the particular nature of agricultural activity, which results from the social structure of agriculture. For the purpose of granting aid as compensation for the effects of the effects of the revaluation, this nature justifies the Federal Republic of Germany in giving priority to the sectors of the agricultural economy which suffered most directly losses of income as a result of the revaluation, that is to say the sectors concerned with working the soil. Since such preference is not arbitrary it cannot be regarded as discrimination between producers prohibited by the second subparagraph of Article 40 (3) of the Treaty.

3. Neither the EEC Treaty nor Article 1 of Regulation No 2464/69 of the Council nor the Council Decision of 21 January 1974, which was notified to the Federal Republic of Germany and extends and amends Article 1 (3) of the said regulation, forbade that Member State to exclude industrial calf fatteners from the aid referred to in the regulation.

In Case 36/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Münster for a preliminary ruling in the proceedings pending before that court between

DENKAVIT FUTTERMITTEL GMBH, Warendorf,

v

FINANZAMT WARENDORF

on the interpretation of the EEC Treaty, Article 1 of Regulation No 2464/69 of the Council of 9 December 1969 on measures to be taken in agriculture as a result of the revaluation of the German mark (Official Journal, English Special Edition 1969 (II), p. 527) and the unpublished Council Decision of 21 January 1974, notified to the Federal Republic of Germany on 24 January 1974 whereby the Council extended and amended Article 1 (3) of the said regulation,

THE COURT

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

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. When the Government of the Federal Republic of Germany took the decision on 24 October 1969 to revalue the German mark as from 27 October 1969 by 8.5% in relation to its official parity, the Federal Republic and the Community faced the problem of compensation for the losses of the income resulting for German agriculture from the linking of the European agricultural prices to a common unit of account.

2. The German authorities and the Commission agreed in estimating the losses of the income suffered by German agriculture as a result of the revaluation at DM 1 700 million a year. In order to compensate for those losses, the Council, by Regulation (EEC) No 2464/69 of 9 December 1969 (Official Journal, English Special Edition 1969 (II), p. 527), authorized the Federal Republic as from 1 January 1970 to grant agricultural producers direct aid, in respect of which provision was made for contributions by the EAGGF [European Agricultural Guidance and Guarantee Fund].

3. Article 1 (1) to (3) of Regulation No 2464/69 provides as follows:

"1. Aid granted to German agricultural producers under the conditions set out below shall be considered to be compatible with the Common Market.

2. Such aid may be granted up to the amount of DM 1 700 million for each budgetary year from 1970 to 1973 inclusive. The Community shall contribute to the financing of such aid on a decreasing scale as provided by Article 2.

3. Aid may be granted in the form of direct aids to agricultural producers in so far as they are not calculated on the basis of the price or the quantity of the product.

Aid may be granted partly in the form of an advance to the agricultural producer when he sells his products, subject to a maximum of 3% of the selling price, to be paid either by the buyer or by an agency to be appointed by the competent national authorities".

4. The Council Decision of 21 January 1974 (which was notified to the Federal Republic of Germany on 24 January 1974, but not published) extends and amends the measure authorized by Article 1 (3) of Regulation (EEC) No 2464/69 inasmuch as the Federal Republic was "provisionally authorized to grant aid to agricultural producers in the form of compensation, paid to the producer when he sells his products, subject to a maximum of 3% of the selling price". The aid as thus amended may be paid in the same way as is provided in the regulation "either by the buyer or by an agency to be appointed by the competent national authorities".

5. On 23 December 1969 the German legislature, basing itself on Regulation (EEC) No 2464/69, enacted the Aufwertungsausgleichgesetz (Law on compensation for the effects of revaluation), Article 4 of which authorized agricultural and forestry undertakings, within the meaning of Article 24 (2) of the Umsatzsteuergesetz (Law on turnover tax) in conjunction with Article 51 of the Bewertungsgesetz (Law on valuation) to reduce the turnover tax (value added tax) by 3%. In order to qualify as an agricultural undertaking within the meaning of the latter provisions, establishments breeding and keeping livestock must have a certain agricultural area and prove a certain ratio between the head of livestock and that area.

6. The company which is the plaintiff in the main action apart from producing feeding-stuffs engages in fattening calves on milk-based substitute feeding-stuffs which it produces itself. For this purpose it buys calves of about one week old and sells them for slaughter after fattening them for four months. Not having any agricultural land for the purpose of fattening its calves, the company constitutes not an agricultural undertaking but rather an industrial undertaking within the meaning of German tax law.

