JUDGMENT OF THE COURT
OF 13 JULY 1978 [1]

# Milac GmbH, Groß- und Außenhandel v Hauptzollamt Freiburg (preliminary ruling requested by the Finanzgericht Baden-Württemberg)

"Monetary compensatory amounts"

Case 8/78

1. *Agriculture — Common organization of the market — Principle of non-discrimination between producers or consumers*
   *(EEC Treaty, Art. 40 (3))*

2. *Agriculture — Common organization of the market — Milk powder — Monetary compensatory amounts — Alterations — Regulation No 725/74 of the Commission — Validity*

1. The principle of non-discrimination laid down in Article 40 (3) of the Treaty does not prohibit different treatment of products which are not identical, unless it results in discrimination between producers or between consumers within the Community.

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

In Case 8/78

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Baden-Württemberg for a preliminary ruling in the proceedings pending before that court between:

MILAC GMBH GROSS- UND AUSSENHANDEL, Darmstadt,

and

HAUPTZOLLAMT (PRINCIPAL CUSTOMS OFFICE) FREIBURG,

on the validity of Regulation (EEC) No 725/74 of the Commission of 29 March 1974 altering the monetary compensatory amounts (Official

1 — Language of the case: German.

Journal 1974, L 89, p. 1), and on the interpretation of the second subparagraph of Article 40 (3) of the EEC Treaty and of the judgment given by the Court of Justice on 23 November 1976 in Case 28/76,

THE COURT

composed of: H. Kutscher, President, M. Sørensen (President of Chamber), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Facts and Issues

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

### I — Facts and written procedure

The facts of the main action are the same as those of Case 28/76 *(Milac)* [1976] ECR 1639); they may be summarized as follows:

Between 26 June and 14 August 1974 Milac imported into the Federal Republic of Germany from France four consignments of unsweetened wholemilk powder having a fat content between 9.6% and 24.5% by weight in packings of a weight in excess of 2.5 kg. Pursuant to Regulation No 725/74, the Neuenberg-Rheinbrücke customs office charged compensatory amounts at the rate of DM 25.74 plus a supplementary amount of DM 0.91 for every additional 1% of fat content per 100 kg net weight.

The point at issue in that case was whether the monetary compensatory amounts applicable to milk powder having a fat content in excess of 3% by weight should be reduced by a "corrective amount" such as that provided for in Regulation No 663/74 of the Council of 28 March 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 (Official Journal 1974, L 85, p. 52). In Regulation No 712/74 of 29 March 1974 (Official Journal 1974, L 88, p. 14), the Commission had not provided for application of that corrective amount to

trade in the product in question. Milac considered that the refusal to reduce the monetary compensatory amounts was unlawful: it claimed that the Commission had applied Regulation No 663/74 wrongly; it alleged that failure to apply the corrective amount was incompatible with the principle of non-discrimination; it also alleged that for Regulation No 725/74 to fix monetary compensatory amounts for the product in question without reduction was contrary to the principles of Regulation No 974/71 of the Council, the basic regulation.

The Finanzgericht Baden-Württemberg, before which the case had been brought, asked the Court to give a preliminary ruling as to whether Regulation No 725/74 should be interpreted as meaning that the compensatory amounts were to be reduced by the corrective amount and whether the said regulation was incompatible with Regulation No 974/71, the basic regulation, by virtue of the level at which the compensatory amounts had been fixed.

By a judgment given on 23 November 1976, the Court ruled:

"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 Annex I to that regulation in the version contained in Regulation (EEC) No 725/74 and applicable to powdered milk under 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 units of account 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".

Milac now argues before the national court that:

— The Court of Justice did not deal with the question of discrimination and distortions of competition;

— The judgment is not binding because its operative part is not supported by the statement of the reasons on which it is based;

— The judgment deprives Milac of legal protection, and is thus an infringement of Article 19 (4) of the German Grundgesetz (Basic Law).

