OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 14 JUNE 1978

My Lords,

This case is a sequel to Case 28/76 *Milac GmbH* v *Hauptzollamt Freiburg* [1976] ECR 1639.

Your Lordships will remember that that case came to the Court by way of a reference for a preliminary ruling by the Finanzgericht of Baden-Württemberg made in proceedings in which the Plaintiff, Milac Gmb, challenged assessments to m.c.a.'s in respect of importations that it had effected in the period June to August 1974 of full-cream milk powder from France. That milk powder had a fat content of between 9.6% and 24.5% and fell within subheading 04.02 A II (b) 2 of the Common Customs Tariff. The Plaintiff's claim, shortly stated, was that the m.c.a.'s in question should have been reduced by a "corrective amount" of 2 u. a. per 100 kg.

In the Opinion that I delivered in that case I set out in some detail the history of the Community legislation that gave rise to the dispute (see [1976] ECR at pp. 1660-1663). I need not, I think, do so again. It will be enough if I recall the following.

At the time of the importations in question there was in force Council Regulation (EEC) No 663/74 of 28 March 1974 (Official Journal L 85 of 29. 3. 1974) "fixing the target price for milk and the intervention prices for butter, skimmed-milk powder and Grana Padano and Parmigiano Reggiano cheese for the 1974/75 milk year". Article 3 of that Regulation provided —

(1) that the price at which the intervention agencies in Belgium, Germany, Luxembourg and the Netherlands were to buy in skimmed-milk powder should be the intervention price less a "corrective amount" of 2 u. a. per 100 kg.;

(2) that the same corrective amount should be applied to trade in that product between each of those Member States and other Member States or third countries (the Benelux countries being considered as one Member State) and that for this purpose "the amounts collected on importation and granted on exportation within the framework of the common agricultural policy" should be "reduced by the corrective amount"; and

(3) that detailed rules for the application of Article 3 should be adopted in accordance with the Management Committee procedure.

Such detailed rules were adopted by Commission Regulation (EEC) No 712/74 of 29 March 1974 "setting out the methods of application of the corrective amount for skimmed-milk powder during the 1974/75 dairy year". That Regulation in effect defined skimed-milk powder for the purposes of Article 3 of Regulation No 663/74 as "Milk in powder or granules of a fat content not exceeding 3%. It also prescribed proportional corrective amounts for certain animal feeding stuffs containing skimmed-milk powder. And it expressly provided that the m.c.a.'s "fixed in accordance with Regulation (EEC) No 974/71" should be reduced by the corrective amounts.

For the period during which the Plaintiff's importations took place the relevant m.c.a.'s were fixed by Commission Regulations (EEC) No 725/74 of 29 March 1974, No 1692/74 of 28 June 1974 and No 2038/74 of 31 July 1974, successively replacing Part 5 of Annex I to Commission Regulation

(EEC) No 218/74 of 25 January 1974. Each of Regulations Nos 725/74, 1692/74 and 2038/74 contained a Note to the effect that the amounts thereby fixed should where appropriate be "reduced in accordance with the provisions of Regulation (EEC) No 712/74".

In Case 28/76 the Finanzgericht referred to this Court two questions, in these terms:

"1. Are the monetary compensatory amounts under Article 1 of Regulation (EEC) No 974/71, in conjunction with Article 1 of Regulation (EEC) No 218/74, Annex I, Part 5 as amended by Regulation (EEC) No 725/74, for milk powder under subheading 04.02 A II (b) 2 of the Common Customs Tariff, to be reduced by the amount of two or less units of account even where the fat content is in excess of 3 % by weight and the remaining conditions of Regulation (EEC) No 712/74 are fulfilled?

2. Were the rates of the monetary compensatory amounts under Regulation (EEC) No 725/74 referred to in question 1 compatible with the basic enabling provision between 25 June and 15 August 1974?"

As I pointed out in my Opinion in that case the questions should strictly have referred to Regulations Nos 1692/74 and 2038/74 as well as to Regulation No 725/74, but this is of no moment.

