In Case 124/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Rolf Wägenbaur, acting as Agent, assisted by Peter Oliver, a member of its Legal Department, with an address for service at the office of Oreste Montalto, a member of that department, Jean Monnet Building, Kirchberg,

applicant,

supported by

THE GOVERNMENT OF THE FRENCH REPUBLIC, represented by G. Guillaume, Director of Legal Affairs in the Ministry for External Relations, acting as Agent, assisted by A. Carnelutti, Secretary for Foreign Affairs, acting as Deputy Agent, with an address for service in Luxembourg at its Embassy,

intervener,

v

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by G. Dagtoglou, acting as Agent, with an address for service in Luxembourg at its Embassy,

defendant,

APPLICATION for a declaration that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty by making imports of UHT milk and cream subject to measures having an effect equivalent to quantitative restrictions on imports,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe, U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due and Y. Galmot, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

1. The product in question

The legislation applicable in England, Wales and Scotland reserves the designation "Ultra Heat Treated" (hereinafter referred to as "UHT") to milk which has been "retained at a temperature of not less than 132.2° Centigrade for not less than one second" (Milk (Special Designation) Regulations 1977, Schedule 2, Part IV (A) (1); Milk (Special Designation) (Scotland) Amendment Order 1966, Schedule 1, Part III (A) (1)).

The essential characteristic of milk which has undergone the UHT treatment is that it will keep more or less at room temperature provided that, directly after treatment and without exposure to the open air, it has been packed in a container which is hermetic to air, light and bacteriological agents.

Cream may also be subjected to the same treatment.

The UHT treatment is among those used in several Member States of the Community according to standards which, if not identical, are at least similar.

2. The relevant legislation

The legislation of the United Kingdom applying to the importation, packaging and marketing of milk and dairy products may be summarized as follows:

A — Importation

(a) The legislation applicable to *England, Wales* and *Scotland:*

Article 4 of the Importation of Animal Products and Poultry Products Order 1980 (SI 1980 No 14) prohibits the landing of animal products in England, Wales or Scotland without a general or specific licence issued by the appropriate minister. Article 3 defines "animal product" within the meaning of that Order to include "anything originating . . . from a living or dead animal".

Article 4 (5) exempts from those requirements products listed in the Schedule to the Order. That list does not include UHT milk or UHT cream.

It follows that imports of UHT milk and UHT cream are subject to the grant of a licence as required by that Order.

(b) Legislation relating to *Northern Ireland:*

Provisions similar to those described in the preceding paragraph apply in Northern Ireland by virtue of the combined effect of the Landing of Carcases and Animal Products Order (Northern Ireland) 1970 (SI 1970 No

145) and the Landing of Carcases and Animal Products (Amendment) Order (Northern Ireland) 1972 (SI 1972 No 113).

It should be noted however that products originating in and imported directly from Ireland, by virtue of Article 5 of SI 1970 No 145, are not affected by the statutory instruments of 1970 and 1972 on the landing of carcases and animal products.

Subject to that exception, the effect of the latter Order is to subject to the licensing procedure all "dairy products" other than "butter, cheese, yoghurt, sterilized or evaporated milk and cream in tins".

It follows from those provisions that neither milk nor cream which has undergone UHT treatment may be imported into Northern Ireland without an import licence, unless produced on the territory of Ireland.

B — Packaging

(a) Legislation applicable to *England* and *Wales:*

Regulation 30 (2) of the Milk and Dairies (General) Regulations 1959 (SI 1959 No 277), as amended by the Milk and Dairies (General) (Amendment) Regulations 1977 (SI 1977 No 171) provides as follows:

"Except in the case of a bottle or carton in which cream is imported and is intended to be delivered to consumers, every person shall cause every bottle or carton in which he intends to deliver milk to consumers to be filled and closed on registered premises . . . ."

Registered premises means premises registered by a local authority under Part III of the 1959 regulations. A local authority can only register for those purposes premises in its own district (Regulation 8 of the 1959 regulations). By virtue of Regulation 8 (4) it is prohibited to carry on the trade of distributor of milk without such registration.

The effect of those provisions is that milk (raw or sterilized) produced in another Member State may not be sold for consumption in England and Wales unless it has been packed on that territory. Since UHT milk is involved the requirement to repack entails a second treatment, in view of the very nature of the process.

(b) Legislation applicable to *Scotland:*

The Milk (Special Designations) (Scotland) Order 1980 (SI 1980 No 1866) provides that "milk shall not be treated by the ultra high temperature method in unlicensed premises."

Licences are issued by the local authority of the area in which such premises are situated (Article 3 (3) of the same Order).

(c) Until 1981 there were no regulations relating to the packaging of UHT milk in Northern Ireland, since the sale of such milk was prohibited there. Since 1981 the packaging of UHT milk in Northern Ireland is governed by Regulation 27 of the Milk Regulations (Northern Ireland) 1981 (SR 1981 No 234).

C — Sale

(a) Legislation applicable to *England* and *Wales:*

Sections 35 to 37 of the Food and Drugs Act 1955, combined with the Milk (Special Designations) Regulations 1977

(SI 1977 No 1033) made hereunder, prohibit the sale of milk for human consumption other than catering sales without a "dealer's licence".

By virtue of Regulation 13 of the 1977 regulations dealers' licences are granted only (subject to exceptions not relevant to the present case) by the local authority for the area within which are situated the premises at or from which the milk is treated or sold. By virtue of Regulation 6, every licence is subject to the general conditions set out in Schedule 1 to the regulations and (as regards UHT milk) in Part IV of Schedule 2 thereto. Paragraph 1 of Schedule I requires the holder of the licence to comply with all relevant provisions of any Milk and Dairies Regulations, including the requirement mentioned above that the containers must be filled and closed on registered premises. Furthermore, paragraph 5 (1) of Part IV of Schedule 2 to those regulations provides in particular that the containers be filled and sealed at the premises at which the treatment has been carried out.

(b) Legislation applicable to *Northern Ireland:*

Until the adoption of regulations in 1981, which are analysed further on, the sale of UHT milk and cream, whether they were domestic or imported products, was prohibited under the provisions of Section 10 of the Agriculture (Miscellaneous Provisions) Act (Northern Ireland) 1967 in conjunction with the Milk Regulations (Northern Ireland) 1963 (SI 1963 No 44) as amended in 1973.

In accordance with the Milk Regulations (Northern Ireland) 1981 (SR 1981 No 234) the sale of UHT milk is permitted provided that milk has been prepared in accordance with the regulations from milk produced in Northern Ireland.

Similarly, by virtue of the Marketing of Milk Products (Amendment) Regulations (Northern Ireland) 1981 (SR 1981 No 233) the sale of UHT cream is permitted provided it has been manufactured in accordance with the regulations in registered premises in Northern Ireland.

(c) Legislation applicable to *Scotland:*

In Scotland the sale of UHT milk is governed by separate legislation similar to that applicable in England and Wales.

In conclusion, the combined effects of the whole of the provisions analysed above may be summarized as follows:

UHT milk and cream may be *imported* into *England, Wales, Northern Ireland* and *Scotland* only with the authorization of the appropriate minister evidenced by an import licence. That stipulation does not however apply to UHT milk and cream coming directly from Ireland and imported into Northern Ireland.

UHT milk (domestic or imported) may be *marketed* in *England, Wales* and *Scotland* only by approved dairies or distributors holding a dealer's licence. That licence requires the operator to pack or, in the case of imports, to repack, that is to say treat again, the milk in a dairy approved by the local authority.

UHT milk and cream, having been totally prohibited from sale in Northern Ireland until the adoption of the Milk Regulations (Northern Ireland) 1981 (SR 1981 No 234), may now be offered for sale in *Northern Ireland* only if they have been produced according to the requirements in force in that province in registered premises.

3. Procedure

1. By letter dated *17 March 1980* (No SG(80) D/3476) the Commission requested the United Kingdom Government, in accordance with the provisions of Article 169 of the EEC Treaty, to submit to it within 30 days of receipt of the letter its observations on the organization of imports of and the sale of UHT milk produced in other Member States. In its letter, the Commission considered that "the rules still applied to UHT milk imported into the United Kingdom (and by analogy to UHT cream in Northern Ireland) are ... excessive and disproportionate to what could be legitimately justified under Article 36 for the protection of human and animal health". The Commission formally recorded "that the United Kingdom has failed to fulfil its obligations under Article 30 of the EEC Treaty in the present case" (last paragraph on p. 5 of the Commission's letter).

2. By a reply dated *30 April 1980* addressed to the Commission by the office of the United Kingdom Permanent Representative to the European Communities, the United Kingdom Government stated in substance that, although the UHT process, when properly carried out, should reduce health risks to a minimum, the measures complained of were justified on human and animal health grounds.

3. The Commission's reasoned opinion dated *7 November 1980* was addressed to the United Kingdom Permanent Representative under cover of its letter No SG(80) D/13285 dated 12 November 1980.