7. In 1974 the turnover of the plaintiff company on sales of calves which it had fattened was DM 21 394 474,21. In its tax return for that year, it claimed aid of DM 641 834,24 (that is to say 3% of its total turnover) under Article 4 of the Aufwertungsausgleichgesetz. By a decision of 26 March 1976, the Finanzamt (tax office) Warendorf, the defendant in the main action, refused to grant that aid, on the grounds that the plaintiff company is an industrial undertaking within the meaning of German tax law and not an agricultural undertaking.

8. After its objection to that decision had proved unsuccessful, the plaintiff company commenced before the Finanzgericht [Finance Court] Münster the proceedings which constitute the main action.

9. By an order of 26 September 1977, the Finanzgericht Münster stayed the proceedings and referred the following

questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Under Community law does the expression 'agricultural producers' in Article 1 (1) and (3) of Regulation (EEC) No 2464/69 include industrial livestock breeders and keepers within the meaning of German tax law?

2. If the first question is answered in the affirmative: Are Article 39 and the second subparagraph of Article 40 (3) of the EEC Treaty and Article 1 of Regulation (EEC) No 2464/69 of the Council or any other provisions of Community law to be interpreted as meaning that they forbid the Federal Republic of Germany, as a Member State of the EEC to which Regulation (EEC) No 2464/69 was addressed, in the event of the grant of direct aid by way of compensation for the revaluation of the German mark in respect of agricultural products subject to an organization of the market, to exclude specific classes of agricultural producers — in this case, industrial livestock breeders and keepers within the meaning of German tax law — from the grant of aid?"

10. This reference was the subject of Case 139/77 ([1978] ECR 1317).

11. Although in that case the Finanzgericht relied only in a general way on the distinction made by German tax law between agricultural and industrial livestock breeders and keepers, the plaintiff in the main action devoted specific arguments in its written observations to the subject of fattening of calves. It alleged that from a structural and economic point of view there is no difference between the *industrial fattening of calves* on the one hand and *agricultural fattening* on the other under German tax law. Both the "agricultural" and "industrial" calf fatteners have to buy young calves from breeders and obtain mixed, milk-based feeding-stuffs from a manufacturer of such feeding-stuffs. The size of the agricultural holding in the case of the "agricultural" fattener is therefore irrelevant to the fattening of calves. (cf. [1978] ECR 1320). The plaintiff in the main action claimed that in granting compensation for revaluation of the German mark only to industrial keepers and breeders, the German legislature was infringing the prohibition of discrimination in Article 40 (3) of the Treaty.

12. In its written observations the Commission alleged that the revaluation affected farmers more than industrial livestock keepers. In general a farmer farming his own land meets his fodder requirements at least partly with his own produce and thus can less easily turn to imported fodder made cheaper by revaluation (cf. [1978] ECR 1327).

13. In its judgment of 13 June 1978 in Case 139/77 (at paragraph 12, second subparagraph) the Court held in respect of the first question that since neither the context nor the objectives of the regulation demand a restrictive interpretation, it is not out of the question that the relatively broad expression "agricultural producers" which is used in the wording of the regulation, may include production of agricultural products by any method whatever.

14. Regarding the second question the Court held (at paragraph 16) that it must be considered whether the differentiation, for the purposes of German tax law, made by the Aufwertungsausgleichgesetz between agricultural breeders and keepers on the one hand and industrial breeders and keepers on the other, is discriminatory within the meaning of Article 40 (3) of the Treaty.

The grounds for the negative answer to that question are set out in paragraph 17 as follows:

"It appears from the case file *inter alia* that, because they use fodder which is mostly their own farm produce, agricultural livestock breeders and keepers within the meaning of German tax law are subject in particular to the risks inherent in working the soil.

On the other hand, industrial livestock breeders and keepers within the meaning of German tax law are not exposed to the same risks, as they buy the feeding-stuffs needed for their animals mostly on either the national or the international market, and if their national currency is revalued they are able to obtain them abroad at advantageous prices.

Accordingly, the distinction between agricultural livestock breeders and keepers and industrial livestock breeders and keepers, which German tax law makes by laying down a ratio between the head of livestock and the utilized agricultural area and which the Government of the Federal Republic of Germany adopted as an objective, albeit unmodulated, criterion as regards the granting of the aid which it is empowered to grant by the provisions of Regulation No 2464/69, cannot be classified as discriminatory".