In the forefront of its case on the first question the Plaintiff put the submission that Article 3 of Regulation No 663/74, on its true interpretation, authorized the Commission to prescribe "corrective amounts" for products other than skimmed-milk powder itself and that the Commission acted unlawfully in not prescribing them for milk powder of a fat content exceeding 3%. In the alternative the Plaintiff submitted that, if Article 3 of Regulation No 663/74 did not authorize the Commission to do that, it was itself unlawful. It is to be observed however that at no point did the Order for Reference raise any question as to the validity of Regulation No 663/74.

On the second question asked by the Finanzgericht, the Plaintiff made two submissions. The first was a broad submission to the effect that the m.c.a.'s applicable at the frontiers of the Federal Republic of Germany had from the start been fixed at too high a level and that they should have been lowered long since. The second was a submission to the effect that, the Council having by Regulation No 663/74 fixed divergent intervention prices for skimmed-milk powder in Germany and the Benelux countries on the one hand the other Member States on the other hand, that divergence should, by virtue in particular of the provisions of Articles 1 (2) and 2 (2) of Regulation No 974/71, have been reflected in the m.c.a.'s fixed for products whose prices "depended" on that of skimmed-milk powder, including full-cream milk powder. The validity of Regulation No 663/74 itself could not be put in issue on the Finanzgericht's second question since that question was limited to whether the relevant rates of m.c.a.'s were "compatible with the basic enabling provision".

Both limbs of the Plaintiff's case on the first question rested on an allegation that in fact the reduction effected by the "corrective amounts" in the prices on the German and Benelux markets for skimmed-milk powder, as compared to the prices ruling for that product on the French market, had an adverse impact on the competitiveness in the former markets of full-cream milk powder. The Plaintiff's customers for full-cream milk powder (mostly manufacturers of chocolates, of ice-cream and of baby-foods) had found it cheaper to turn to skimmed-milk powder mixed with melted butter, the latter being also fairly

cheap owing to the relatively low intervention price of butter. In support of that allegation the Plaintiff produced statistics and other material, in particular statistics showing a decline in German imports of full-cream milk powder from France. The Plaintiff submitted that, on those facts, the application of "corrective amounts" to skimmed-milk powder but not to full-cream milk powder infringed the principle of equal treatment and in particular the specific enunciation of that principle in Article 40 (3) of the Treaty forbidding, in the common organization of agricultural markets, "any discrimination between producers or consumers within the Community".

The Commission for its part contested the facts alleged by the Plaintiff. It asserted that the reduction effected by the "corrective amounts" in German and Benelux prices for skimmed-milk powder was too marginal to have made any appreciable difference to the competitiveness of full-cream milk powder in those markets, and it ascribed the drop in German imports of French full-cream milk powder to other causes, among them the presence on the market of cheap butterfat. The Commission offered to produce expert evidence in support of its view (an offer that was repeated in the present case).

In the events, neither I nor the Court thought it necessary that the issue of fact thus raised should be resolved.

On the case as it had been presented to us, the first question to be determined was whether, as a matter of interpretation of the language of Regulation No 663/74, it authorized the Commission to prescribe corrective amounts for products other than skimmed-milk powder, in particular for full-cream milk powder. Both I and the Court held that it did not. In those circumstances the submission that the Commission, in failing to fix such corrective amounts, had infringed the principle of equal treatment necessarily fell by the wayside. The only remaining question could be whether, in omitting to authorize the Commission to prescribe such corrective amounts, the Council was in breach of Article 40 (3) of the Treaty. I considered that question at some length and came to the conclusion that, even if the facts were as alleged by the Plaintiff, they would not afford any ground for holding that the Council had been guilty of discrimination of a kind forbidden by the Treaty — for holding, in other words, that Regulation No 663/74 was invalid (see [1976] ECR at p. 1665). The Court, in its Judgment, did not deal with the point, presumably because it was not raised by the Order for Reference — though the Court did, in dealing with the Finanzgericht's second question, advert briefly to the Plaintiff's argument based on Article 40 (3) (see paragraphs 11 and 12 of the Judgment).