4. By a letter dated *12 January 1981* the United Kingdom Permanent Representative reaffirmed that the measures were justified on health grounds.

5. Since the United Kingdom Government had not taken the necessary steps to comply with the reasoned opinion of 7 November 1980, the Commission decided to submit the present application of the Court of Justice. It was registered at the Court on *22 May 1981.*

6. By a request lodged on *22 September 1981,* the Government of the French Republic requested the Court to allow it to intervene in support of the submissions of the applicant in this case.

By an order dated 14 October 1981, the Court, on hearing the views of the Advocate General, decided to accede to that request.

The Government of the French Republic lodged its statement in intervention on 31 January 1982.

7. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court, pursuant to Article 45 of the Rules of Procedure, ordered certain measures of inquiry.

By letters dated 21 and 30 July 1982 addressed by the Court Registry to the United Kingdom Government and the Commission those parties were invited to reply to the following questions before 30 September 1982:

(a) Questions addressed to the United Kingdom and the Commission:

Can statistics be supplied on the production of UHT milk and cream in

the Member States and on the trade in those products between the various Member States of the Community?

Can statistics be supplied on the relative share of UHT milk and cream in the consumption of dairy products in the different Member States of the Community?

Can statistics be supplied on the respective shares in the consumption of UHT milk and cream in the United Kingdom attributable to imports and to local production (if possible, with separate figures for each of the constituent parts of the United Kingdom, England, Wales, Scotland and Northern Ireland, and if appropriate for British exports of those products to markets other than the national market)?

(b) Questions addressed to the United Kingdom:

Can the United Kingdom Government state precisely, in the light of the distinction made by the Commission between the "specific licence" and "general open licence" systems, how the system of import licences for UHT milk introduced by its health authorities operates?

In particular, can the United Kingdom Government give details of the conditions — other than the requirement that health certificates issued in the exporting Member State be produced — to which the grant of such a licence is subject and state whether the UHT milk is subjected, after importation, to quality control by means of sampling or by any other method?

Can the United Kingdom Government give the Court information regarding the conditions laid down by its authorities for the bulk importation of milk?

(c) Questions addressed to the Commission:

Can the Commission give details of the criteria on which it relies in support of its statement that the health rules in force in the various Member States relating to UHT treatment and the packaging of milk are "similar" or "at least equivalent" to those in force in the United Kingdom?

Can the Commission give the Court information regarding the conditions imposed on the importation of UHT milk by the other Member States?

Can the Commission indicate how far work has progressed on its "proposals for a Council directive laying down the health requirements which must be met by heat-treated milk intended for direct human consumption"?

II — Conclusions of the parties

The *Commission* claims that the Court should:

1. Declare that, by submitting imports of UHT milk and cream to the restrictions and prohibitions referred to, the United Kingdom has failed to fulfil its obligations under Article 30 of the EEC Treaty:

2. Order the Government of the United Kingdom to pay the costs.

The *United Kingdom Government* formulated no specific conclusions. In concluding its defence it states that "since it has no practicable means of satisfying itself as to the adequacy of those methods [adopted in other Member States for supervising the production and sale of milk], it considers itself to be under a duty to the public of

the United Kingdom, in the interests of animal and public health and consumer protection, pending the introduction of agreed Community measures, to maintain its own system of control." For the reasons given, the United Kingdom Government submits that it is justified under the Treaty in so doing.

The *Government of the French Republic* claims that the Court should:

1. Uphold the conclusions of the Commission of the European Communities;
2. Declare that by adopting and maintaining in force all the legislative provisions cited by the Commission, including all amendments to date, the United Kingdom has failed to fulfil its obligations under the Treaty;
3. Order the United Kingdom to pay the costs, including those incurred by the intervener.

III — Summary of the submissions and arguments of the parties

1. Commission of the European Communities

The Commission considers that the effect of all the regulations adopted by the United Kingdom is to restrict the importation of UHT milk on to the territory of the United Kingdom.

1. Appraising those measures in the light of Article 30 of the EEC Treaty, the Commission considers that those provisions constitute a hindrance to imports so as to fall within the prohibition in Article 30 of the EEC Treaty on measures having an effect equivalent to quantitative restrictions.

It states that, according to the Court's judgment of 15 December 1976 in Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921 the requirement, even as a pure formality, of import licences in intra-Community trade, such as the licence required in the present case with regard to milk, falls within the prohibition contained in Article 30.

Moreover, the Commission submits that the apparently non-discriminatory nature of the marketing requirements (packaging and sale) in no way prevents those measures from falling under Article 30 of the EEC Treaty. In that respect, the Commission bases its argument on the judgment of the Court of 20 February 1979 in Case 120/78 *(Rewe-Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649).

2. As regards the possible justification of those measures in the light of Article 36 of the EEC Treaty, the Commission distinguishes between two different cases; on the one hand the case of "general open licences", and on the other hand the case of "specific licences".

(a) It is the Commission's understanding that in the case of "general open licences" the appropriate United Kingdom authority requires, for the importation of a category of products, a licence which, in fact, takes the form of a published notice laying down the general conditions to which imports are subject. In such a case, if those conditions are satisfied, importers may import the products without being required to apply for a licence for each individual operation (specific licence). The Commission considers that, in the absence of the harmonization of health standards, such a system must be regarded as being contrary to Article 30 of the Treaty but, however, justified on grounds of the protection of the health of animals under Article 36 if:

It is published;

It is open to all importers or potential importers;

It does not require importers, who satisfy the criteria, to obtain any further licence or authorization;

It is shown to be neither excessive nor arbitrary and thus justified under Article 36.

(b) On the other hand the system of specific licences requires each importer to apply for the grant of a licence or authorization in respect of each importation and is by its very nature open to unnecessary delay on the part of the importing Member State and is therefore not justified under Article 36. According to the Commission, that assertion is borne out in the present case by the fact that such a system of specific licences provides no greater health guarantee than the system of general open licences.

In fact, the Commission considers that the United Kingdom authorities could perfectly well store at a central point the information necessary for the protection of public health gathered from health certificates accompanying each import consignment. In fact, the United Kingdom authorities, which have the power to determine the contents of such certificates (provided that the information required concerns only the essential features of production, treatment and distribution of the milk), could, with the help of a central point for monitoring the information gathered, follow and, if necessary, withdraw from the market, any imported consignment of milk which is suspect from the health point of view. For that reason the Commission considers unfounded the United Kingdom's argument that individual or specific licences are necessary to enable any milk coming from an infected area to be traced quickly after importation.

Relying on the judgments of the Court of 20 May 1976 in Case 104/75 *(De Peijper* [1976] ECR 613) and of 8 November 1979 in Case 251/78 *(Denkavit* v *Minister für Landwirtschaft* [1979] ECR 3369), the Commission considers that the United Kingdom, with a view to lightening the administration's burden, may not subject importers to requirements which are more restrictive than necessary and that the United Kingdom authorities might achieve the legitimate objective of protecting the health of animals and humans by resorting to measures which are less restrictive of the free movement of goods.

In that connection the Commission envisages the possibility of the United Kingdom authorities' carrying out checks on the premises of UHT milk producers established in other Member States, who wish to export to the United Kingdom whilst observing the regulations in force in that Member State. The Commission points out that such checks are carried out by British health inspectors (in particular in Argentina) in the premises used for slaughtering and packaging meat intended for the United Kingdom market. For that reason, the Commission considers that a system of imports dependent on the delivery of health certificates, drawn up, as appropriate, after inspection of producers' premises, by inspectors of the United Kingdom authorities, would be able to ensure all the necessary safeguards, without disproportionately affecting freedom of trade. The Commission points out, moreover, that such a system could be supplemented by random inspections carried out on imported consignments.

3. Apart from the case, explained above, where merely a general open licence is required, the Commission

considers that the United Kingdom measures are justified neither to protect the health of livestock nor to protect human health, nor finally to protect the consumer.

(a) The protection of British livestock could be guaranteed since the UK authorities would be certain that the imported milk comes from an area of production free of infectious diseases or, at least, from an area where any such infection has been brought under control. To that end, the Commission points out that the requirement of a health certificate from an exporting country accompanying the imported consignments, linked to a centralized system of monitoring that information would enable the United Kingdom to exercise control over those imported products which pose a threat and, if necessary, to prohibit the importation or the sale of milk coming from doubtful areas.

In the Commission's opinion such a system is found to be satisfactory in all Member States where it is operated and the Commission states that, contrary to the United Kingdom's assertion, neither Belgium nor Denmark operates a licensing system for imports. Consequently, only the United Kingdom and Ireland subject imports of milk to a system as restrictive as the system under challenge in the present proceedings and, in that respect, the Commission states that the possibility of proceedings against Ireland is at present under consideration.

(b) Nor does the protection of human health necessitate the operation of a system as restrictive as the one at present in force in the United Kingdom.