15. The sole paragraph in the operative part of the judgment of the Court of 13 June 1978 in Case 139/77 reads as follows:

"Neither the provisions of the EEC Treaty nor Article 1 of Regulation No 2464/69 of the Council nor the provisions of the Council Decision of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial livestock breeders or keepers from the aid referred to in the said regulation".

16. It appears from the file in the present case that the Finanzgericht Münster does not consider itself bound by the operative part of the judgment in Case 139/77 because it takes the view that the court relied on inaccurate facts relating to the fattening of calves. By order dated 19 January 1979 it once again stayed the proceedings pending before it and referred to the Court under Article 177 of the Treaty the following question for a preliminary ruling (expressly limited to calf fatteners):

"Do the EEC Treaty, Article 1 of Regulation (EEC) No 2464/69, the Council Decision of 21 January 1974 or any other provision of Community law forbid the Federal Republic of Germany to exclude 'industrial' calf fatteners within the meaning of German tax law from aid under the regulation if agricultural calf fatteners use the same industrially produced feeding-stuffs for fattening calves as industrial calf fatteners?"

17. The order making the reference was registered at the Court on 2 March 1979.

18. It appears from the grounds given the order making the reference to the Court that according to the national court (accepting in this respect the argument of the plaintiff) agricultural calf fatteners within the meaning of

German tax law use the *same feeding-stuffs* as industrial calf fatteners, that is to say, solely *industrially produced milk-based substitute feeding-stuffs* such as the plaintiff itself produces and also uses for fattening its calves. Both agricultural and industrial calf fatteners must use these feeding-stuffs exclusively for feeding their animals in order to obtain the "white" meat which has a special market value and which alone is sold as "veal". In theory certain agricultural calf fatteners can (also) fatten their calves with feeding-stuffs from their own agricultural production. In that case, however, they produce red meat which is sold as beef. In addition, the fattening costs are substantially increased if feeding-stuffs from a farmer's own agricultural products are used.

19. The Finanzgericht adds that if "industrial" calf fatteners are agricultural producers within the meaning of Community law and if Community law forbids the exclusion of specifically agricultural producers from aid by way of compensation for revaluation in respect of agricultural market products, then the action succeeds.

20. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the plaintiff in the main action, represented by Dietrich Ehle and Ulrich C. Feldmann, Advocates at the Cologne Bar, by the defendant in the main action, represented by its manager, Mr. Ernst, and by the Commission of the European Communities, represented by its Legal Adviser, Peter Karpenstein.

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

II — Summary of written observations

The *plaintiff in the main action* observes that the question assumes that agricultural calf fatteners use the same industrially-produced feeding-stuffs as industrial calf fatteners. Citing Cases 104/77 *Oelschläger* v *Hauptzollamt Emmerich* [1978] ECR 796 and 131/77 *Milac* v *Hauptzollamt Saarbrücken* [1978] ECR 1050 it claims that it is for the national court making the reference to *determine the facts* in proceedings under Article 177 of the Treaty. Therefore, for the purposes of its preliminary ruling the Court must rely on the facts found by the Finanzgericht in its order making the reference regarding the feeding-stuffs used for calf fattening.

On the facts the plaintiff claims that more than 99% of German calves are fattened with milk-based substitute feeding-stuffs. The size of the farm is therefore irrelevant as regards the fattening of calves. The calf fattener is classified under German law as agricultural solely because he has cultivated land. Nevertheless, he must use this for *other purposes* (for example the cultivation of cereals) which itself has

nothing to do with calf fattening. In the agricultural undertaking calf fattening thus constitutes a special sector in which the *agricultural calf fattener is also carrying on an "industry"*. In that sector there is no "typically agricultural sector".

The plaintiff further points out that for calf fattening it mainly has working for it *calf fatteners* (Lohnmäster) who *are paid a wage* and themselves have agricultural land which cannot, however, be used for calf fattening. Such calf fatteners are thus agricultural livestock keepers within the meaning of German tax law. They receive a wage for fattening which constitutes a kind of guaranteed price. The wage is based on the average income of an "agricultural calf fattener". The compensation for revaluation is also part of the average income. The risk of price fluctuation on the market is borne by the plaintiff. If the employed calf fattener in question did not enter into contracts of employment for fattening and bore the market risk himself he would also receive compensation for revaluation. Regulation (EEC) No 2464/69 as applied by the German legislature thus "penalizes" the plaintiff as an industrial calf fattener for protecting with a price guarantee the farmer properly so-called from the market risk for calf fattening.

According to the plaintiff the above facts are *common ground* between the parties to the main action.