By an order of 29 September 1977, the Finanzgericht Baden-Württemberg decided to refer the matter to the Court of Justice again, and submit the following question to it for a preliminary ruling under Article 177 of the EEC Treaty:

"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 purposes 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 courts decide upon the discriminatory effect and reduce the amount of the charge accordingly?"

The order of the Finanzgericht Baden-Württemberg was received at the Court on 25 January 1978.

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

## II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

### *A — Observations submitted by Milac*

Milac concurs with the opinion of the Finanzgericht that in the context of the fixing of monetary compensation Regulation No 725/74 must take the corrective amount into consideration for milk powder having a fat content in excess of 3 % by weight, the nature and extent of the reduction being determined in accordance with Regulations Nos 663/74 and 712/74.

It points out that a preliminary ruling by the Court is binding only if its operative part is supported by the statement of the reasons on which it is based. Paragraph 12 of the decision of 23 November 1976 contains a mere finding of fact and no reasons. It does not give the reason why it was possible for the monetary compensation to be reduced by DM 5.50 in the case of milk powder having a fat content not exceeding 3 % by weight, whereas that was not the case for milk powder having a fat content in excess of 3 % by weight.

The Community citizens concerned should be able to deduce from the preliminary rulings of the Court the reasons why their applications submitted on the basis of concrete facts have not been successful. If the statement of the reasons on which the decision is based does not deal or does not sufficiently deal with the question of breach of the prohibition on discrimination, the question referred for a preliminary ruling has not been bindingly decided.

In the judgment in Joined Cases 124/76 and 20/77 ("maize groats and meal" [1977] ECR 1795), the Court declared that the prohibition on discrimination laid down in Article 40 (3) of the Treaty is "a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law". It is not disputed that the principle of equality, which has the status of a constitutional rule, is directly applicable.

In view of the guarantee of legal protection provided by Article 19 (4) of the Grundgesetz, national courts should where necessary rule on the discriminatory effects of a regulation if, without giving any grounds, the Court of Justice has omitted to make such a ruling in relation to the main point in an action.

As regards the facts constituting the discrimination, Milac points out that there is no specific use, and hence no market, for whole-milk powder in which it cannot be replaced by skimmed-milk powder and butterfat. Owing to the fact that the corrective amount was not applied to whole-milk powder, the chocolate and ice-cream industries, which were Milac's customers, have changed over to purchasing skimmed-milk powder and butter-fat. For a customer processing some 4 000 tonnes of milk powder *per annum*, the costs of the basic ingredients have thereby been reduced by some DM 220 000 *per annum*.

For the purpose of calculating and levying the monetary compensation within the framework of Regulation No 974/71, the Council and the Commission established a close relationship between the intervention products skimmed milk and butter-fat, on the one hand, and whole-milk powder on

the other. In Part 5 in the annex to Regulation No 725/74, special monetary compensation is fixed for the non-fatty portion of milk powder contained in contained in whole-milk powder. The Commission took yet another step in the field of monetary compensation by imposing a compensatory amount even on whey. In the parallel Case 131/77 *(Milac)*, the Commission gave as its reason for doing so the fact that "the relationship between the price of powdered whey and that of skimmed-milk powder corresponds to the relationship between the respectieve protein contents of those products". The compensatory amount for whole-milk powder is derived at the level of the non-fatty portion of the milk powder, that is, exactly from the intervention product skimmed-milk powder. Milac absolutely fails to understand why such an exact derivation is not also carried out where by different arrangement of the intervention prices corrective amounts are introduced and calculated in conjunction with the monetary compensation.

*B — Observations submitted by the Council*

According to the Council, the Finanzgericht does not state with sufficient clarity whether the first question is intended to obtain an interpretation of the judgment of 23 November 1976 or whether it is a fresh reference to the Court of Justice of a question which has already been submitted to it. The Court has not so far ruled on the question whether an application for the interpretation of a judgment given on a reference for a preliminary ruling is admissible.