In the result the Court, in answer to the questions referred to it by the Finanzgericht, ruled as follows (see [1976] ECR at p. 1659):

"1. The combined provisions of Article 1 of Regulation (EEC) No 974/71, Article 1 of Regulation (EEC) No 218/74 and Part 5 of Annexe I to that Regulation in the version contained in Regolation (EEC) No 725/74 and applicable to powdered milk unter tariff subheading 04.02. A II (b) 2 of the Common Customs Tariff must be interpreted as meaning that they do not allow the reduction of the monetary compensatory amounts by 2 u. a. or less where the fat content by weight is in excess of 3%.

2. Consideration of the second question has disclosed no factor of such a kind as to affect the validity of Regulation No 725/74."

The case having then gone back to the Finanzgericht, the Plaintiff submitted to

that Court that the Judgment of this Court was not binding because it had failed to deal with the argument founded on Article 40 (3) of the Treaty, so that the grounds given for the decision were inadequate.

In my opinion those submissions were misconceived. No doubt Article 63 of the Rules of Procedure of the Court requires a judgment to state the grounds for the decision. But that does not mean that a judgment must deal with every argument presented to the Court, whether it is in point or not. As I have shown, the contents of the Order for Reference in Case 28/76, and the way in which that case unfolded, made it strictly unnecessary for the Court to deal with the question whether the relevant Regulations were compatible with Article 40 (3) of the Treaty. It is neither here nor there that nonetheless the Court adverted briefly to the Plaintiff's argument based on Article 40 (3) and that I considered it more fully.

At all events, on the basis of those submissions, the Plaintiff asked the Finanzgericht

(1) to refer the case back to this Court with a specific request that it should rule on the question "whether the application of different intervention prices without a price compensation" was compatible with Article 40 (3) of the Treaty and with certain earlier Judgments of the Court (which were among those cited to us by the Plaintiff in Case 28/76 and which I there discussed: see [1976] ECR at p. 1664);

(2) alternatively to refer the case to the Bundesverfassungsgericht under Article 100 of the German Constitution on the footing that there had been a breach of Article 19 (4) of that Constitution, in that the Plaintiff had been denied justice; and

(3) in the further alternative to decide itself that the m.c.a.'s to which the Plaintiff had been assessed should be reduced by 2 u.a. per 100 kg.

The Finanzgericht decided to refer the case back to this Court. On this occasion the questions asked in the Order for Reference are these:

"1. Did the Judgment of the Court of Justice of the European Communities of 23 November 1976 in Case 28/76 determine authoritatively the validity of Regulation (EEC) No 725/74 for the purpose of the further conduct of the main action so that it may no longer be questioned whether that regulation infringes the prohibition on discrimination contained in the second subparagraph of Article 40 (3) of the EEC Treaty?

If the first question is answered in the negative:

2. Does the second subparagraph of Article 40 (3) of the EEC Treaty create individual rights which the national courts must respect?

If the first question is answered in the negative and the second in the affirmative:

3. May the national court decide upon the discriminatory effect and reduce the amount of the charge accordingly?"

So the Finanzgericht still does not expressly ask this Court to rule upon what, as was agreed before us by the Plaintiff and the Comission, is now the crucial issue, viz., putting it shortly, whether Council Regulation No 663/74 was compatible with Article 40 (3) of the Treaty. The Court was pressed nonetheless to rule on that issue. In my opinion common sense demands that that request should be acceded to, even if it means a slight departure from procedural rectitude. I say "slight" because I think that, given a reasonably generous interpretation of the closing words of the Finanzgericht's first

question, they may be taken as an invitation to the Court to rule on the issue, should the Court think fit.

It would not however be right for me to weary Your Lordships with a repetition of what I said on that issue in Case 28/76. My reasons for thinking that there is no ground for holding that Regulation No 663/74 was incompatible with Article 40 (3) remain essentially the same. I have not found either in the Plaintiff's written observations in this case or in what was said on its behalf at the recent hearing anything to persuade me that I was then wrong. Indeed I did not discern that on that issue any fresh argument of any substance was put forward on the Plaintiff's behalf in this case.