Regarding the application of the principle of non-discrimination in Article 40 (3) of the Treaty to the specific facts the plaintiff points out that this principle means that similar situations must not be treated differently unless a distinction is justified objectively. As appears from the facts set out, in the case of industrial and agricultural calf fattening within the meaning of German tax law it is not just a question of "comparable situations" but even more of *identical* situations. There is, however, no possible reason to justify different treatment of identical situations.

The plaintiff challenges the statement of the Court in its judgment of 13 June 1978 to the effect that the German legislature was adopting an objective and non-discriminatory criterion for distinguishing between agricultural breeders and keepers on the one hand and industrial breeders and keepers on the other "by laying down a ratio between the head of livestock and the utilized agricultural area". In that phrase contained in the grounds of its judgment the Court wrongly assumed that agricultural livestock breeders and keepers used mostly fodder from their own farm produce. This alone ("accordingly") was sufficient to justify, in the Court's view, the ratio between head of livestock and utilized agricultural area as a criterion of distinction.

Referring to the finding of the Court in its judgment that there was an "unmodulated" criterion of distinction the plaintiff alleges that, even where an unmodulated criterion of distinction is applied, to refuse the plaintiff compensation for revaluation while allowing it to agricultural calf fatteners would clearly exceed the limits of

permissible classification ("Typisierung"). Calf fattening is a very important *specific and independent economic sector* (the plaintiff estimates its total turnover in the Federal Republic in 1974 at some 600 million marks) to which such a criterion cannot be applied, at least if it leads, as it does in this case, to placing a class of taxpayers ("industrial" calf fatteners) in a clearly less favourable competitive position than that of another class of taxpayers ("agricultural" calf fatteners).

In the plaintiff's view it is not possible to claim that the Aufwertungsausgleichgesetz was an emergency measure. At least it might have been expected that the legislature in 1974, that is five years after the Aufwertungsausgleichgesetz entered into force, would abolish the quite considerable discrimination between agricultural and industrial calf fattening.

In no case should classification lead to identical situations being treated differently from the point view of tax law and entitlement to aid on the sole ground that in the one case the calf fattening is done by a farmer who *inter alia* works the soil and in the other case by an undertaking such as the plaintiff which, *inter alia,* manufactures animal feeding-stuffs. Such criteria of definition have no connexion with calf fattening as such, nor with the use of fodder and cannot therefore objectively justify discrimination.

The aim of Regulation No 2464/69 was to allow compensation for losses caused by the fall in agricultural prices. In the case of calves agricultural and industrial fatteners were affected in the same way by these losses. In this respect it is significant that in 1974 the system of monetary compensatory amounts in Regulation No 974/71 of the Council was implemented. That system was based on monetary compensation which was neutral *vis-à-vis* products. Therefore compensation for currency revaluation ought at the latest by 1974 to have been neutral *vis-à-vis* products for fattening calves because the system of monetary compensatory amounts, which had the same origins and aims as compensation for revaluation, granted strictly neutral compensation benefiting or, as the case may be, burdening all agricultural products.

There are no *other reasons* which could justify not giving compensation for revaluation in respect of industrial calf fattening. In particular industrial calf fatteners do not enjoy in relation to agricultural calf fatteners structural and social advantages which could justify denying them aid.

The plaintiff proposes that the following answer should be given to the question put by the Finanzgericht Münster:

The EEC Treaty and in particular the second paragraph of Article 40 (3) and Regulation (EEC) No 2464/69 in conjunction with the Council Decision of 21 January 1974 forbid excluding industrial calf fatteners within the meaning of the German tax law from compensation for currency revaluation where agricultural calf fatteners use the same industrially produced feeding-stuffs for fattening calves as industrial calf fatteners.

The Finanzamt Warendorf, *the defendant in the main action,* takes the view that it is not only with milk-based substitute

feeding-stuffs that white veal is produced. It is also possible to obtain the same result with full-cream milk supplemented subsequently if necessary with concentrated feeding-stuffs. The "agricultural" producer is able to produce full-cream milk on his own farm by giving part of the land over to dairy cows (Milchvieh). If he has sufficient land he thus has the opportunity of choosing between feeding-stuffs he produces himself and feeding-stuffs bought in. There is therefore no reason to depart from the judgment given by the Court in Case 139/77 since no new facts have been raised by the present reference.