The Council considers that in favour of the possibility of a fresh reference, one may cite the remark of Mr Advocate General Lagrange in his opinion in Joined Cases 28, 29 and 30/62 *(Da Costa and Others* [1963] ECR 31, at p. 44): "Once again, better for a court to interpret the law (the purpose for which it is set up) than to interpret its own decisions". On the other hand, in favour of an interpretation according to Article 40 of the Protocol on the Statute of the Court of Justice of the EEC, one may cite the following argument: where it is a question of the validity of a legal measure and where the Court has found that consideration of a question referred to it for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of that measure, it might be prejudicial to legal certainty in such a case to admit a fresh reference of the same question.

At all events, the Council considers that the Court dealt with the question of the prohibition on discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty, in paragraph 12 of the decision in its judgment of 23 November 1976.

Even if the Court were to answer the first question in the negative, it would not have to deal with the other two questions: if it gave such an answer, it would then have to go on to consider whether the regulation at issue breaches the prohibilition on discrimination. Should the Court consider the second and third questions, the Council adds that the decision of the Court is binding upon the national court. The latter should not be allowed on its own initiative to carry out a fresh examination of the question whether any individual rights have been infringed for the purposes of the second subparagraph of Article 40 (3) of the Treaty. Therefore the Court should refuse to answer the second question and answer the third in the negative.

Finally the Council considers that, as emerges from the settled case-law of the Court as well as from the joint declaration by the three institutions other than the Court, dated 5 April

1977, fundamental rights are duly guaranteed in Community law.

*C — Observations submitted by the Commission*

Regarding first of all the nature of the first question submitted by the Finanzgericht, the Commission argues as follows:

It is possible to contemplate the application by analogy of Article 40 of the Protocol on the Statute of the Court of Justice of the EEC. In principle that provision also allows an interpretation of "preliminary rulings" to be obtained, in so far as the application comes from an institution of the Community or from a "party". Here the national court is intervening in the place of the "party" to the adversary proceedings. However, it should not be forgotten that the Court has hitherto interpreted Article 40 strictly to its letter.

A preliminary ruling may also be considered as an "act of an institution of the Community" within the meaning of subparagraph (b) of Article 177 of the Treaty, which means that an interpretation of it could be sought by way of a fresh reference for a preliminary ruling. The Finanzgericht Hamburg sought to follow this course in Case 135/77 *(Bosch)*, in which judgment was given on 13 March 1978, but the question was left undecided. Such a view gives rise to certain reservations. First, its consequence would be that each national court would be entitled at any time to make a reference under Article 177 in relation to any previous preliminary ruling. Secondly, it could even lead to the paradoxical consequence that the Court might have to give a ruling on the validity of its own preliminary rulings.

In fact, application of Article 40 by analogy is neither apposite nor necessary to attain the desired aim. Since a preliminary ruling is necessarily incidental, a national court can always dispel any doubts arising from the interpretation of such a ruling by referring to the Court a fresh question in an appropriate form concerning the interpretation or validity of the legal measure at issue. Therefore there is basically no need to obtain an interpretation of a judgment as such. That power was conferred on the parties to the action and on institutions of the Community, who have no other means of clarifying any uncertainties. However, such a solution is made superfluous by the special nature of the procedure for a preliminary ruling, which is a procedure for collaboration between national courts and the Court of Justice.

In view of the paramount importance which the Finanzgericht attaches to the question of discrimination for the purpose of reaching a decision in the main action, it appears that only fresh consideration of that question by the Court can fulfil the real aim of the court making the reference. The problem raised would not be resolved by mere logical analysis of what the Court expressed or may have intended to express in its judgment of 23 November 1976. Moreover, the risk which such a limited question might present would become particularly clear in the event of the Court's answering the first question in the negative, that is to say in the event of the Court's finding that it did not dispose of the question of discrimination in its judgment of 23 November 1976. It would be most unsatisfactory if the Court had to content itself with making such a finding without being able at the same time to rule on the consequences resulting from it.

