

of domestic products. That is in particular the case of national price-freeze rules which, by preventing increases in the prices of imported products from being passed on in selling prices, freeze prices at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the products in question into the Member State concerned can do so only at a loss or, in the light of the level of the frozen prices of national products, are induced to give preference to the latter.

6. Having regard to its material sphere of application, Article 85 of the EEC Treaty does not relate to national price-freeze rules.

If the application of such rules by a Member State to products subject to a common organization of the market contravenes the principle laid down in the second paragraph of Article 5 of the Treaty by jeopardizing the objectives or the functioning of that common organization the assessment of the compatibility of those rules with Community law does not depend on the provisions of Article 85 of the Treaty but rather on the provisions governing the said organization.

In Case 5/79,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel, Rouen (Criminal Chamber), for a preliminary ruling in the proceedings pending before that court between

PROCUREUR GÉNÉRAL AT THE COUR D'APPEL, on the one hand, and

HANS BUYS, HAN PESCH, YVES DULLIEUX and DENKAVIT FRANCE S.À.R.L. on the other,

on the interpretation of Regulation (EEC) 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), of Regulation No 804/76 of 7 April 1976 (Official Journal L 93, p. 22) and of Regulation No 974/71 of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257) as well as of Articles 30 to 34, 5 and 85 of the EEC Treaty,

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

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. Order No 76-86 P of 22 September 1976 on prices at production level and at the various stages of distribution of all products effected a general price freeze in France until 31 December of the same year: the level of prices was not to exceed that reached on 15 September 1976.

In the terms of Article 2 of the order the measures freezing prices did not affect "fresh agricultural and fisheries products". The scope of this exception was explained in two press notices dated 23 September and 1 October 1976 relating to the application of these measures.

These press notices stated that:

— *At production level* fresh agricultural products were exempted from the freeze and, as regards other agricultural products, those whose prices were governed by decisions adopted

within the framework of the EEC agricultural policy were also exempted;

— *At distribution level* the system differed according to two categories of products:

(a) As regards fresh agricultural and fisheries products distributors were able to maintain the absolute value of the margins in effect at the date of the price freeze. Distributors could thus add to the sales prices applied at that date increases in producer prices which subsequently took place (and, for imported products, increases in c.i.f. prices free at frontier), so as to maintain the absolute value of the margin in effect on 15 September 1976. On the other hand they were required to allow their customers to benefit from any reductions which might take place in supply prices as their right to maintain the margin of profit in force on

15 September 1976 did not include that of increasing the margin owing to such reductions;

- (b) As regards the other agricultural products subject to the market rules of the Community such as appear on List II annexed to the press notice, their prices were also excluded from the area of application of the aforementioned ministerial order at the wholesale stage. They were on the contrary subject to the price freeze at the later stages of distribution.

Milk powder appeared among the products on List II. Milk-feed products were not mentioned on that list.

2. Denkavit France, S.à.r.l., a producer of animal feeding-stuffs, put on sale in September and October 1976 six milk-feed products for calves containing a high percentage of milk products, in particular milk powder.

Those products were put on sale at prices prohibited by the order of 22 September 1976 and criminal proceedings were commenced against the directors of the company, Hans Buys, Han Pesch and Yves Dullieux, before the Tribunal de Grande Instance, Rouen. By a decision of 12 May 1978, the court acquitted the three accused of the charge raised against them.

The Procureur Général [Public Prosecutor] at the Cour d'Appel, Rouen, appealed against that decision.

The Cour d'Appel, Rouen, took the view that:

- Community law has precedence over national law and must be applied by national courts;

- A decision as to whether the prosecutions in question are justified involves an assessment of the validity of the price freeze order, No 76-86 P of 22 September 1976, in the light of Community law.

The court therefore decided by a judgment of 13 December 1978 to stay the proceedings and to refer the following questions to the Court of Justice in pursuance of Article 177 of the Treaty:

1. As regards the fixing of prices at the production or wholesale stages, must milk-feed products for calves of the nature and composition stated above be included among the products subject to the rules of the common organization of the agricultural markets? In particular, do they come either within the definition of milk products (Article 1 of Regulation No 804/68 of 27 June 1968) or within that of animal feeding-stuffs (Article 4 of Regulation No 990/72 as amended by Regulation No 804/76 of 7 April 1976) or within any other class of agricultural products subject to Community legislation under Article 38 of the Treaty of Rome?
2. Are such feeds subject to the compensatory amounts provided for in Regulation No 974/71 of 12 May 1971, and if so does this in itself mean that they are subject to the common organization of the markets under Article 1 (1) of the said regulation?