The *Commission* first expresses doubts about the same court, which has already made a reference to the Court of Justice in Case 139/77, making a second reference on the alleged discriminatory nature of the distinction made by German law. Nevertheless, it considers that it does not have to make formal objections to admissibility since the judgment of 30 June 1978 relates only in a general way to the distinction between agricultural keepers and breeders on the one hand and industrial keepers and breeders on the other and in the absence of a specific question from the national court at the time does not go into the special situation of calf breeding. Further, in a situation very similar to the present, the Court held that it is for the national court to decide whether it is sufficiently enlightened by the preliminary ruling given or whether it is necessary to make a further reference to the Court (Case 29/68 *Milch-, Fett- und Eier-Kontor* v *Hauptzollamt Saarbrücken* [1969] ECR 165, at p. 180).

As for the substance of the reference for a preliminary ruling the Commission wonders whether, having regard to the wording of the order making the reference, the Finanzgericht does not also seek a re-examination of the first question put in Case 139/77, that is to say, the concept of "agricultural producers" from the point of view of Community law, a question on which the Court has so far not given a definite answer. Nevertheless, the Commission does not think it is necessary to interpret the reference for a preliminary ruling to this effect.

The Commission states that it does not *prima facie* understand the comment to the effect that the action will succeed if Community law prohibits the Federal Republic of Germany from excluding industrial calf fatteners from aid under Regulation No 2464/69. According to the case-law of the Court (Joined Cases 124/76 and 20/77 *S.A. Moulins et Huileries de Pont-à-Mousson* [1977] ECR 1795, at p. 1813) the fact that a regulation is incompatible with the principle of equality does not necessarily mean that all undertakings excluded from benefiting under the regulation are entitled to the aid in question. In this event it is for the legislature (Community or national) to draw the consequences resulting from the Court's finding of incompatibility.

The Commission considers that even in its present form it is necessary to answer the question put by the Finanzgericht in the negative both on grounds of law and of fact.

Even assuming (contrary, in the Commission's view, to the facts) that agricultural calf fatteners use *only* milk-based substitute feeding-stuffs of the type manufactured by the plaintiff, the difference in treatment between agricultural and industrial calf fatteners in respect to aid is justified on objective grounds. If the two classes of calf fatteners enjoyed the same advantages by reason of the revaluation, the revaluation would cause the agricultural producer considerable losses in respect of the produce of his land and of his dairy produce. Further, calf fattening should not be taken as the sole basis of comparison. It would be wrong to separate this activity from all the activities of a farm and then to compare it with industrial calf fattening which is done independently of any adequate agricultural land.

The Commission recalls the necessity of finding a speedy and necessarily schematic and general solution to the problem of loss of income suffered by hundreds of thousands of agricultural producers by reason of the revaluation in 1969. By adopting, for the purposes of the grant of aid, the distinction made by German tax law between agricultural and industrial livestock breeders (and not only of a certain class of animals) the German legislature adopted a criterion allowing the aid to be granted to a class of breeders ("agricultural") made up largely of those who also worked the land. It was precisely products from working the land which decreased in value following the revaluation.

Apart from the above considerations the Commission does not accept the argument that there is no difference between the breeding methods used by agricultural and industrial calf fatteners.

In this respect a twofold correction is necessary. On the one hand neither the Commission nor the Court stated that agricultural breeders basically used their own products to fatten their calves. The observations in the judgment of 13 June 1978 criticized by the plaintiff and the Finanzgericht referred to *agricultural livestock breeders in general.* Secondly, the question of any discrimination should not be considered in the present case only from the point of view "calf fatteners". It is necessary on the contrary to consider the position on the whole of the market in calves, that is to say to compare the breeding methods used for *all* "agricultural" calves for sale on the German market and for the animal for sale by "industrial" producers. If this is done it will be observed that the position on the German market in calves is as follows:

The animals offered for sale on the German veal market do not all come from specialized fattening undertakings; far from it. Although the majority of these calves have been bred by agricultural and industrial fatteners, a not inconsiderable proportion of the animals however comes from milk producers who have a dairy herd of some size and who use traditional methods for fattening until slaughter the calves which come

from their herd and are not intended for its replenishment. The proportion of calves reared by these small farmers who do not specialize in fattening is considerable.

Whereas specialized industrial fatteners use only industrially produced milk-based substitutes, agricultural fatteners and naturally even more occasional fatteners use to a large extent the milk produced on their own farm. To some extent they use directly the full-cream milk produced by their dairy herd to feed their animals and also use for the same purposes the skimmed milk which they receive back from the dairy to which they have first delivered their full-cream milk.