The First question

The Court of Justice dealt with the question of discrimination in paragraph

12 of the decision, albeit indirectly. It found that the system of monetary compensatory amounts applicable to "other products derived from milk" — in this case milk powder having a fat content in excess of 3% by weight — did not necessarily also have to be amended "in order to avoid any possibility of placing other products derived from milk in a less favourable position". That should suffice to establish that the operative part of the judgment is also supported by the reasons on which the decision is based.

Strictly speaking, the question of discrimination should have been considered in the context of the first question submitted for a preliminary ruling, especially by considering whether the principle of equality of treatment is observed by Regulation No 663/74, in particular in the Court's interpretation of it (cf. *inter alia* paragraph 10 of the decision). However, by citing the plaintiff's submission (paragraph 11 of the decision), the Court of Justice did advert to the argument that the Commission and the Council acted in a discriminatory fashion. For that reason, it must be permissible to give a more general import to the observations made by the Court in paragraph 12 of the decision, and not to limit them to the mere fixing of monetary compensatory amounts.

At all events, the first question is formulated too narrowly, and should also deal with the question whether it was discriminatory for Regulation No 663/74 of the Council to restrict the application of the corrective amount to certain milk products.

In this situation, mere interpretation of the judgment cannot but run the risk of giving rise to further difficulties as to both substance and form. Therefore it seems to the Commission that the proper way of eliminating the uncertainties is to complete the judgment given in Case 28/76 by adding to it any findings relating to discrimination which may appear appropriate.

The second question

The Commission emphasizes, purely incidentally, that at all events the provisions of the second subparagraph of Article 40 (3) of the Treaty create individual rights where a directly applicable provision of secondary Community law is contrary to them and is consequently void or invalid. This would be the case in the main action if it were to be found that the failure to apply the corrective amount to the product in question breached the principle of non-discrimination.

The third question

The Commission emphasizes, also incidentally, that the Finanzgericht referred the question of discrimination to the Court in the first reference for a preliminary ruling: consequently it no longer has any power to decide that question of law arbitrarily. Otherwise, there would be a risk that, after referring a case to the Court for a preliminary ruling and after the preliminary ruling had been given, a national court might not follow the ruling in its judgment.

At Milac's request, the file of the aforesaid Case 28/76 was joined to the file of the present case.

At the hearing on 25 May 1978, Mr Ehle, Rechtsanwalt of Cologne, appeared for Milac, B. Schloh, acting as Agent, for the Council and P. Gilsdorf, acting as Agent, for the Commission.

The Advocate General delivered his opinion at the hearing on 14 June 1978.

## Decision

1 By an order of 29 September 1977, which was received at the Court on 25 January 1978, the Finanzgericht Baden-Württemberg, pursuant to Article 177 of the EEC Treaty, submitted three questions for a preliminary ruling on the validity of Regulation (EEC) No 725/74 of the Commission of 29 March 1974 altering the monetary compensatory amounts (Official Journal 1974, L 89, p. 1) and the interpretation of the second subparagraph of Article 40 (3) of the EEC Treaty.

2 These questions were raised in the course of a case concerning the calculation of monetary compensatory amounts and of the corrective amount applicable to imports of unsweetened whole-milk powder having a fat content between 9.6% and 24.5% by weight from France into the Federal Republic of Germany between 26 June and 14 August 1974 carried out by the plaintiff in the main action. The competent customs office, the defendant in the main action, classified the product under subheading 04.02 A II b 2 of the Common Customs Tariff and, pursuant to Regulation No 725/74, charged compensatory amounts at the rate of DM 25.74 as the basic amount plus a supplementary amount of DM 0.91 for every additional 1% of fat content per 100 kg net weight.

