

The relevance of Article 5 also arises from the suggestion that, if the article is unlawful in that it interferes with private law contracts which have already been concluded, the two plaintiffs cannot pass on to their customers the substantial cost arising from the protein security. But in that case the burden imposed on the two applicants goes manifestly beyond the limits of what can be required of them.

(e) With regard to the question whether the regulation is contrary to the *financial and budgetary provisions* of the Treaty, the plaintiffs in the main actions state that the stocks of skimmed-milk powder could equally well have been reduced by lowering the price of skimmed-milk powder and giving it its value as animal feed and introducing an appropriate financial levy. In these circumstances the obligation to purchase skimmed-milk powder represents a misuse of the law. If the Community institutions were allowed to misuse their powers in this way without regard to the financial and budgetary provisions of the Treaty, the Community could, for its own benefit, create any conceivable source of revenue.

(f) In addition to the legal objections which the plaintiffs in the main actions raised in each of the two cases, they adduce a new complaint, namely, infringement of the rules of the General Agreement on Tariffs and Trade (GATT).

In a reference to the observations of the Council and of the Commission in Case 83/76 to the effect that there is nothing to prevent the Community institutions from making vegetable protein subject to fiscal charges, they ask the Court to consider whether Article XI of GATT is applicable in the present case. There is no question in this case of direct application of the provisions of GATT to the rights of a citizen of the Community: since the judgment of 12 December 1972 in Joined Cases 21 to 24/72, *International Fruit Company NV,* ([1972] ECR 1219), this is out of the question. Its relevance in the present case consists in the fact that these substitute measures (Alternativmaßnahmen) which, in the Commission's view, are perfectly legal, infringe rules of international law. In this connexion it ought to be possible to ascertain whether the Commission can in any case have recourse to other rules.

This is not the case. The provisions of GATT are infringed not only by the introduction of the obligation to purchase but also by the application of levies or duties to oil-producing fruit or feeding-stuffs containing protein.

The obligation to purchase is a quantitative restriction contrary to Article XI of GATT, because milk hitherto used in the Community is, as a result of the obligation to incorporate it; replacing animal feeding-stuffs of vegetable origin, which are no longer imported into the Community.

Furthermore the obligation to purchase infringes Article III of GATT, which lays down that imported and domestic products must be treated alike as regards internal taxation and rules; the production of oil-producing fruit containing protein and of protein feeding-stuffs in the Community is in fact minimal. It is not the use of domestic products but almost exclusively the importation of animal feeding-stuffs containing protein which is in practice affected by the obligation to purchase.

2. (a) As regards the alleged infringement of *Article 39 (1)* of the Treaty the *Council* points out that the case-law of

the Court allows the Community institutions to give certain objectives of Article 39 temporary priority over others.

The effect of the obligation to purchase is, more particularly, to stabilize markets. It enabled between 300 000 and 400 000 tonnes of skimmed-milk powder to be disposed of and is therefore in accordance with the objective laid down in Article 39 (1) (c).

Nor does the contested regulation infringe the provisions contained in subparagraphs (a) and (b) of Article 39 (1).

The Council shares the Finanzgericht's opinion that, although subparagraph (b) is linked to (a) by the word 'thus', which refers to the increase of productivity mentioned in (a), the objective of increasing earnings referred to under (b) must be given an importance of its own.

(b) The obligation to purchase does not contravene the *prohibition of discrimination.* In principle, it covers all those who use protein feeding-stuffs.

It is true that poultry farmers are compelled to use a proportion of the skimmed-milk powder produced by surpluses for which they bear no responsibility. But there is no discrimination in this case; this is clear from the first sentence of Article 38 (1) and Article 43 (2) of the Treaty.

In support of this contention too, this Council refers to Article 39 (2) (c) of the Treaty.

(c) In the Council's view, it has not infringed the *principle of proportionality.*

The obligation to purchase is an appropriate measure for the attainment of the objective prescribed; this is proved by the fact that it made it possible to dispose of between 300 000 and 400 000 tonnes of skimmed-milk powder. It was also a necessary measure since, if it had not been for this measure, the objective would never have been attained.

In conclusion the Council refers to the principle that the legislature has a wide measure of discretion in adopting measures of economic policy. The Court has accepted this point of view in deciding on several occasions that under Community law a measure of economic policy can create entitlement to damages only if there has been a sufficiently flagrant violation of a superior rule of law for the protection of the individual.

(d) *Articles 85 (1) (e) and 86 (d)* of the Treaty are not infringed since they refer to undertakings and not the Community.

Furthermore, under Article 42 of the Treaty, the chapter on the rules relating to competition applies only in part to agricultural products.