The Commission greatly regrets that it does not have absolutely precise figures of the respective quantities of feeding-stuffs used. The statistics available, however, indicate that at present one third of calves are bred and fattened with full-cream and skimmed milk and two thirds with industrially produced milk-based substitute feeding-stuffs. In any event it is wrong to claim that "agricultural" fatteners use *only* milk-based substitute feeding-stuffs as do "industrial" fatteners. On the one hand some 5% of the production of full-cream milk in the Community (or some 5 000 000 tonnes annually) is used in feeding-stuffs for calves and on the other hand it is possible to show on the basis of the applications for aid which the Commission receives for the use of skimmed milk in animal feeding-stuffs that at present in the Community more than 2 000 000 tonnes of skimmed milk are used each year in feeding-stuffs for calves (in 1978 it was exactly 2 336 000 tonnes)

As regards the amounts of aid granted for liquid skimmed milk for use as animal feeding-stuffs on the basis of Article 10 of Regulation No 804/68 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I) p. 176) no distinction was made up to 1978 between feeding-stuffs for calves and for other animals. As a result only the total quantity used for animal feeding-stuffs is known. Between 1968 and 1970 it increased for the Community of the Six to some 6 000 000 tonnes annually but it fell between 1970 and 1972 to some 3 500 000 tonnes. In the Community of the Nine the use of liquid skimmed milk in animal feeding-stuffs fell between 1973 and 1976 from 5 000 000 to 3 000 000 tonnes and then increased in the following two years to 3 500 000 tonnes and 4 000 000 tonnes respectively. The use of liquid skimmed milk in the Federal Republic represents between 40 and 45% of these quantities. Since aid for the use of skimmed milk in pig and poultry feed was increased by Commission Regulation No 2793/77 (Official Journal No L 321 of 16 December 1977, p. 30) from 1 January 1978, it is possible to determine very precisely on the basis of applications for aid sent to the competent intervention agencies the amount of liquid skimmed milk used annually in each Member State for feeding-stuffs for calves on the one hand and for other animals on the other. For 1978 the total amount of liquid skimmed milk used for animal feeding-stuffs and subsidized by the Community amounted to 4 069 000 tonnes of which 2 326 000 tonnes was for calves, or about 60% of the total quantity.

In view of the fact that even previously the greater part of liquid skimmed milk

intended for animal feed was used in feeding-stuffs for calves (otherwise there would have been no reason to increase appreciably by Regulation No 2793/77 the aid for the use of liquid skimmed milk in feed for animals other than calves), it must be admitted that even during the years in question, that is to say, from 1969 to 1974 from 2 to 3 million tonnes of liquid skimmed milk were used annually in the Community for feeding-stuffs for calves. It is even probable that the quantity of skimmed milk used during those years was appreciably higher than it is today. The statistics available in fact show that in the Federal Republic the ratio between the quantity of the agricultural product, milk, and of the industrially produced milk-based substitutes used in feeding-stuffs for calves did not begin appreciably to alter in favour of the latter until about 1973. At the time of which the regulations in question were adopted the natural product, milk, must have been used to an appreciably larger extent than the present ratio of one third to two thirds would indicate.

The Commission concludes from the previous considerations that as regards the exclusion of industrial calf fatteners from compensation for the revaluation in 1969 the only decisive factor is that there are differences between the methods of feeding and that there is no doubt that these differences are quantitatively important.

The Commission adds further that it would be wrong to claim that only the use of industrially produced milk-based substitute feeding-stuffs allows the production of the popular "white" meat. Calves reared on milk also produce a "white" meat the quality of which is superior to that of veal obtained by the use only of substitutes.

The Commission is therefore of the opinion that the second reference to the Court for a preliminary ruling by the Finanzgericht Münster should be answered as follows:

Even having regard to the special position on the German market in calves, neither the EEC Treaty nor Article 1 of Regulation No 2464/69 of the Council nor the Council Decision of 21 January 1974 prohibited the Federal Republic of Germany from excluding industrial calf fatteners from the aid provided for by Regulation No 2464/69.

III — Oral procedure

At the hearing on 4 October 1979 the plaintiff in the main action, represented by Dietrich Ehle, Advocate at the Cologne Bar, and the Commission of the European Communities, represented by its Legal Adviser, Peter Karpenstein, acting as Agent, submitted oral observations.

The Advocate General delivered his opinion at the sitting on 23 October 1979.