3 In the course of the same main action, by an order of 3 December 1975 the Finanzgericht referred to the Court, pursuant to Article 177 of the EEC Treaty, two questions for a preliminary ruling on the interpretation and validity of Regulation No 725/74 (Case 28/76 *Milac).* The questions submitted by that order were as follows:

"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 2 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?"

4 On the grounds stated in its judgment of 23 November 1976 (Case 28/76 [1976] ECR 1639), the Court gave the following answer to the first question:

"The combined provisions of Article 1 of Regulation (EEC) No 974/71, Article 1 of Regulation (EEC) No 218/74 and Part 5 of Annex I to that regulation in the version contained in Regulation (EEC) No 725/74 and applicable to powdered milk under 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 units of account or less where the fat content by weight is in excess of 3%."

5 In its order for reference the Finanzgericht explained the scope of the second question by stating that it might be asked whether the monetary compensatory amounts charged on the imports of milk powder pursuant to Regulation (EEC) No 725/74 of the Commission were within the scope of the authorization contained in Regulation (EEC) No 974/71 of the Council (Official Journal, English Special Edition 1971 (I), p. 257) and were compatible with the aims of that regulation, but did not ask whether the provisions of the regulation constituted discrimination within the meaning of Article 40 (3) of the Treaty.

6 In its aforementioned judgment, the Court answered the second question as follows:

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

7 Whilst, in the course of the proceedings, the plaintiff in the main action had alleged that there was discrimination within the meaning of Article 40 (3) of the Treaty, the answer given by the Court referred only to the terms of the second question as submitted by the Finanzgericht, that is to say to the compatibility of Regulation No 725/74 with the basic enabling provision, namely Regulation No 974/71 of the Council.

8 Taking the view that in order to give judgment in the main action it also needed to know whether the provisions of the regulation in question had been adopted in breach of the principle of non-discrimination laid down in Article 40 (3) of the Treaty, the Finanzgericht has further referred the following questions to the Court:

"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 purposes 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?

9 The three questions should be dealt with together.

10 Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) provides that each year there shall be fixed a target price for milk and intervention prices — designed to assist in achieving the target price of milk — for certain products processed from milk: butter, skimmed-milk powder and certain cheeses.

11 Article 1 (2) of Regulation No 974/71 of the Council provides that the products for which compensatory amounts may be charged on imports from Member States and third countries or granted on exports to Member States and third countries shall be:

"(a) products covered by intervention arrangements under the common organization of agricultural markets;

(b) products whose price depends on the price of the products referred to under (a) and which are governed by the common organization of markets".

For the products referred to in subparagraph (b), Article 2 (2) of that regulation provides that "the compensatory amounts shall be equal to the

incidence, on the prices of the product concerned, of the application of the compensatory amount to the prices of the product ... on which they depend".

12 The particular situation obtaining in the certain Member States did not permit the application of a uniform intervention price for skimmed-milk powder and therefore Article 2 of Regulation No 1188/73 of the Council of 8 May 1973 fixing the target price for milk and the intervention prices for butter, skimmed-milk powder and Grana Padano and Parmigiano Reggiano cheeses for the 1973/74 milk year (Official Journal 1973, L 122, p. 1) laid down a corrective amount of 2 units of account per 100 kg to reduce the intervention price at which the intervention agencies in Belgium, Germany, Luxembourg and the Netherlands would buy in skimmed-milk powder and provided for the application of this corrective amount to the product in question in trade between each Member State referred to above and the other Member States and third countries.

13 Regulation No. 663/74 of the Council of 28 March 1974 fixing the prices for the 1974/75 milk year (Official Journal 1974, L 85, p. 52) again increased the target price for milk, maintained the intervention price for butter in the original Member States (which had been reduced for the 1973/74 milk year) and increased the intervention price for skimmed-milk powder.