The Commission seeks to emphasize that the criteria used for the purpose of protecting public health may not be appraised abstractly but must on the contrary be viewed in context. Thus, the Commission considers that, in view of the health precautions taken in the various Member States, milk is "very far from being a major source of human disease". It states that, to its knowledge, the case reported by the United Kingdom, of intoxication of certain persons due to the presence of enterotoxins in UHT milk marketed in the Federal Republic of Germany, "must rank as one of the very few cases of illness, if not the only case, ever to have been caused by UHT milk". In that respect it emphasizes that a second UHT treatment would not have destroyed the enterotoxins which caused the illness.

For that reason the Commission considers that, for the purpose of protecting public health, the same criteria may not be applied to a product such as milk, which is widely consumed and the characteristics of which are well established, and to entirely new and only partly tested products such as the pesticides and artificial preservatives which formed the subject-matter of the judgments of the Court of 5 February 1981 in Case 53/80 (*Officier van Justitie* v *Koninklijke Kaasfabriek Eyssen BV* [1981] ECR 409) and of 17 December 1981 in Case 272/80 (*Openbaar Ministerie* v *Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] ECR 3277). The Commission rejects the comparison made by the United Kingdom to demonstrate the lawfulness of its restrictive measures because, *inter alia*, the production and

sale of the chemical products at issue in those cases were totally prohibited on the territory of the Member States concerned, which is not so in the present case.

The Commission emphasizes that figures for intra-Community trade show that for a number a years there has been substantial trade in UHT milk between all the Member States of the Community except the United Kingdom and, so far as the Commission is aware, no health problem has occurred. In addition some Member States noted for their high standard of public health protection, such as the Netherlands and the Federal Republic of Germany, have very liberal rules regarding imports of these products.

In that respect the Commission submits that no system of safeguards is absolutely fail-safe, that the dangers referred to by the United Kingdom to justify its restrictive policy on imports are just as acute on its own territory and, finally, that the health standards in force in the different Member States are similar, if not at least equivalent, to those imposed in the United Kingdom.

Furthermore, the Commission argues that it is scientifically proven that a second UHT treatment of milk and dairy products is ineffective and thus useless to eliminate dangerous substances which have resisted the first treatment. However, it is principally on the requirement of a second treatment that the United Kingdom authorities are insisting to ensure the protection of public health. For that reason the Commission considers that the measures applied by the United Kingdom are disproportionate in relation to the purpose to be achieved.

In support of that argument, the Commission points out that:

UHT cream and flavoured UHT milk may, after importation, still be freely marketed on certain parts of the territory of the United Kingdom, whereas those products, as the United Kingdom admits, pose an equal threat to public health, although their consumption is less. Indeed, the Commission "deeply regrets" that the United Kingdom did not see fit to await the outcome of the present proceedings before setting in motion the process of consultation leading to the extension to those products of all the restrictive measures applying to imports of milk (letter from the Ministry of Agriculture, Fisheries and Food dated 9. 10. 1981 to the responsible authorities). The Commission states that, if the measures envisaged, which seek to subject the marketing of flavoured cream and milk to the requirement of a second UHT treatment on the territory of the United Kingdom, were finally adopted, further proceedings under Article 169 of the EEC Treaty would probably have to be instituted on that ground against the United Kingdom.

The system of import licences prior to any entry of UHT milk on to the territory of the United Kingdom does not enable the public health authorities to satisfy themselves as to the non-pathogenic quality of the milk intended for sale on the United Kingdom market. In fact, the Commission observes, first, that no health inspection is carried out by inspectors from the United Kingdom in the Member State or States seeking to export and, secondly, that no inspection may take place on the territory of the

United Kingdom itself since the products in question are not landed prior to the issue of a licence. Therefore the Commission questions the objectivity of the criteria used by the United Kingdom authorities for the grant of those licences and emphasizes that, if the true criterion is whether the area of production is infected, the requirement of a prior licence is unjustified and may easily be replaced by the system of export documents described above.

Finally, the United Kingdom, in order to justify its system, has adduced no evidence of any outbreaks of disease linked to imports of dairy products.

In concluding its submissions on the question of the protection of public health, the Commission relies on the judgments of the Court of 8 November 1979 in *Denkavit* (cited above) and 7 April 1981 in Case 132/80 *(United Foods* v *Belgian State* [1981] ECR 995), where it was held that an importing Member State should, wherever possible, give credence to health certificates delivered by the authorities of the exporting Member State, subject to spot checks. In that respect the Commission is of the opinion that the United Kingdom can no longer justify its refusal to do this by relying on the opinion of Mr Advocate General Mayras of 14 June 1979 in Case 244/78 *Union Laitière Normande* v *French Dairy Farmers* [1979] ECR 2685 since, in its view, his Opinion was overruled in the judgments cited above.

(c) In the Commission's view, consumer protection cannot be viewed separately from the question of public health. Consequently, hindrances to trade which could not be justified from the point of view of public health cannot be justified by reference to the objective of protecting consumers. In any case, the Commission recalls that the requirement of a second UHT treatment on the territory of the United Kingdom for the purpose of protecting the consumer is ineffective and liable to alter the organoleptic quality of milk to the detriment of consumers.

In concluding, the Commission states that its task is to ensure that distribution conditions for food products which are compatible with human and animal health are maintained and improved throughout the Community. It continues to take the view that the measures of the United Kingdom are "considerably more restrictive than is necessary" of imports of UHT milk and that the United Kingdom authorities could ensure the protection of public health by means which are less restrictive of trade and compatible with the case-law of the Court. To that effect it would be sufficient if the United Kingdom were to lay down the requirement that importers should produce veterinary certificates drawn up by the exporting Member State.

For those reasons, the Commission claims that the United Kingdom has failed to fulfil its obligations under the EEC Treaty by adopting the contested measures relating to imports of milk on to its territory.

2. The United Kingdom Government

As to the admissibility of the Commission's application:

The United Kingdom initially claimed that the Commission's application sought a declaration by the Court that the United Kingdom had failed to fulfil its obligations under Article 30 of the

Treaty as regards the provisions applicable in the United Kingdom at the date when this action was registered, namely on 22 May 1981, and referred to in the reasoned opinion of 7 November 1980. Subsequent to those dates, the law was changed in Northern Ireland by the Milk Products (Amendment) Regulation 1981 (SR 1981 No 233) and the Milk Regulations (Northern Ireland) 1981 (SR 1981 No 234), which were made on 10 July 1981 but did not come into effect until 30 July 1981. Therefore in the United Kingdom's view, the Commission's conclusions relating to those new regulations are inadmissible. In the final state of its conclusions the United Kingdom appears to have abandoned that objection of inadmissibility.

As to the substance, the United Kingdom Government denies the breach of Article 30 of the EEC Treaty alleged by the Commission and maintains in any event that the health measures contested by the Commission are justified under Article 36 of the EEC Treaty.

After pointing out the high level of consumption of liquid milk in the United Kingdom of 137.1 kg per head of population in 1978 — a figure which is only exceeded by Ireland and places the United Kingdom in second place as a consumer of milk in the Community — and the need for strict standards of hygiene in view of the bacteriological vulnerability and the large consumption of the product, the United Kingdom Government dwells on the long history since 1914 and the well-established nature of regulations relating to the sale of milk on its territory.

According to the United Kingdom Government, the regulations in issue pursue two objectives, namely the protection of animals and the protection of humans.

1. In order to protect *animals and livestock* in the United Kingdom the authorities must be certain that no milk or dairy product which is infected (in particular with foot-and-mouth disease) is imported on the territory of the United Kingdom so that milk of foreign origin is prevented from constituting a potential carrier of serious animal diseases. To that end, underlying United Kingdom regulations is the requirement that no raw milk may be imported.

With that aim in mind the system of import licences was established. In practice, a licence is granted where the exporting State is able to certify (or where the importer is able to submit a certificate to the same effect) that the area of production of the milk for importation into the United Kingdom has been free from foot-and-mouth disease for at least 12 months and that the milk has been pasteurized or heat-treated. In a case where the milk does not come from an area which has been free of disease for 12 months, the milk is accepted into the United Kingdom if the importer is able to prove that the milk has undergone UHT treatment to 140 °C for three seconds, which is a more stringent requirement than the normal UHT treatment but one which is necessary to ensure the inactivation of the foot-and-mouth disease virus. A complete ban is

not considered necessary unless the United Kingdom authorities have reason to suspect that the disease is out of control in the area of production.

According to the United Kingdom Government, the system of individual import licences is less burdensome than the Commission appears to think. In fact it is to the advantage of the trade that the health authorities of the exporting country, in the absence of standards common to the different producing countries, should know exactly what is required for importation into the United Kingdom before the milk is shipped.