(e) With regard to the question whether *Article 5* of the regulation interferes with existing rights, the Council notes that the Finanzgericht Hamburg did not make this question, which was raised by the plaintiff in the main action, the subject of reference. For this reason the Council expresses a view on this issue only in respect of Case 120/76. But even in that case it is doubtful whether this question has any significance in the main proceedings before the Finanzgericht Bremen, since the statement of the facts refers to 15 April 1976 and not to a date between the day on which the regulation came into force and the day on which it was applied.

The measure embodied in Article 5 of the regulation is dictated by the public interest.

The Council could have been criticized if it had not adopted that provision. If prior contracts had not been covered by the new rules this would in fact have compromised the attainment of the objective of economic policy underlying the obligation to purchase. The measure provided for in Article 5 was therefore dictated by an overriding matter of public interest within the meaning of the

judgment of the Court of 14 May 1975 in Case 74/74 *CNTA* v *Commission* ([1975] ECR 533).

In any case the measure cannot constitute an unlawful encroachment on existing private rights and cannot be compared with expropriation. It merely involves the adjustment of pre-existing contracts to a new situation determined by considerations of economic policy.

(f) As regards the alleged *infringement of the financial and budgetary provisions of Community law,* the Council states that, in this case, there is no question of creating one of the Community's own resources but of introducing a security designed to ensure that the obligation to purchase is complied with. The Court has, in previous cases, already had to consider similar arrangements for security and has declared them to be lawful.

Nor is there any foundation for the submission relied upon by the plaintiffs in the main actions that these rules involve a violation of the principle of the transference of the budget because the benefits and the revenue produced are not entered in the Community budget. Securities, including securities which are forfeit, never appear as such in the budget and the provisions of Article 10 (2) of the regulation under which any security forfeited is to be used to offset the intervention expenditure on the market in milk are in accordance with the rules accepted at the present time.

(g) Again, the Council does not consider that the regulation in question suffers from a *defect of form.*

The Council could have quite legitimately confined itself to adopting the regulation and empowering the Commission to promulgate the 'detailed rules for the application' (the words used in Article 9 (1) of the regulation) in accordance with the so-called Management Committee procedure. The main rules are contained in Regulation (EEC) No 563/76. Even though the Management Committee procedure involves the exercise of substantial implementing powers, it has been recognized as lawful by the Court: judgment of 17 December 1970 in Case 25/70, *Einfuhr- und Vorratsstelle* v *Köster* ([1970] ECR 1161).

3. (a) In the statement which the *Commission* lodged with the Court in the present cases, it confines itself to a concise statement of the legal arguments which, in its view, confirm the validity of the said regulation, having regard to the questions raised in the orders making the references. It also refers to its observations in Joined Cases 83 and 94/76, *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Bernd Adleff* v *Council and Commission.*

As regards the alleged infringement of *Article 39 (1)* of the Treaty, it states that, in view of the very wide wording of the objectives listed in this article and their relationship with each other, it is only in extreme cases that it is possible to establish that rules promulgated by a Community institution are clearly outside the scope of those objectives. The Court has already declared that those objectives cannot always in practice be pursued simultaneously and that the Community institutions may accordingly allow any one of them temporary priority.

The question whether the rules accord with the objective laid down in Article 39 (1) (a) involves a complicated economic value-judgment implying wide powers of discretion: for the purposes of judicial review, there must have been at least a serious error in the assessment of the economic considerations. Furthermore, the rules which were introduced are merely a supplementary measure arising from the implementation of a market policy, which has for many years been based upon rationalization and improvement of organizational structures.

In any case, it is impossible to carry out an appraisal of the legality of general policy by virtue of which the contested measure was adopted on the basis of a retrospective review of the extent to which it was successful; in terms of the law, it is enough that when a measure is promulgated it does not appear manifestly unsuitable for the purpose of attaining the objective in view.

The rules at issue are the result of the price maintenance policy and accordingly help to increase the individual earnings of persons engaged in agriculture (Article 39 (1) (b)).

The Commission shares the view of the Finanzgericht Hamburg that, bearing in mind the structure and purpose of the Treaty, it is impossible to conclude, as the plaintiffs in the main actions argued, that, because of the use of the word 'thus' in Article 39 (1) (b), the earnings of persons engaged in agriculture can be increased only by increasing productivity.

Above all, the contested measure accords with the objective of stabilization of the market (Article 39 (1) (c)). Any consideration of it must have regard to the market in milk as a whole. It is very difficult to restore a satisfactory balance between supply and demand. In consequence, the Community institutions must be able, on a provisional basis, to apply unorthodox measures in so far as they are essential for the improvement of outlets.