14 The fifth recital of that regulation states:" ... the particular situation obtaining in certain Member States at present does not permit the application of a uniform intervention price for skimmed-milk powder; ... it is therefore necessary to apply a corrective factor to the aforesaid price". The sixth recital states: "... in order to ensure that this corrective factor affects market prices in the said Member States without leading to distortions of competition it is necessary to compensate for price differences occurring in trade in skimmed-milk powder".

15 Article 40 (3) of the Treaty provides that any common price policy shall be based on common criteria and uniform methods of calculation.

16 In its order of 3 December 1975, the Finanzgericht had expressed doubts as to whether the intervention price for skimmed-milk powder actually applied in Germany was compatible with the objectives of the organization of the milk market, and had drawn the attention of the Court to the preamble to Regulation No 663/74 of the Council which, according to the Finanzgericht, gives no legal justification for the difference in treatment resulting

from the provisions of Article 3 of the regulation but merely states that the particular situation obtaining in certain Member States at present does not permit the application of a uniform intervention price for skimmed-milk powder and that it is therefore necessary to apply a corrective factor to the aforesaid price. Nevertheless, the Finanzgericht had not raised any question concerning the legality of that provision but, for the questions which it referred to the Court, had started out from the assumption that the different intervention prices were lawful. In its written observations in Case 28/76, the plaintiff in the main action had also stated that the question whether the introduction of different intervention prices was compatible with the common organization of the milk market was not the subject of the reference for a preliminary ruling, and that it could be assumed that different intervention prices were lawful.

17 However, it should be noted that owing to the revaluation of certain national currencies, in particular that of the Federal Republic of Germany, and to the devaluation of other national currencies, the unity of the intervention price expressed in units of account had been broken since March 1971, and subsequently has been only formal or notional in the Community. Although the statement of the reasons on which the Council's regulation was based was elliptical, it expressed sufficiently the Council's intention to fix a fresh intervention price for skimmed-milk powder which in real terms would be as uniform as possible. The provisions of Article 3 of Regulation No 663/74, which were adopted in order that intervention prices might be fixed at a uniform level in real terms, are not incompatible either with the provisions of Regulation No 805/68 of the Council or with the provisions of Article 40 (3) of the Treaty.

18 As the Court has already ruled in its judgment of 2 July 1974 (Case 153/73 *Holtz & Willemsen* [1974] ECR 675), the objectives referred to in Article 40 of the Treaty, that is, the establishment of a common agricultural policy and a common organization of agricultural markets, presuppose the adoption of common rules and criteria for producers and consumers of agricultural products and the consequent exclusion of any discrimination based on nationality or locality.

In this light the various factors in the common organization of the markets, protective measures, aids, subsidies, and the like may be distinguished according to the areas and other conditions of production or consumption only in terms of criteria of an objective nature which ensure a proportionate distribution of advantages and disadvantages for those concerned without distinguishing between the territory of Member States. Therefore the principle of non-discrimination between producers or consumers within the Community is one of the fundamental principles of the Treaty which must

be observed by any court. Consequently it is necessary to consider the compatibility of the provisions of the regulation at issue with that principle.

19 Article 3 of Regulation No 663/74 of the Council provided that, in trade between each of the Member States referred to in paragraph (1) and the other Member States and third countries, the corrective amount was to be applied only to "the product in question", that is to say skimmed-milk powder. In an annex to Regulation No 712/74 setting out the methods of application for Article 3 of Regulation No 663/74, the Commission fixed the corrective amounts applicable to milk of a fat content not exceeding 3% by weight and to certain kinds of forage.

Article 2 of that regulation provided that the monetary compensatory amounts fixed in accordance with Regulation No 974/71 were to reduced by the amounts fixed in the annex. In Regulation No 725/74 the Commission fixed new rates for the monetary compensatory amounts to be applied *inter alia* to milk and milk products. That regulation did not provide for any specific reduction of the monetary compensatory amounts to be applied in Germany to milk powder having a fat content in excess of 3% by weight.