What is more, it is well established that cattle infected with foot-and-mouth disease may yield milk infected with the virus before outward symptoms become evident. Milk from such cattle, having undergone only pasteurization, which may not inactivate the virus, could well be already in transit, or actually imported into the United Kingdom before the disease had been identified in the cattle from which it came. It is therefore essential that the United Kingdom health authorities should be able at any time to trace any consignment of imported milk and in the shortest time possible. Only a system of individual or specific licences affords such a safeguard. Under a system of general open licences it would be possible to trace imported consignments only if, first, the customs authorities in all parts of the country operated for the health authorities a system of "immediate and continuous" notification of all imports and, secondly, if the health authorities were able to notify to all customs authorities health information concerning all exporting countries so that the customs authorities would be in a position to stop, at any point of entry of milk into the United Kingdom, consignments accompanied by health certificates of the exporting country which are no longer regarded as being valid owing to a subsequent disclosure that it is an area of infection. That system would be complicated and costly whilst not offering absolute safeguards from the point of view of health. For those reasons, the United Kingdom Government considers that the system of individual import licences is the most appropriate and safest, regard being had to the objective pursued. Moreover, it adds that that system demonstrated its effectiveness when a foot-and-mouth epidemic broke out in France in 1981 and during the current outbreak of the disease in Denmark. Finally it points out that it has never received complaints from importers that the system is slow or cumbersome. In particular, the applicants in the *Union Laitière Normande* case, mentioned above, obtained such a licence without any difficulty. The United Kingdom Government states finally that, to its knowledge, other Member States, namely Ireland, Denmark and Belgium, operate similar licensing systems.

2. The protection of *human health* requires the United Kingdom authorities to make certain that milk, once it has been imported, is suitable for human consumption, in the same way as they control the quality of domestic production.

To that end, the United Kingdom legislation, which applies uniformly to imported milk and to domestically-produced milk, stipulates that UHT milk may be sold for human consumption

only if it has been treated and packed in the United Kingdom in the prescribed manner according to the requirements of a system designed "to provide careful safeguards and supervision for the protection of the consumer". In that respect the United Kingdom is of the opinion that it cannot rely on treatments carried out in other Member States which, whilst being similar owing to technical requirements, are not identical to the treatments required in the United Kingdom.

3. The United Kingdom Government affirms its conviction that its legislation is compatible with Community law.

It contends that, in the absence of common rules relating to the protection of public health and consumers, it is for the Member States to regulate all matters relating to the production and marketing of milk on their own territory. Obstacles to movement within the Community resulting from the disparity of national laws relating to the marketing of milk must be accepted in so far as those provisions of national law may be recognized as being necessary to satisfy mandatory requirements relating to the protection of public health and consumer protection.

Relying on the case-law of the Court laid down in the judgments of 16 May 1979 in Case 2/78 (*Commission* v *Belgium* [1979] ECR 1761) and of 20 February 1979 in Case 120/78 (*Rewe-Zentrale AG*, cited above), the United Kingdom Government considers that its legislation relating to the importation and marketing of dairy products cannot be regarded as conflicting with the requirements of Article 30 of the Treaty since that legislation is neither unreasonable nor disproportionate in relation to its objective, which is to ensure that dairy products sold for consumption on the territory of the United Kingdom are free of micro-organisms and toxic substances. Conversely, it considers that it would be unreasonable to expect its authorities to rely on bilateral arrangements or the health standards of other Member States until the Commission's harmonization proposals, which have not been adopted by the Council, are implemented in the Member States.

4. Alternatively, the United Kingdom Government submits that the legislation "clearly falls within the exemption provided by Article 36 of the EEC Treaty as being justified on grounds of the protection of life and health of humans", which, under the case-law of the Court, would lift the prohibition contained in Article 30 by which its legislation might otherwise be caught. In that respect, the United Kingdom Government emphasizes that the measures in question are not dictated by a requirement to lighten the administration's burden and reduce public expenditure but by a concern for effectiveness and health safety. For that reason it considers that the case-law of the Court as laid down in its judgments in *Denkavit* and *de Peijper*, and supported by the Opinion of Mr Advocate General Mayras in the *Union Laitière Normande* case, enables the conclusion to be drawn, contrary to the Commission's argument, that a system of

import licences such as the system operated by it for dairy products is not, in principle, contrary to Articles 30 et seq. of the Treaty.

The United Kingdom considers that the primordial importance, in its eyes, of the requirements of public health, which was recognized by the Court in its judgments in the *de Peijper* case and *Koninklijke Kaasfabriek* and which the Commission recalled in its observations in the *Biologische Producten* case, compels it to establish a system for the protection of the consumer which affords the maximum safeguards for consumers in accordance with the principle recognized by the Court at paragraph 15 of its judgment in the *de Peijper* case where it held that "... it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure (as regards public health) and in particular how strict the checks to be carried out are to be."

In that connection, the United Kingdom states that, having regard to the bacteriological vulnerability of milk, it cannot content itself simply with a check carried out in those places where the milk is treated, as suggested by the Commission. In fact a strict control over the whole production cycle of the milk is absolutely necessary in order to guarantee the quality of the final product sold for consumption. In support of that assertion, the United Kingdom put in several documents annexed to its pleadings.

Thus, it is clear from an article published in the "Revue laitière francaise" No 398 of June 1981, entitled "Recommandations pour l'amélioration de la qualité bactériologique du lait au niveau des laiteries" (Annex IV to the defence), that a number of factors account for the deterioration of milk between farm and creamery, including the high temperature of milk stored on the farm, the mixing of milk of different quality, the frequency of collections and the conditions under which collections are carried out (whether refrigerated bulk tanks are used or not), the care with which containers and tankers are cleaned. That article, which dealt with production conditions in France, indicates at least one fundamental difference between the United Kingdom and its partners in the Community, namely that in the United Kingdom daily bulk collection is "virtually universal" and, where it is not, is carried out every two days after refrigerated storage of the milk, whilst in the other Member States, for example in France, at least according to the article, collections of raw milk are spread out sometimes at intervals as long as two or three days, that is to say six milkings, which poses a serious risk of spreading bacteria and, necessarily, leads to the production of UHT milk of mediocre quality (see Annex IV to the defence, p. 3, column 1, — Recommendations of the Working Party of the Centre National de Coordination des Études et Recherches sur la Nutrition et l'Amélioration). Those threats to the quality of the final product become yet more serious if the milk intended for UHT treatment has, prior to that treatment, been pasteurized. The United Kingdom Government relies on two

scientific articles,[1] reproduced in Annexes 4 and 5 to its rejoinder to show that where enterotoxins are present in pasteurized milk they may develop more rapidly than if the milk had not been pasteurized, because pasteurization, which succeeds in destroying most micro-organisms, enables the staphylococci contained in the enterotoxins to grow without competition in an almost sterile growth medium.

Similarly, an article entitled "Incidence of enterotoxin-producing staphylococcus aureus in UHT milk", published by R. Eschement and W. Steur in 1981 in "Öffentliches Gesundheitswesen" (annexed to the defence), well highlighted the dangers of a deficient supervision of the production cycle of milk. In fact, that article, which related to an epidemic which broke out in the Federal Republic of Germany and poisoned 30 persons as a result of the presence of enterotoxins in UHT milk, shows that the possibility of milk which has been treated correctly being contaminated after heat treatment cannot be ruled out and that the organoleptic qualities of the contaminated milk need not necessarily be altered and thus the suspicion of the consumer is not aroused.

The United Kingdom Government states that it is only because of very strict health precautions which have been operated for many years by its authorities to supervise the production cycle of milk on its territory that that product no longer constitutes a major source of human disease. In that respect it explains, furthermore, that the high degree of reliability from the health point of view achieved by its dairy production is, likewise, partly due to the structure and size of the dairy farms concerned (these are on average considerably larger than the average in the other Member States as the comparative statistics set out in Annex III to the rejoinder show) which makes it easier to enforce rigorous compliance with the provisions in force. The United Kingdom states that it has no scientific information available to it which would support the Commission's view that milk, in the other Member States, does not constitute a source of diseases. It emphasizes that, at the Community level, there is no system for notifying outbreaks of disease of the type mentioned in the publication referred to above and that, in the absence of reliable statistical information it cannot understand how the Commission can assert without any scientific foundation that milk is far from being "a major source of human disease".

For that reason, the United Kingdom maintains on the one hand that it is necessary for it to exercise a strict and all-embracing control over the production cycle and marketing of milk sold for consumption on its territory and, on the other hand, that the exercise of that control outside its territory is virtually impossible.

In fact, the method of production of milk is not at all comparable with the production cycle of meat in Argentina used by the Commission by way of comparison. There are 25 establishments in Argentina approved by the United

1 — Donnelly *et al.*, "Production of enterotoxin A in milk", *Applied Microbiology*, Vol. 16, No 6, June 1968, p. 917-924;
Tatini *et al.*, "Factors influencing the production of staphylococcal enterotoxin A in milk", *Journal of Dairy Science*, Vol. 54, No 3, 1971, pp. 312-320.