Decision

1 By an order of 19 January 1979 which was received at the Court on 2 March 1979 the Finanzgericht Münster referred to the Court, pursuant to Article 177 of the EEC Treaty, a question on the interpretation of the said Treaty, Article 1 of Regulation No 2464/69 of the Council of 9 December 1969 on measures to be taken in agriculture as a result of the revaluation of the German mark (Official Journal, English Special Edition 1969 (II), p. 527) and the Council Decision of 21 January 1974, notified to the Federal Republic of Germany on 24 January 1974, whereby the Council extended and amended certain provisions of Article 1 of the said regulation.

2 The reason for the main action is the rejection by the Finanzamt Warendorf, the defendant in the main action, of an application for aid under the Aufwertungsausgleichgesetz (Law on compensation for the effects of revaluation), which was enacted on 23 December 1969 pursuant to the said regulation. This application was made by the plaintiff company in the main action, whose business, apart from the production of animal feed, is the fattening of calves with milk-based substitute feeding-stuffs which it produces itself.

3 The defendant in the main action based its refusal to grant the aid applied for by the plaintiff company on the fact that, since the company did not have any agricultural land for the purpose of fattening its calves, it constituted not an agricultural undertaking within the meaning of German tax law, to which the previously mentioned Law refers, but rather an industrial undertaking.

4 It is right to recall that the main action has already given rise to a reference for a preliminary ruling made by the same Finanzgericht, which was the subject of Case 139/77 in which the Court gave judgment on 13 June 1978 ([1978] ECR 1317). In that judgment the Court, after examining (pages 1329 to 1331) the origin and substance of the Community rules and the national law in question answered the following questions referred to it for a preliminary ruling:

"1. Under Community law does the expression 'agricultural producers' in Article 1 (1) and (3) of Regulation (EEC) No 2464/69 include industrial livestock breeders and keepers within the meaning of German tax law?

2. If the first question is answered in the affirmative:

Are Article 39 and the second subparagraph of Article 40 (3) of the EEC Treaty and Article 1 of Regulation (EEC) No 2464/69 of the Council or any other provisions of Community law to be interpreted as meaning that they forbid the Federal Republic of Germany, as a Member State of the EEC to which Regulation (EEC) No 2464/69 was addressed, in the event of the grant of direct aid by way of compensation for the revaluation of the German mark in respect of agricultural products subject to an organization of the market, to exclude specific classes of agricultural producers — in this case, industrial livestock breeders and keepers within the meaning of German tax law — from the grant of aid?"

5 Regarding the first question the Court held that since neither the context nor the objectives of Regulation No 2464/69 demand a restrictive interpretation, it is not out of the question that the relatively broad expression "agricultural producers", which is used in the wording of the regulation, may include production of agricultural products by any method whatever.

6 Regarding the second question the Court stated that it must be considered whether the differentiation, for the purposes of German tax law, made by the Aufwertungsausgleichgesetz between agricultural breeders and keepers on the one hand and industrial breeders and keepers on the other, is discriminatory within the meaning of Article 40 (3) of the Treaty. The Court gave the following grounds for answering this question in the negative (paragraph 17):

"It appears from the case file *inter alia* that, because they use fodder which is mostly their own farm produce, agricultural livestock breeders and keepers within the meaning of German tax law are subject in particular to the risks inherent in working the soil.

On the other hand, industrial livestock breeders and keepers within the meaning of German tax law are not exposed to the same risks, as they buy the feeding-stuffs needed for their animals mostly on either the national or the international market, and if their national currency is revalued they are able to obtain them abroad at advantageous prices.

Accordingly, the distinction between agricultural livestock breeders and keepers and industrial livestock breeders and keepers, which German tax law

makes by laying down a ratio between the head of livestock and the utilized agricultural area and which the Government of the Federal Republic of Germany adopted as an objective, albeit unmodulated, criterion as regards the granting of the aid which it is empowered to grant by the provisions of Regulation No 2464/69, cannot be classified as discriminatory."

7 In giving a preliminary ruling on the questions put by the Finanzgericht the Court held:

"Neither the provisions of the EEC Treaty nor Article 1 of Regulation No 2464/69 of the Council nor the provisions of the Council Decision of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial livestock breeders or keepers from the aid referred to in the said regulation".

8 By its order for reference to the Court in the present case the Finanzgericht put a new question for a preliminary ruling worded as follow:

"Do the EEC Treaty, Article 1 of Regulation (EEC) No 2464/69, the Council Decision of 21 January 1974 or any other provision of Community law forbid the Federal Republic of Germany to exclude 'industrial' calf fatteners within the meaning of German tax law from aid under that regulation if agricultural calf fatteners use the same industrially produced feeding-stuffs for fattening calves as industrial calf fatteners?"