That being the crucial issue, the temptation for me to leave the case there is great. The Finanzgericht's Order for Reference, and the observations submitted to us, particularly on behalf of the Commission and of the Council, raise, however, some questions of general importance and I think I must refer to them, if only briefly.

Firstly, there can of course be no doubt that a ruling of this Court under Article 177 of the Treaty is binding on the national court or tribunal to which it is addressed. In a case, however, where the validity of an act of a Community institution is in issue and the Court has not been persuaded of its invalidity, it is the practice of the Court not to rule affirmatively that that act is valid but to rule to the effect that consideration of that issue has disclosed no factor of such a kind as to affect the validity of the act in question. The Court's purpose in adopting that form of ruling is, I apprehend, to allow for the possibility that, in another case, some new point may be raised which does lead to the conclusion that the act is invalid. Of the rulings in Case 28/76 the first was merely on interpretation but the second, on validity, was in that usual form and so left open the possibility of a new point being raised.

Secondly, it is always open to the national court or tribunal to which a ruling is addressed, if it does not consider itself sufficiently enlightened by the judgment of the Court, to make a further reference to the Court under Article 177: see Case 29/68 *Milchkontor* v *HZA Saarbrücken* [1969] ECR at p. 180.

It follows in my opinion that, here, the Finanzgericht, if it was left in doubt by the Judgment of the Court in Case 28/76 as to whether it covered the question of the compatibility of Regulation No 663/74 with Article 40 (3) of the Treaty, was entitled and indeed bound to refer the case back to the Court. In saying that it was bound so to do, I do not overlook that the Finanzgericht, as a court whose own decision would be open to appeal, could have decided the issue itself in the first instance. But, having decided to make a reference to this Court and having obtained, as a result, a ruling that bound it but the effect of which it did not consider clear, it must in my opinion refer the case back. The puzzling thing is that the Finanzgericht did not expressly ask the Court the crucial question. It is not however, I think, for me to speculate as to the reasons for that.

It also follows in my opinion that the concern evinced by the Commission and by the Council as to whether the Order for Reference was admissible, and, if so, on what ground, was unnecessary. They suggested that that Order might, in view of its content, be regarded rather as an application for interpretation of the Court's Judgment in Case 28/76 than as an ordinary order for reference. If so, the question arose, so they suggested, whether the application was admissible either under Article 40 of the Statute of the Court or, under Article 177, as a reference to the Court for a

ruling on the interpretation of an act of an institution of the Community, i.e. of the Court itself. As to Article 40, it was pointed out that, in terms, that Article envisaged only an "application by any party or any institution of the Community establishing an interest therein". Could, then, Article 40 be extended "by analogy" to an application made by a national court? If not, the idea that the Court could, under Article 177, interpret its own judgments was even more startling.

In my opinion, interesting though the discussion of those questions was, and pertinent though it might be in a future case, it was, with all respect to those who initiated it, irrelevant in the present case.

As to the question whether the second subparagraph of Article 40 (3) of the Treaty in so far as it excludes "any discrimination between producers or consumers within the Community" creates "individual rights which the national courts must protect", I need say only that I agree with the Commission. The very nature of that provision is such that it cannot by itself create such rights. But, by the same token, it can be invoked by a private person in a national court to challenge the validity of an act of a Community institution directly affecting him.

There remains the question what form, in this unusual case, Your Lordships' formal ruling should take. As to that I agree with the Commission and with the Council that a suitably formulated answer to the Finanzgericht's first question should render any answer to its second and third questions otiose. I also think that the reasons given in Your Lordships' Judgment for the ruling with which it concludes will matter more than the actual form of that ruling. I suggest that, if Your Lordships share my view on the substance of the case, those reasons should be so framed as to make it unnecessary for the formal ruling to say more than that further consideration of the question has disclosed no factor of such a kind as to affect the validity of Regulation (EEC) No 725/74.