Kingdom authorities, which obtain supplies from 45 slaughterhouses. Moreover the task of health inspections is shared between the Community and the United Kingdom. To achieve a health control over milk comparable in degree to the inspections carried out on Argentinian meat would demand of the United Kingdom a disproportionate and unreasonable effort, even if it were accepted that the United Kingdom authorities would only control certain approved undertakings. Thus, for example it appears that the Union Laitière Normande controls 17 dairies supplied by nearly 40 000 producers, that is to say more than 2 300 farms per dairy.

Irrespective of the question of the cost of those controls, the practical difficulties would be considerable (approval procedure, settlement of possible disputes, powers of the inspectors, etc.), would give rise to disparities between importers and would reduce economic viability at a time when discussions are in progress at Community level with a view to introducing a Community system for the control of the production and marketing of milk. Furthermore, the United Kingdom observes that such a system amounts, in fact, to re-establishing a system of licences prior to export analagous to the system contested by the Commission.

In any event, the United Kingdom, relying upon statistics set out in Annex I to its rejoinder (source: Eurostat 1980 and *EEC Dairy Facts and Figures 1981,* Milk Marketing Board) asserts that trade in milk between Member States is not as extensive as the Commission appears to think and on no account could be described as substantial. It adds that, contrary to the Commission's assertion, it cannot be said that a Member State "runs no risk" in importing milk from another Member State. There is no provision in the Treaty which requires a Member State to abandon its own system for the protection of public health and to rely on the health criteria applied by another Member State because certain Member States may be content with a lower degree of protection.

On that point, moreover, the United Kingdom observes that the health standards in force in the different Member States are not harmonized and they are, furthermore, observed and enforced in varying degrees from one Member State to another and from one region to another within a given Member State. In that connection, the United Kingdom Government states that, although the machines operating UHT treatment of milk are similar in all the Member States, the health standards of their production depend to a large extent on their maintenance and their settings in accordance with standards which, here again, are variable and observed in varying degrees.

That "difference of approach" to health questions is, moreover, clearly demonstrated by the negotiations in progress within the Community relating to the harmonization of health standards for the production of UHT milk. Thus Articles 6 and 14 of the Council's second draft directive authorize Member States to derogate from the quality standards laid down in the directive provided that the milk produced under those

conditions is not exported. For that reason the United Kingdom Government seeks to emphasize that it is the disparities in national laws and the variable degree of their application in the different Member States, and not United Kingdom requirements, which are the cause of the difficulties impeding the free movement of UHT milk within the Community. The United Kingdom explains that, whilst it is disposed to admit the entry on to its territory of milk merely on presentation of health certificates issued by other Member States in the context of the protection of animal health, it cannot content itself with that safeguard, having regard to the disparities described above, when milk of foreign origin is involved which is intended to be sold for human consumption.

As regards the free importation of UHT cream and flavoured milk into the United Kingdom, the United Kingdom Government states that its authorities have initiated the consultations required to subject those products to the same system as milk and that "as these controls would now apply to both domestic and imported supplies of cream and flavoured milk" that measure could no longer be regarded as discriminatory. Furthermore, the United Kingdom Government considers that the future regulations concerning cream and flavoured milk, which are prompted by the same requirements of public health as the legislation applicable to UHT milk, are equally valid under Community law.

As regards the United Kingdom requirement of repacking and therefore of retreating imported UHT milk, the United Kingdom Government points out that that legislation, which considerably pre-dates the consumption of UHT milk, has the effect of preventing such milk from entering the United Kingdom market. Consequently the public is protected against a possible defective treatment of the milk and at the same time against the possibility that the milk was in an unsatisfactory condition prior to that treatment. The fact that that requirement makes the importation of UHT milk impossible owing to the increased costs, which it entails, certainly has the effect of creating a hindrance to trade but that hindrance is, in the United Kingdom Government's view, justifiable on grounds of public health under Article 36 of the EEC Treaty.

For those reasons, the United Kingdom Government considers that, in the absence of common provisions, the measures which it has put into effect to ensure that UHT milk consumed on its territory is innocuous are justified under the Treaty.

3. The Government of the French Republic

The French Government in its analysis of the United Kingdom legislation states that it has the effect of:

Requiring any importer wishing to import milk into the United Kingdom to have first obtained an import licence the object of which is to ensure the protection of animal health;

Compelling any importer seeking to sell milk to obtain a dealer's licence, that is to say, in fact, to be himself established in the United Kingdom and also to treat and pack his product- in the United

Kingdom; that is apparent from the conditions for the grant of that licence and from the admission of the United Kingdom authorities contained in the letter of 27 April 1979 giving the United Kingdom Government's reply to a question of the Court in the *Union Laitière Normande* case.

1. The French Government considers that the United Kingdom measures constitute two impenetrable barriers to the importation and marketing of milk of foreign origin and it is undeniable that they directly and effectively hinder trade between Member States. As such those hindrances to the free movement of goods can only be described as measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty.

In that respect it emphasizes that the mere existence of those measures, even if it were assumed that they had no restrictive effect on trade, would, under the case-law of the Court, *per se* be contrary to Article 30 of the Treaty. In fact, the requirement of an import licence, which is issued only on presentation of a certificate attesting that the milk intended for importation has either been pasteurized or been heat-treated to 140°C for at least three seconds, comes within the definition of a measure having equivalent effect, which "also applies to the obligation to produce a certificate to the effect that the imported feedingstuffs have undergone specified treatment in the exporting country", as was held in the judgment of the Court in the *Denkavit* case. The same applies to the requirement to repack and thus to retreat milk in an approved establishment in the United Kingdom, which is a condition precedent to obtaining a dealer's licence. The combined effect of those two types of provision (import licence and marketing licence) is *a fortiori* contrary to the case-law of the Court, which has constantly stated that the legal classification of measures restrictive of trade is not altered by the fact that those measures are apparently non-discriminatory.

2. The French Government acknowledges that measures contrary to Article 30 of the Treaty may nevertheless be justified under Article 36 of the Treaty. The French Government states however that reliance on the derogation contained in Article 36 is only permissible if two conditions are fulfilled:

The measures constituting a derogation must seek to achieve one of the legitimate purposes enumerated in that article;

The measures must be "justified", that is to say that it is satisfactorily shown that those measures are necessary and do not constitute a disguised restriction on trade.

(a) In that connection the French Government observes that it is incumbent upon the Member State seeking to invoke the derogation contained in Article 36 to demonstrate that reliance on that provision is justified. That results from the need to interpret that provision strictly, since it is a provision authorizing derogations from one of the foundations of the Community, and confirmation of that view may be found in "the approach adopted by the Court of Justice in a number of cases", the most conclusive in

that respect being the judgment of 20 February 1979 in the *Rewe-Zentrale* case (cited above), which has moreover been approved in other decisions, such as those given in the judgments of 9 December 1981 in Case 193/80 (*Commission* v *Italy* [1981] ECR 3019) and of 17 December 1981 in the *Biologische Producten* case, cited above.

The French Government considers that the United Kingdom has not adduced any evidence to show that its health provisions are justified and that it rejects in advance any demonstration to convince it that the legitimate objective of protecting animal and human health pursued by it could be achieved by other methods which are less restrictive. It notes that the United Kingdom, by stating at paragraph 65 of its defence that, as regards the methods operated by other Member States, "it has no practical means of satisfying itself as to the adequacy of those methods" (to achieve the desired protection), gives to understand that, even if a Member State agreed to provide the evidence that its production satisfied the United Kingdom criteria as to quality, that offer would be rejected as being pointless.

The French Government states that it "attaches the greatest importance to that point of procedure" since upon it depends the success of the collaboration which, according to the case-law of the Court as laid down in particular in the judgment of 17 December 1981 in the *Biologische Producten* case, the Member States are required to establish amongst themselves with a view to relaxing control in areas which have not yet been harmonized by Community law. That collaboration rests upon an obligation to cooperate in good faith and the French Government considers, in essence, that the United Kingdom's attitude cannot constitute a firm foundation for such collaboration when that Government requires of other Member States an absolute and literal observance of the provisions of its legislation including the least important secondary legislation.

(b) Furthermore, the French Government considers that the United Kingdom Government, far from showing that its provisions are absolutely necessary and cannot be replaced by control procedures which are less restrictive, confines itself to casting doubt on the methods employed and controls operated in the other Member States and to an assertion that no system of bilateral cooperation is practicable and concludes that a complete re-treatment of the milk is alone able to allay its fears regarding the protection of public health.

The French Government states that it cannot acknowledge that those assertions, which, it emphasizes, emanate from a distrust toward the other Member States which is "unique of its kind", can be regarded as constituting proof. It adds that if all the Member States were to apply such reasoning analagously, many obstacles to trade in food would reappear, or those obstacles would appear in areas where they had never existed, whereas elimination of those barriers has been carried out without giving rise to any sudden renewed outbreak of disease attributable to the

poor quality of products imported on the faith of health control certificates drawn up by the Member States in which those products originate.