20 In the previous case, 28/76, the plaintiff in the main action had claimed that Regulation No 725/74 was to be interpreted as meaning that the corrective amount referred to in Regulation No 663/74 of the Council must be applied in all circumstances, at least in so far as milk powder coming within tariff subheading 04.02 A II b 2 of the Common Customs Tariff was concerned.

21 In its judgment of 23 November 1976 the Court dismissed that interpretation of the regulation at issue.

22 As regards the questions submitted in this case, the plaintiff in the main action claims that Regulation No 725/74, and possibly Regulations No 663/74 of the Council and No 712/74 of the Commission, are unlawful for breach of the principle of non-discrimination laid down in Article 40 (3) of the Treaty. In support of this argument it alleges that the failure to apply a corrective amount to whole-milk powder causes distortions of competition in the milk market. It claims that purchasers of whole-milk powder were able to obtain that product in Belgium, the Netherlands and in Germany at a price 2 units of account per 100 kg lower than the price prevailing in France and that there is no appreciable difference between the market for whole-milk powder and the market for skimmed-milk powder. It states further that at the time in question the chocolate and ice-cream industry

changed over from using whole-milk powder to using skimmed-milk powder supplemented by butter-fat.

23 On the other hand, the Commission is of the view that the users of whole-milk powder and of skimmed-milk powder are different: skimmed-milk powder is used for making soups and dietetic foodstuffs and for making certain kinds of forage, whereas whole-milk powder is used by the chocolate and ice-cream industry. The Commission states that whole-milk powder and skimmed-milk powder are not usually competing products, and that if at the time in question the chocolate and ice-cream industry had begun to substitute skimmed-milk powder and butter-fat for whole-milk powder, the reason for that substitution is not to be found in the failure to apply a corrective amount to whole-milk powder but in the relatively low price of butter, since the intervention price for butter had not been increased for the milk year 1974/75 and since intervention butter was at that time being offered to the cake-making and ice-cream industries at a particularly favourable rate.

24 The principle of non-discrimination laid down in Article 40 (3) of the Treaty does not prohibit different treatment of products which are not identical, unless it results in discrimination between producers or between consumers within the Community.

25 The plaintiff has not shown what constitutes the discrimination alleged to result from the provisions at issue, either as regards producers or as regards consumers within the Community. As to the allegation by the plaintiff in the main action to the effect that purchasers of whole-milk powder were able to obtain that product in Belgium, the Netherlands or Germany at a price 2 units of account per 100 kg lower than the price prevailing in France, that allegation is not based on any comparison of actual market prices in the light of actual rates of exchange, and corresponds only to a purely theoretical deduction from the provisions of the regulations themselves. The statistics supplied by the Commission show that even in the Federal Republic of Germany, where the corrective amount was not applied to whole-milk powder, production of that product declined sharply at the time in question. Consequently, it cannot be concluded that the level of imports into the Federal Republic of Germany of whole-milk powder from France was appreciably affected by the failure to apply the corrective amount.

26 As to the complaint of the plaintiff in the main action concerning the substitution of skimmed-milk powder supplemented by butter-fat for whole-milk powder, it is to be noted that the argument concerning "substitution"

confirms the Commission's statement that they are two different products which are not usually in competition with one another. Even if it were established that the provisions at issue were the cause of that substitution, that fact cannot be considered in itself as constituting discrimination either between producers or between consumers within the Community within the meaning of Article 40 of the Treaty.

27 The answer should therefore be that consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulation No 725/74, having regard to Article 40 (3) of the EEC Treaty.

## Costs

28 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and as these proceedings are, 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, costs are a matter for that court.

On those grounds,

## THE COURT

in answer to the questions referred to it by the Finanzgericht Baden-Württemberg by an order of 29 September 1977 hereby rules:

**Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulation No 725/74, having regard to the provisions of Article 40 (3) of the EEC Treaty.**

Kutscher Sørensen Donner

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 13 July 1978.

A. Van Houtte
Registrar

H. Kutscher
President