As regards the submissions based on Article 39, the Commission makes the general comment that the measure adopted under Regulation (EEC) No 563/76 falls within the general scope of the objective provided for in subparagraphs (a) to (c) of Article 39 (1) in so far as it is viewed in a more general context and attention is not confined to its isolated effect on the processing industry.

(b) As regards the alleged infringement of the *principle of proportionality,* the Commission adopts the standpoint of the Finanzgericht Hamburg, which is based on respect for fundamental rights. The Commission also endorses the observations made by the Finanzgericht to the effect that the principle of proportionality is to be regarded as violated only if the means chosen is wholly inappropriate and the legislature's grounds are so manifestly erroneous that they can provide no reasonable basis for legislative measures.

There can be scarcely any doubt that the arrangements were calculated to make a substantial contribution towards the absorption of the skimmed-milk powder surplus because it has enabled substantial quantities of the product to be put to new uses.

The fact that the stocks continued to increase during the period when the regulation was applied in no way detracts from the efficacy of the regulation since the increase in stocks during that period was in any case less than the quantities which it was possible to dispose of as a result of the regulation.

The compulsory purchase system was, moreover, also necessary because there was no other way of quickly achieving the desired result.

(c) The reasons which justify any prohibition of *linked transactions* between undertakings in the private sector are in no way applicable to comparable measures adopted by public authorities under measures relating to economic policy. Moreover such linked transactions are very familiar both in Community practice and in practice in the Member States.

(d) As regards the alleged violation of the *principle of non-discrimination,* the Commission states that it endorses the observations of the Finanzgericht Hamburg that the said restrictive conditions

do not in principle exclude measures which burden certain trade interests in favour of others.

It is true that the issue can be correctly decided only on the basis of precise knowledge of the situation on the market and of the instruments of the organizations of the market.

The arrangements at issue affect virtually the whole of the animal feed industry. Milk producers also participate in the arrangement inasmuch as they use feeding-stuffs based on vegetable protein.

There is, moreover, no principle laying down that a particular industry must, on its own, bear the cost involved in solving its own problems. There must exist some connexion between the industry 'called upon to bear the cost' and the industry 'benefited'. Such a link does in fact exist between all sectors of agriculture and, in particular, between the vegetable protein and the animal protein sectors.

As there is no other less costly means of purchasing feeding-stuffs it may moreover be concluded that in principle the cost must be passed on to the purchaser and the ultimate consumer.

There is no legal principle which, in such circumstances, requires all taxpayers to pay the additional cost arising from the market policy. There can be even less question of special, arbitrary or discriminatory treatment of a particular group of traders.

(e) The observations of the Commission regarding *Article 5* of the regulation relate solely to Case 120/76, since the Finanzgericht did not consider this ground of complaint relevant in Case 119/76.

The meaning of the rules at issue is perfectly clear. The Community legislature was aware that, in particular, the import trade in the products in question (but in part also certain subsequent stages in the marketing of them as well as purchasers of home-produced substances) was to a large extent covered by contracts sometimes extending over considerable periods. For this reason it was considered necessary to make it possible for the branches of the industry directly affected by compulsory purchase lawfully to pass on to their purchasers the costs with which they were debited.

The Commission is not, however, in agreement with the view that the absence of such rules would have amounted to something akin to expropriation. The charge arising from the obligation to purchase can hardly be treated differently from a charge arising from the introduction of a customs duty, which the import trade must in principle always be prepared for.

There is no point in going into the question whether the obligation thus imposed does in fact constitute interference with existing contractual obligations. What is involved is in any case a rule of public law which on one point, namely the purchase price, changes the basis of contractual obligations. In this connexion there can be no question of an interference with freedom in business transactions. On the contrary, the provision in question makes it possible for existing contracts to be discharged satisfactorily.

The Commission does not see why, if that clause falls, the whole of the rules are also invalid. If necessary the arrangements could be maintained and applied in a reasonable manner even if they did not affect the existing contracts.

(f) As regards the alleged *infringement of financing rules,* the Commission states that it is incorrect to compare the compulsory purchase arrangements with a Community tax because it enables economies to be made. The object of the arrangements is not in any event to increase the Communities' own resources but to absorb the skimmed-milk powder

surpluses. Moreover, the Communities' own resources are used without discrimination to finance all expenditure entered in the budget: Article 5 of the decision of 21 April 1970 on the Communities' own resources. Nor is the security provided for under the regulation an end in itself but it is designed to ensure the purchase of skimmed-milk powder. This case is accordingly concerned with supplementary measures which are purely ancillary to the original measures.