For that reason the French Government considers that the United Kingdom, because it has not given any evidence for its assertions, cannot be permitted to rely upon Article 36 in order to justify a system for the protection of public health which protects its market to an excessive degree and is in itself excessive.

3. However, the French Government seeks to demonstrate, in addition, the "unjustified, discriminatory and arbitrary nature" of the United Kingdom requirements for re-treatment and re-packaging. According to its analysis, the United Kingdom requirements for re-treatment and repackaging are based on the notion that contamination during the treatment or packaging of UHT milk cannot be ruled out and that, to ensure perfect quality, the UHT milk must be "watched" from producer to consumer. The United Kingdom authorities have not been able to convince themselves that such a "watch" can be carried out in all cases in the other Member States.

(a) As to those points, the French Government states first that all the Member States are just as concerned about the need to combat any risk of deterioration in the hygiene conditions of milk and that, for 30 years, comprehensive and strict legislation has been laid down for that purpose. It adds, by way of example, that French legislation lays down the conditions for milking, storage on the farm, collection, transport to the dairy, conservation, pasteurization, UHT sterilization, packaging, warehousing and transport to the points of sale and, finally, the offering for sale. It states, moreover, that observance of those provisions is enforced by regular checks carried out both by the Veterinary Department and the Food Hygiene Department of the Ministry of Agriculture and the Anti-Fraud and Quality-Control Department of the Ministry for Consumer Affairs and, finally, that any breaches of those provisions are severely punished.

For that reason, the French Government affirms that, as a result of the application of those provisions, UHT milk produced in France meets the most demanding quality standards. As evidence of that high quality, it refers to the attestation of the quality of French UHT milk produced by the Union Laitière Normande drawn up on 20 October 1971 by the National Institute for Research in Dairying (Shinfield, Reading), the text of which is annexed to its statement in intervention.

(b) Secondly, the French Government observes that the "perfection demanded by the United Kingdom for milk to be consumed by its nationals does not even exist on its own territory". In that respect it points out that the production cycles of UHT milk in the United Kingdom are subject to the same risks as those to which the other Member States of the Community are exposed and numerous factors adversely affecting milk have been ascertained in the United Kingdom as is shown by an article from an unidentified United Kingdom publication, annexed to its statement. According to that article relating to the result of tests for contamination by antibiotics of milk treated in England

and Wales, the rate of negative tests was 14% as regards dairies established in England and Wales, which was more than 10 times higher than the results of other producing countries, in particular the Netherlands, France and the Federal Republic of Germany, where the equivalent rate was approximately 1.5%.

(c) Thirdly, the ambiguity is highlighted in the United Kingdom's argument that the United Kingdom authorities, by insisting on treatment in the United Kingdom, wished to remove all uncertainties as to the state of milk from other Member States either before or after UHT treatment. In fact, the French Government states that a second UHT treatment of milk is virtually ineffective against those micro-organisms which were not destroyed by the first UHT treatment and that, consequently, the requirement for re-treatment, at the same time as being prohibitive from the economic point of view, does not even serve to remove the uncertainties which concern the United Kingdom authorities. In particular, it is scientifically proven that, when milk has received a second UHT treatment, it usually shows a negative reaction to the Aschaffenburg turbidity test which is sufficient to make it unsuitable for human consumption since a positive reaction to that test is a necessary condition for qualification as UHT milk. For that reason it considers in essence, either that the requirements of public health which prompt the United Kingdom legislature are merely a pretext for imposing a second treatment, which is ineffective but costly, or that those requirements are truly fundamental and that, therefore, it is only by a total prohibition of sales of imported milk, even if it has been re-treated, that those requirements can be satisfied. The French Government therefore poses the question whether, in practice, the arguments of the United Kingdom ought to be understood as revealing its intention never to allow the sale for human consumption in the United Kingdom of imported UHT milk, even if it has been re-treated.

(d) Fourthly, the French Government points out the contradiction in the United Kingdom position in strictly regulating the importation and marketing of UHT milk whereas imports of UHT cream and flavoured UHT milk are not subject to the requirement of a second treatment. On that point it emphasizes that those products come from the same factories, are produced from the same milk collections, and are treated in the same way as UHT milk which is not flavoured. However, the marketing in the United Kingdom for many years of those products originating in French dairies has given rise to no incident or contamination and the French Government regards that difference in treatment applied to products which are in all respects comparable as proof of the "fragile nature of the scientific justifications" put forward by the United Kingdom in support of the requirement of the second treatment. In that respect, it emphasizes that the recent decision of the Ministry of Agriculture dated 9 October 1981 to extend the restrictive provisions to cream and flavoured milk has not reduced the health risk incurred even if the coherence of the measures has thus been formally restored.

(e) Finally, the French Government point to the great similarity of views in

health matters prevailing in the different Member States as regards milk to demonstrate the unfounded and excessive nature of the measures laid down by the United Kingdom.

It states that the methods of control of the production cycle of milk from collection to consumption are largely standardized, that the definition itself of UHT milk is virtually harmonized, as may be seen from the proposal for a Community directive on heat treated milk (Doc. R/3187/1/78) of 22 December 1978, Annex A, Chapter V, paragraph 5 of which lays down three conditions which milk must satisfy to be described as UHT milk, and, finally, that the same machines, manufactured by a small number of manufacturers, are mostly used on both sides of the channel. That convergence of views and methods is also borne out by the small number of technical processes for sterilization of milk known at present (three).

Finally, the French Government summarizes its view by affirming that the United Kingdom has been unable to show that the contested measures are well founded on an objective view or that those excessive measures have any purpose other than achieving absolute territorial protection. The French Government emphasizes, moreover, that those measures result from a mistrust of the practices adopted in the other Member States and that they are undermined by the contradictions inherent in the United Kingdom's position regarding imports of UHT cream, flavoured milk and butter. The latter produce is imported in large quantities into the United Kingdom and the health considerations which are marshalled against the entry of dairy products are not used to stop those imports.

4. The United Kingdom Government

In an annex to its rejoinder, the United Kingdom Government sets out its observations in reply to the statement in intervention submitted by the French Government, whilst at the same time stating that it considers that it has to a large extent refuted those arguments in its defence and rejoinder.

(a) First, as regards the duties incumbent on a Member State which relies on Article 36 of the Treaty, the United Kingdom Government states that, whilst it is for the United Kingdom to demonstrate that the measures in question are effectively intended to protect public health, which it believes to have done, it does not follow that in order to justify its measures the United Kingdom must prove that milk from particular Member States presents a theat to human or animal health.

The United Kingdom Government points out once again that, regard being had to the complexity of the factors involved in the production of milk and the bacteriological vulnerability of that product, the protection of public health cannot be guaranteed by collaboration between the responsible authorities of the different Member States so long as no common system of standards applies. The cooperation which the Court spoke of in the *Biologische Producten* case cannot apply in this case, in view of the multiplicity of problems indicated in its pleadings in reply to the Commission

and is directly contrary to the opinion expressed by Mr Advocate General Mayras in the *Union Laitière Normande* case. The United Kingdom states that it understands the cases on cooperation between Member States cited by the French Government as acknowledging such cooperation to be one of the possibilities open to Member States to facilitate the free movement of goods but not as laying down an obligation to reach agreement between national authorities.

(b) Secondly, the United Kingdom Government makes it clear that it has no desire to cast aspersions on the quality of milk production in the other Member States. It states that the "mistrust" which it has shown toward those products, noted by the French Government in its statement, is merely an illustration of the fact that, since it has no tangible means at its disposal to ensure the quality of the production conditions of milk in other Member States, it is not disposed to accept for human consumption imported milk which is produced on the basis of health provisions which differ from those which it imposes on its own producers and over which it can exercise no control.

(c) The United Kingdom Government seeks, finally, to refute the analysis of its legislation by the French Government according to which the United Kingdom requirements for re-treatment and repackaging of imported UHT milk are "unjustified, arbitrary and discriminatory".

It is not possible, to assume that the standards and technical processes relating to UHT milk are harmonized or afford the same safeguards from one Member State to another.

In fact, the standards laid down by the World Health Organization have not been generally accepted and are to be considered again at a meeting in Rome in April 1982. Secondly, harmonization efforts at Community level are far from being completed on the essential points and seek to establish a double system of standards applicable according to whether the product is intended for export or for domestic consumption. According to the United Kingdom, the difficulties which prevent those efforts from being concluded, contrary to the French Government's assertion, prove how far the matter is from a *de facto* harmonization.

As regards the technology employed in the treatment of UHT milk, the United Kingdom Government states that its legislation requires the machines used to be equipped with machinery for continuously recording temperatures, that records at the production centres should be preserved for a given minimum period and, finally, that the milk produced should undergo the "colony count test" (cf. Milk (Special Designations) Regulations 1977, Schedule 2, Part IVa, paragraph 3). The United Kingdom Government observes that, to its knowledge, none of those requirements is imposed by French legislation.