9 It must be observed on the one hand that this question, unlike the questions put in Case 139/77, refers not to livestock breeders and keepers in general but only calf fatteners and on the other hand that it assumes the premise, explained in the grounds of the order for reference, that "agricultural" calf fatteners use in fattening the same industrially produced milk-based substitute feeding-stuffs as "industrial" calf fatteners.

10 The correctness of this assumption was challenged by the Commission. In its view, apart from manufactured feed substitutes, "agricultural" calf fatteners also use to a considerable extent full cream milk or skimmed milk which they produce themselves. In this respect the Commission refers to the facts based on the Community system in force since 1969 of aid granted for milk for use as animal feeding-stuffs and to the statistics relating to feeding with full

cream milk and skimed milk in the Federal Republic of Germany. The result is that very large quantities of full cream and skimmed milk are used as animal feeding-stuffs and more than half such quantities is used for feeding calves as is shown by the results of the application of the differentiated system of aid established by Commission Regulation No 2793/77 (Official Journal No L 321, p. 30).

11 On the basis of all the facts which it gives the Commission estimates that at present milk makes up a third of feeding-stuffs for calves and that this ratio was probably even higher during the period from 1969 to 1973.

12 The Court cannot, within the framework of proceedings brought under Article 177 of the Treaty, settle a difference of this kind which, like any other assessment of the facts involved, is within the province of the national court.

13 It is right, nevertheless, to observe that even assuming that "agricultural" calf fatteners exclusively use the same industrially produced milk-based substitute feeding-stuffs as used by "industrial" calf fatteners, this does not affect the answer to be given to the new question put by the national court.

14 As was recalled in the judgment given in Case 139/77, in the words of the first recital in the preamble to Regulation No 2464/69, "the revaluation of the German mark and the present unaltered value of the unit of account entail a reduction in agricultural prices expressed in German marks . . . from 1 January 1970; . . . German agriculture will thereby suffer a loss of income". The losses contemplated, which the regulation aimed to compensate, were in the agricultural sectors such as milk and cereals where an intervention system applied. The revaluation almost automatically led to a reduction in agricultural prices expressed in German marks but fixed in units of account under the Common Agricultural Policy. It is precisely in these sectors that production depends on working an adequate amount of agricultural land.

15 Accordingly, the distinction between agricultural livestock breeders and keepers and industrial livestock breeders and keepers, which German tax law makes on the basis of a ratio between the head of livestock and the agri-

cultural land used and which the Federal Republic of Germany adopted for the purpose of granting aid under the Aufwertungsausgleichgesetz meets the aim of the regulation.

16 It must be remembered that the fourth recital in the preamble to the regulation states: "The aid must be granted only during a specific period, it being possible to ensure the continuation of aid through measures of social or structural policy". It follows from this that the aid contemplated falls within the perspective of considerations of a social nature corresponding to the requirement of Article 39 (2) (a) of the Treaty of taking account of the particular nature of agricultural activity, which results from the social structure of agriculture. For the purpose of granting aid as compensation for the effects of the revaluation, this nature justifies the Federal Republic of Germany in giving priority to the sectors of the agricultural economy which suffered most directly losses of income as a result of the revaluation, that is to say the sectors concerned with working the soil. Since such preference is not arbitrary it cannot be regarded as discrimination between producers prohibited by Article 40 (3) of the Treaty.

17 It follows from all these considerations that the answer to the national court should be that neither the provisions of the EEC Treaty nor Article 1 of Regulation No 2464/69 of the Council nor the Council Decision of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial calf fatteners from the aid referred to in the said regulation.

Costs

18 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court are not recoverable.

19 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Finanzgericht Münster by an order of 19 January 1979, hereby rules:

Neither the provisions of the EEC Treaty nor Article 1 of Regulation No 2464/69 of the Council nor the Council Decision of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial calf fatteners from the aid referred to in the said regulation.

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Bosco

Delivered in open court in Luxembourg on 15 November 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 23 OCTOBER 1979 [1]

Mr President,
Members of the Court,

The question at issue in the reference for a preliminary ruling with which we are concerned today is not new to us. It is concerned with the compensation for revaluation laid down in the German Law of 23 December 1969. That Law was passed following the revaluation of the German mark in 1969 and on the basis of Regulation No 2464/69 of the Council (Official Journal, English Special Edition 1969 (II), p. 527). The said Council regulation was continued in force and amended by the Council Decision of 21 January 1974 and the German Law was still in force in 1974.

1 — Translated from the German.