Even if the provision on the security were regarded as having something in common with a tax this would not affect its validity. Under Article 43 of the Treaty the Community has power to impose taxes in a number of guises.

The Commission considers that the plaintiffs in the main action cannot claim before the national court that the provision of Regulation (EEC) No 563/76 relating to the offsetting of intervention expenditure by use of the securities (Article 10 (2)) is invalid, because they are not affected by that measure.

Even if the provisions in question were infringed, the only consequence would be that the forfeited securities and the price of skimmed-milk powder would fall to be treated as revenue in the budgets of the Member States. This is not therefore one of the circumstances which can be the subject of question as to its validity under the procedure laid down in Article 177. However, even if it were possible to establish the alleged invalidity, this could not affect the validity of the scheme as such. The question of the budget in which the revenue must be entered is a secondary and a separate one from the economic aspects of the scheme.

Moreover, the provision that any security forfeited shall be used to offset the intervention expenditure does not involve an intolerable extension of the Communities' own resources within the meaning of Article 2 of the decision of 21 April 1970. These securities do not constitute an independent source of finance for the Community budget but revenue received in connexion with intervention arrangements.

There is nothing unusual in those arrangements since they are to be found in various Community rules. It is clear from the foregoing that there can be no question of a violation of the budgetary principles in Article 199 of the Treaty. The costs, profits, revenue and savings arising from intervention on the market do not appear as such in the budget of the Communities but are accounted for exclusively on the appropriate account of the intervention agencies. Finally, a trader acting upon his own behalf cannot automatically invoke the violation of the principles of budgetary management, such as the principle of the transparence of the budget.

(g) With regard to the alleged *defects of form* the Commission contends that the plaintiffs in the main actions overlook the fact that Community law does not require the substance, object and scope of the powers conferred on the Commission to be strictly defined in the Council regulation. The Commission is often vested with wide powers and a considerable margin of discretion, in particular when it is legislating under the Management Committee procedure. This practice has, in various cases, already been approved by the Court.

III — Oral procedure

The plaintiffs in the main actions, represented by Mr Gündisch of Hamburg, the Council, represented by its legal adviser B. Schloh, acting as Agent, and the Commission, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, submitted oral observations at the hearing on 3 May 1977.

The Court had invited the Commission and the Council to supply, at the hearing, information and suitable explanations concerning the costs of dehydrating skimmed milk and the costs of denaturing necessitated by the compulsory use of skimmed-milk powder in feeding-stuffs compared with the value of this milk as animal feed.

In Joined Cases 83 and 94/76 and 4 and 15/77, the *applicants* replied that the three factors, dehydration, storage and denaturing, represented a total of about 27 u.a. or DM 95 per 100 kg, and that the value of 100 kg of skimmed-milk powder as animal feed was roughly between DM 50 and 65.

The *Commission* replied that the cost of manufacturing skimmed-milk powder was on average 15 u.a. per 100 kg. The denaturing costs involved in the scheme in question are between 1 and 3 u.a. per 100 kg according to the denaturing method. The value of skimmed-milk powder as animal feed varies according to whether the product is used for feeding calves or for swine and poultry. In the first case the supply price fixed by the Community for this type of use determines the price on the market. For the period in question the supply price was 52 u.a. per 100 kg of skimmed-milk powder. In the second case the market price of the product is fixed on the basis of its value as animal feed compared with substitute products and, in particular, of the price of soya oil cake. During the time when the contested regulation applied, the price of soya oil cake was about 18 units of account per 100 kg. The price of soya at the present time is 25 u.a. per 100 kg.

The Advocate General delivered his opinion at the hearing on 7 June 1977.

Decision

1 By the orders of 2 December and 8 November 1976, which reached the Court on 16 and 17 December 1976, the Finanzgericht Hamburg and the Finanzgericht Bremen submitted questions under Article 177 of the EEC Treaty concerning the validity of certain provisions of Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (OJ L 67, p. 18).

The questions referred to the Court concern the provisions of that regulation which make the free circulation in the Community of certain feeding-stuffs subject to the presentation of a 'protein certificate' the issue of which is in turn conditional on the provision of a security or the submission by the person concerned of a document establishing proof of the purchase and the denaturing of a quantity of skimmed-milk powder.

These questions are submitted in connexion with proceedings in which two undertakings which are importers of feeding-stuffs seek annulment of the

decisions in which the German customs authorities rejected their applications for customs clearance of various consignments of animal feed products on the ground that they were not accompanied by a 'protein certificate'.