Finally, as regards the control procedures administered in the different Member States, the United Kingdom Government states that, having made considerable efforts on its own territory to reduce the risks inherent in the production and collection of milk, it finds itself unable to subscribe to the

French Government's view that all the Member States operate and enforce equivalent systems of control.

The United Kingdom does not accept that this is so and considers that the continuation in force of the measures under challenge in this case is therefore justified until Community measures are introduced since, as things stand, it is impossible for it to know whether adequate precautions have, in fact, been taken in any particular case.

IV — Replies of the parties to the questions put by the Court

(a) The replies of the United Kingdom Government were registered at the Court on 30 September 1982.

1. It appears therefrom that few of the statistics requested are available. However certain useful figures were able to be given:

Production of UHT milk in the United Kingdom in 1981-82:	53 million litres
Production of UHT cream in the United Kingdom in 1980:	6 000 tonnes
Imports into the United Kingdom of UHT cream in 1980:	3 475 tonnes

UHT milk accounts at present for approximately 0.7% of total consumption of liquid milk in the United Kingdom.

In 1980-81, at least 99.7% of the consumption of UHT milk in the United Kingdom was accounted for by domestic production (approximately 25% in the case of UHT cream).

2. As regards the nature of the system of import licences operated, the United Kingdom refers essentially to its earlier documents for a description of that system. It states however that the system consists essentially of *specific* import licences the conditions for the grant of which vary according to the health situation of the centre of production. The licence may be limited to one import transaction or may be for a limited period. Unless there is any change in the health situation of the centre of production, no quality control of the imported milk is undertaken since it is covered by a licence.

Finally, the United Kingdom explains that the conditions for the importation of UHT milk in bulk are identical to those for packaged UHT milk, although it points out that bulk transport is not commercially practicable.

(b) The Commission's replies were registered at the Court on 1 October 1982.

1. As regards statistics relating to production, trade and consumption, the Commission states that there is no reliable and complete statistical information. It considers however that trade in UHT milk and cream between the Member States is considerable because those are the types of milk and cream which are the safest.

2. As to the similarity of health standards in force in the Member States relating to treatment by UHT process and packaging of milk, the Commission relies upon the replies to its requests for information addressed by it to the Member States in March 1980 and in August 1982. It sets out, in respect of

each of those States (except Italy and Greece), the health standards applicable to UHT milk (treatment and packaging), which effectively are very similar.

3. As to the imports controls operated by the other Member States, the Commission sets out certain details of the various national provisions. It infers from them that:

The United Kingdom is the only Member State to require a second treatment of UHT milk;

The United Kingdom and Ireland are the only Member States to operate a system of import licences;

The other Member States merely require UHT milk to have been treated according to certain hygiene standards. The imported products are then tested by sampling in the same way as milk produced domestically.

Certain Member States such as Denmark, the Federal Republic of Germany and Luxembourg also require the production of a veterinary certificate by a veterinary surgeon of the exporting Member State certifying that the milk satisfies the conditions laid down.

4. Finally, the Commission states that the draft directives relating to the health conditions which heat-treated milk ought to meet have progressed with disappointing slowness since 1972 and that there is no prospect of those drafts being adopted in the near future.

V — Oral procedure

The parties presented oral argument at the sitting on 10 November 1982.

The Advocate General delivered his opinion at the sitting on 7 December 1982.

Decision

1 By an application lodged at the Court Registry on 22 May 1981 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty by placing restrictions on the importation of milk and cream treated by the UHT process and on the sale of those products in its territory.

2 The "Ultra Heat Treated" process, whereby the product is retained at a temperature considerably in excess of 100° Centigrade for a short time, enables milk so treated to be kept for several months at room temperature,

provided that, directly after that treatment, it is aseptically packed in hermetically-sealed containers.

3 The application specifically relates to a series of legislative provisions intended to regulate in the different parts of the United Kingdom the importation, packing and sale of milk and dairy products treated by that process. The combined effect of those provisions may be summarized as follows:

(i) UHT milk and cream may be imported into England, Wales, Northern Ireland and Scotland only with the authorization of the competent authority evidenced by an import licence. That stipulation does not, however, apply to UHT milk and cream originating in Ireland and imported directly into Northern Ireland.

(ii) UHT milk (whether domestic or imported) may be marketed in England, Wales and Scotland only by approved dairies or distributors holding a dealer's licence. That licence requires the operator to pack the milk in a dairy approved by the competent local authority.

(iii) Since the adoption of new regulations dealing with milk and cream in Northern Ireland (SR 1981 Nos 233 and 234) UHT milk and cream may only be offered for sale in Northern Ireland if produced in accordance with the requirements in force in that province. Before those regulations came into force on 31 July 1981, all sales of UHT milk and cream were prohibited in Northern Ireland.

4 The Commission considers that the measures applied by the United Kingdom constitute measures having an effect equivalent to restrictions on imports prohibited by Article 30 and not justified under Article 36 of the Treaty.

The admissibility of the Commission's conclusions

5 In its application the Commission sought a declaration that the United Kingdom had failed to fulfil its obligations under Article 30 solely in respect of the provisions applicable on 7 November 1980, the date of the reasoned opinion addressed to the United Kingdom pursuant to Article 169 of the

Treaty. However, after that date the law was changed in Northern Ireland by the regulations of 1981 (SR 1981 Nos 233 and 234) made on 10 July 1981 and brought into force on 31 July 1981. The effect of those regulations was to substitute for a total prohibition on the sale of UHT milk and cream in Northern Ireland a system under which such sales are permitted only if the said products have been produced in accordance with the requirements of the regulations in force in Northern Ireland. In its reply the Commission requested that its applications for a declaration be extended to cover those new regulations. The admissibility of that request must be examined.

6 As the Court held in Case 232/78 (*Commission* v *France* [1979] ECR 2729), even though Article 42 of the Rules of Procedure allows fresh issues to be raised in certain circumstances a party may not alter the actual subject-matter of the dispute during the proceedings. Consequently, the substance of the application must be examined solely with reference to the conclusions contained in the application instituting the proceedings. Furthermore, in the context of proceedings brought by the Commission under Article 169 of the Treaty, the letter addressed by the Commission to the Member State inviting it to submit its observations and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, which cannot thereafter be extended. In fact the opportunity for the State concerned to be able to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure under Article 169.

7 It follows that the amended conclusions submitted by the Commission in its reply relating to the regulations adopted in 1981 in respect of Northern Ireland are inadmissible. However, since the Commission did not expressly abandon its previous conclusions, these are admissible in support of its application under Article 169 in so far as they are directed against the regulations in force in Northern Ireland on the date of the reasoned opinion.

The substance of the application

1. The contested provisions in general

8 The United Kingdom contends that in the absence of common rules it is for the Member States to regulate all matters relating to the production and marketing of milk on their own territory and that therefore the contested national provisions relating to UHT milk and cream do not fall within the purview of Article 30 of the Treaty. That contention must be rejected. The absence of common rules or of harmonizing directives relating to the production or marketing of a product is not sufficient to prevent that product from falling within the scope of the prohibition laid down in Article 30 of the Treaty. The prohibition of measures having an effect equivalent to quantitative restrictions in fact applies to all trading rules of Member States capable of hindering, whether directly or indirectly, actually or potentially, intra-Community trade.

2. The requirement of a specific import licence

9 The Court has already held that Article 30 precludes the application to intra-Community trade of national provisions which require, even as a pure formality, import licences or any other similar procedure.

10 The United Kingdom states that there is much flexibility in the grant of such import licences. However, the Court has consistently held (cf. judgments of 24 January 1978 in Case 82/77 *van Tiggele* [1978] ECR 25 and 19 February 1981 in Case 130/80 *Keldermann* [1981] ECR 527) that provisions caught by the prohibition laid down in Article 30 of the EEC Treaty do not escape that prohibition simply because the competent authority enjoys a discretionary power in the application of those provisions. Freedom of movement is a right whose enjoyment may not be dependent upon a discretionary power or on a concession granted by the national authorities.

11 It follows from the foregoing that the system of import licences operated by the United Kingdom constitutes a restriction on imports prohibited by Article 30 of the Treaty.

12 However, those provisions, whilst constituting measures having an effect equivalent to quantitative restrictions, must be examined to see whether they are permissible under Article 36 of the Treaty, which provides that the provisions of Article 30 shall not preclude prohibitions or restrictions on imports justified on grounds, *inter alia,* of the protection of health and life of humans or animals.

13 That article constitutes a derogation from the fundamental principle of the free movement of goods and must therefore be interpreted in such a way as not to extend its effects further than is necessary for the protection of the interests which it seeks to safeguard.

14 According to the Commission, it is clear from the decisions of the Court that an import licence is in any event contrary to Article 30 of the Treaty and cannot be saved by the exception contained in Article 36. To that it must be said that, whilst the requirement of a licence, even as a formality, is contrary to Article 30 of the Treaty, it does not necessarily follow that a measure of that kind may in no case be justified under Article 36. The justification claimed by the United Kingdom must therefore be examined.