2 Regulation (EEC) No 563/76 was promulgated at a time when the stocks of skimmed-milk powder bought in by the intervention agencies pursuant to Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ English Special Edition 1968, p. 176) had reached considerable proportions and were continuing to increase despite the measures adopted by the Community institutions to curb the tendency towards over-production of milk and to increase the sale of skimmed-milk powder. The system established by Regulation (EEC) No 563/76 the application of which was not extended beyond the end of the original period of application, which expired on 31 October 1976, was designed to reduce stocks through the increased use in feeding-stuffs of the protein contained in skimmed-milk powder. To this end the regulation made the grant of the aids provided for certain vegetable protein products as well as the free circulation in the Community of certain imported animal feed products subject to the obligation to purchase specified quantities of skimmed-milk powder. In order to ensure that this obligation was fulfilled the grant of aid and free circulation were subject to the provision of the purchase and of the denaturing of the prescribed quantities of skimmed-milk powder.

3 Under Article 1 of Commission Regulation (EEC) No 753/76 of 31 March 1976 laying down detailed rules for the sale of skimmed-milk powder for use in animal feed (OJ L 88, p. 1), skimmed-milk powder held by the intervention agencies was resold by them in fulfilment of the obligation to purchase at a price of 52·16 u.a. per 100 kg multiplied by a coefficient which, in the case of the Federal Republic of Germany, amounted to 0·8325. The denaturing costs to be borne by the purchaser were between 1 and 3 u.a. per 100 kg. During the period when Regulation (EEC) No 563/76 applied, the market price of soya oil cake, a vegetable product with a nutritional value comparable to that of skimmed-milk powder for use in animal feed other than that for young calves, varied between 13·30 and 20·40 u.a. per 100 kg, the average being about 18 u.a. per 100 kg. The compulsory purchase of skimmed-milk powder was, therefore, imposed at a price equal to about three times its value as animal feed. The security, which was released only on production of proof of the purchase of a specified quantity of powdered skimmed milk, was fixed at such an amount that, if it was forfeited, its effect on the prices of feeding-stuffs was slightly more than the increase due to the purchase of powdered skimmed milk.

4 Article 5 of the regulation laid down that, in the case of contracts concluded before the date of entry into force of the regulation, the burden of the costs arising under the arrangements was to be borne by the successive buyers of the products in question. The regulation did not contain any similar provision making it possible for consumers of feeding-stuffs, such as breeders of poultry and pigs, to incorporate the increase in the price of their products.

5 The validity of these arrangements has been contested on grounds of conflict in particular with the objectives of the common agricultural policy as defined in Article 39 of the Treaty, the prohibition of discrimination laid down in the second subparagraph of Article 40 (3) and the principle of proportionality between the means employed and the end in view. Because of the close connexion between these grounds of complaint, it will be appropriate to consider them together.

6 Under Article 39, the objectives of the common agricultural policy are to be the rational development of agricultural production, the assurance of a fair standard of living for the whole of the agricultural community, the stabilization of markets and the availability of supplies to consumers at reasonable prices. Although Article 39 thus enables the common agricultural policy to be defined in terms of a wide choice of measures involving guidance or intervention, the fact nevertheless remains that the second subparagraph of Article 40 (3) provides that the common organization of the agricultural markets shall be limited to pursuit of the objectives set out in Article 39. Furthermore, the same subparagraph lays down that the common organization of the markets 'shall exclude any discrimination between producers or consumers within the Community'. Thus the statement of the objectives contained in Article 39, taken together with the rules in the second subparagraph of Article 40 (3), supplies both positive and negative criteria by which the legality of the measures adopted in this matter may be appraised.

7 The arrangements made by Regulation (EEC) No 563/76 constituted a temporary measure intended to counteract the consequences of a chronic imbalance in the common organization of the market in milk and milk products. A feature of these arrangements was the imposition not only on producers of milk and milk products but also, and more especially, on producers in other agricultural sectors of a financial burden which took the form, first, of the compulsory purchase of certain quantities of an animal feed product and, secondly, of the fixing of a purchase price for that product at a level three times higher than that of the substances which it replaced. The obligation to purchase at such a disproportionate price constituted a

discriminatory distribution of the burden of costs between the various agricultural sectors. Nor, moreover, was such an obligation necessary in order to attain the objective in view, namely, the disposal of stocks of skimmed-milk powder. It could not therefore be justified for the purposes of attaining the objectives of the common agricultural policy.

8 In consequence, the answer must be that Council Regulation (EEC) No 563/76 of 15 March 1976 is null and void.

Costs

9 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Finanzgericht Hamburg and the Finanzgericht Bremen by orders of 2 December and 8 November 1976, respectively, hereby rules:

Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs is null and void.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 5 July 1977.

A. Van Houtte
Registrar

H. Kutscher
President