15 In that connection the United Kingdom states, first, that the system of specific import licences which it operates enables it to impose conditions as to the heat treatment of imported milk varying according to the disease status of the exporting country (heat treatment at a higher or lower temperature according to the time which has elapsed since the last outbreak of foot-and-mouth disease). The United Kingdom also stresses that cattle infected with foot-and-mouth disease may yield infected milk before the outward symptoms of the disease become evident and before the outbreak is discovered by the health authorities. In such a case the import licences would be granted in the normal way and the milk, having undergone a treatment insufficient to inactivate the virus, might already be in transit or actually imported into the United Kingdom before the disease had been identified. It is therefore necessary, in the United Kingdom's view, that its authorities should be able, as soon as they are informed of the situation by the exporting country, to trace the infected consignments and to destroy them before they reach the market. According to the United Kingdom, only a system of specific licences enabling consignments of imported milk to be identified and traced meets that requirement.

16 Whilst the protection of the health of animals is one of the matters justifying the application of Article 36, it must none the less be ascertained whether the machinery employed in the present case by the United Kingdom constitutes a measure which is disproportionate in relation to the objective pursued, on the ground that the same result may be achieved by means of less restrictive measures, or whether, on the other hand, regard being had to the technical constraints already mentioned, such a system is necessary and hence justified under Article 36.

17 It may be conceded, in that respect, that information of an administrative nature or concerning health obtained by the United Kingdom authorities when processing applications for licences lodged by importers is undeniably of assistance in achieving the above-mentioned objective of protecting animal health, if that information is centralized and utilized appropriately by the competent authorities.

18 Even though the United Kingdom maintained at the hearing that current administrative practice permits licences to be issued promptly and automatically, a system requiring the issue of an administrative authorization necessarily involves the exercise of a certain degree of discretion and creates legal uncertainty for traders. It results in an impediment to intra-Community trade which, in the present case, could be eliminated without prejudice to the effectiveness of the protection of animal health and without increasing the administrative or financial burden imposed by the pursuit of that objective. That result could be achieved if the United Kingdom authorities abandoned the practice of issuing licences and confined themselves to obtaining the information which is of use to them, for example, by means of declarations signed by the importers, accompanied if necessary by the appropriate certificates.

19 It follows from the foregoing considerations that in the present case the requirement of import licences, which is incompatible with Article 30 of the Treaty, is not saved by the exception contained in Article 36.

3. The system of dealers' licences and the requirement that imported UHT milk be packed on premises within the United Kingdom

20 It is not disputed that the regulations examined above, which require UHT milk imported into the United Kingdom to be packed on premises within the United Kingdom, make it necessary to treat that milk again, since it is technically impossible to open the packs and then repack the milk without causing it to lose the characteristics of "Ultra Heat Treated" milk.

21 Therefore, the need to subject that product to a second heat treatment causes delays in the marketing cycle, involves the importer in considerable expense and, moreover, is likely to lower the organoleptic qualities of the milk. In fact, the requirement of re-treatment and repacking constitutes, owing to its economic effects, the equivalent of a total prohibition on imports, as the United Kingdom has expressly acknowledged. The United Kingdom is therefore wrong in its submission that the contested provisions, supposedly applying without distinction to domestic and imported products, have no discriminatory effect and, for that reason, escape the application of Article 30 of the Treaty.

22 The Court therefore finds that the system of dealers' licences operated by the United Kingdom constitutes a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the Treaty.

23 The United Kingdom claims however, that in the present state of Community law such a prohibition is the only effective means of protecting the health of consumers and is therefore justified under Article 36.

24 The United Kingdom bases its view essentially on the disparities in the laws of the Member States relating to the production and treatment of UHT milk, on the varying degree of application of those different laws and on the impossibility of its exercising control over the production cycle of UHT milk

in the other Member States from collection at the farm to packing and distribution. However, it asserts that such control is indispensable for ensuring that the milk obtained is free of any bacterial or virus infection.

25 Those arguments cannot be upheld. In the first place, it is clear from the evidence before the Court, and in particular from the Commission's replies to the questions asked by the Court, that the alleged disparities in the laws of the Member States are in truth limited. In fact, by virtue of the various laws, regulations and administrative practices, the production of UHT milk is carried on in the different Member States in accordance with very similar rules. Those rules prescribe: on the one hand, heat treatment carried out under comparable conditions of temperature and for very brief periods and, on the other hand, aseptic packing in sterile, hermetically-sealed containers.

26 Secondly, an analysis of the scientific and technical documents submitted by the parties for the Court's examination demonstrates that UHT milk is produced in the different Member States with machines manufactured by a very small number of firms in accordance with comparable technical characteristics and that the milk, having undergone identical controls, is of similar quality from the point of view of health.

27 Thirdly, the very characteristics of UHT milk, which may be kept for long periods at normal temperatures, obviate the need for control over the whole production cycle of such milk if the necessary precautions are taken at the time of the heat treatment.

28 Under those circumstances, the United Kingdom, in its concern to protect the health of humans, could ensure safeguards equivalent to those which it has prescribed for its domestic production of UHT milk, without having recourse to the measures adopted, which amount to a total prohibition on imports.

29 To that end, the United Kingdom would be entitled to lay down the objective conditions which it considers ought to be observed as regards the quality of the milk before treatment and as regards the methods of treating and packing UHT milk of whatever origin offered for sale on its territory. The United Kingdom could also stipulate that imported UHT milk must satisfy the requirements thus laid down, whilst however taking care not to go beyond that which is strictly necessary for the protection of the health of the consumer. It would be able to ensure that such requirements are satisfied by requesting importers to produce certificates issued for the purpose by the competent authorities of the exporting Member States.

30 As the French Government correctly stated in its intervention in support of the Commission's application, the Court has consistently held (cf. judgment of 20. 5. 1976 in Case 104/75 *De Peijper* [1976] ECR 613 and 8. 11. 1979 in Case 251/78 *Denkavit* [1979] ECR 3369) that, where cooperation between the authorities of the Member States makes it possible to facilitate and simplify frontier checks, the authorities responsible for health inspections must ascertain whether the substantiating documents issued within the framework of that cooperation raise a presumption that the imported goods comply with the requirements of domestic health legislation thus enabling the checks carried out upon importation to be simplified. The Court considers that in the case of UHT milk the conditions are satisfied for there to be a presumption of accuracy in favour of the statements contained in such documents.

31 That necessary cooperation does not, however, preclude the United Kingdom authorities from carrying out controls by means of samples to ensure observance of the standards which it has laid down, or from preventing the entry of consignments found not to conform with those standards.

32 Finally, it must be noted that United Kingdom has accepted imports on to its territory of UHT cream and flavoured UHT milk without requiring a second treatment, whereas, according to its own argument, those products

theoretically represented the same risks to the health of humans, whatever the quantities imported. It has not been shown that public health in the United Kingdom has been affected in the slightest by such imports.

33 It follows from the foregoing considerations that the system of dealers' licences constitutes an impediment to the free movement of dairy produce which is disproportionate in relation to the objective pursued and is not therefore justified under Article 36 of the Treaty.

4. The total prohibition on the sale of UHT milk and cream in Northern Ireland until 31 July 1981

34 The legislation in question entails a complete prohibition on imports for sale and hence constitutes a restriction on trade prohibited by Article 30 of the Treaty.

35 It has neither been shown nor even alleged that those provisions were adopted out of a concern for the protection of public health. Therefore, they cannot be justified under Article 36 of the Treaty.

36 The Court concludes therefore that by adopting the various aforementioned provisions relating to the importation, packing and marketing of UHT milk the United Kingdom failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty.

Costs

37 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the United Kingdom has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares the Commission's conclusions to be inadmissible in so far as they relate to the new legislation applicable in Northern Ireland with effect from 31 July 1981 (SR 1981 Nos 233 and 234);**

2. **Declares that, by prescribing a system of prior individual licences for imports on to its territory of milk and cream which have undergone "Ultra Heat Treatment" on the territory of other Member States, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;**

3. **Declares that, by making the distribution in England, Wales and Scotland of UHT milk imported from other Member States subject to a system involving a second heat treatment and the repacking of the milk, the United Kingdom has failed to fulfil its obligations under Article 30 of the EEC Teaty;**

4. **Declares that, by prohibiting all sales of UHT milk or cream in Northern Ireland until the adoption of the new regulations on milk in 1981 (SR 1981 Nos 233 and 234), the United Kingdom failed to fulfil its obligations under Article 30 of the EEC Treaty;**

5. **Orders the United Kingdom to pay the costs.**

Mertens de Wilmars Pescatore O'Keeffe Everling

Mackenzie Stuart Bosco Koopmans Due Galmot

Delivered in open court in Luxembourg on 8 February 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President