If the answers to Questions 1 and 2 are to the effect that the products in question are subject to Community legislation, the Court of Justice is requested to answer the following questions:

3. Does the common organization of the market in milk and milk products laid down in Regulation No 804/68 of 27 June 1968, either alone or in conjunction with the common organization of the market in beef and veal laid down in Regulation No 805/68, prohibit Member States from applying national price freeze rules to the milk-feed products for calves defined above?
4. Do the rules on the free movement of goods laid down in Articles 30 to 34 of the Treaty of Rome, and more particularly Article 22 of Regulation No 804/68 as regards milk products, prohibit the application to the said products of national price freeze rules which prevent increases in the purchase price of raw materials or finished products from being passed on in selling prices?
5. Does the common organization of the market in milk products (Regulation No 804/68) prohibit Member States from applying national price freeze rules which do not contain special provisions for agricultural products governed by decisions of the EEC?
6. Do the combined provisions of Articles 5 and 85 of the Treaty of Rome prohibit Member States from applying national rules freezing the prices of products subject to Community legislation?

3. A copy of the judgment in question reached the Court on 3 January 1979.

The accused parties, represented by G. M. Ubertazzi and F. Capelli of the Milan Bar, the French Government, represented by M. Daudelot, the Secretary General of the inter-

departmental committee for questions of European economic co-operation, acting as Agent, and the Commission of the European Communities, represented by J. C. Séché, Legal Adviser to the Commission, and B. Hoff-Nielsen, a member of the Commission's Legal Department, acting as Agents, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure after putting a written question to the Commission of the European Communities.

II — Written observations submitted in pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

A — Observations of the accused parties

So as to reply to *Question 1*, Buys, Pesch, Dullieux and Denkavit France S.à.r.l., the accused parties in the main proceedings, first of all consider the composition of the products in dispute which, contrary to what has been recorded by the court of reference, is as follows:

— skimmed-milk powder: 60-65 %

— whey powder: 12-20 %

— maize starch: 4-7 %

— fats: 15-20 %

— additives: 0.3 %.

All those raw materials, except for the additives, are agricultural products subject to common organizations of the market.

By reason of their composition the milk-feed products must be classified under subheadings 23.07 B I a 3 and 23.07 B I a 4 of the Common Customs Tariff.

Since prepared animal fodder referred to in Chapter 23 of the Nomenclature of the Common Customs Tariff appears in the list which is the subject of Annex II to the EEC Treaty it should be considered as an agricultural product. It corresponds in fact to the definition of products of first-stage processing as set out by the Court of Justice in the *König* judgment, 185/73 ([1974] ECR 607). Its close economic interdependence with basic agricultural products is proved by the fact that the products in question contain 99.7 % of agricultural raw materials and that the price of these substances amounts to 85-90 % of the price of the finished product.

Milk-feed products — as agricultural products within the meaning of Article 38 (1) of the Treaty — are moreover expressly governed by the system of common organizations of the agricultural markets within the meaning of Article 40 of the Treaty, by virtue of Article 1 (g) of Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products.

It follows therefore from the foregoing considerations not only that the products in question contain products covered by a common organization of the market but also that they are themselves subject to a common organization.

Moreover, provided that they contain at least 60 % of skimmed-milk powder, they also come within the definition of

animal feedingsuffs according to Article 4 of Regulation (EEC) No 990/72 (Official Journal, English Special Edition 1972 (II), p. 428), as amended by Regulation (EEC) No 804/76.

Question 2 merges in essentials with Question 1. The applicability to a certain product of specific rules resulting from the common agricultural policy — in this case monetary compensatory amounts — confirms that the product is in fact subject to the common organization of agricultural markets.

It may be seen from Commission Regulation (EEC) No 572/76 of 15 March 1976 (Official Journal L 68, p. 5) as amended by Commission Regulation (EEC) No 2232/76 of 14 September 1976 (Official Journal L 253, p. 1) that compensatory amounts were fixed not only for the majority of raw materials used in the composition of milk feed but also for milk-feed products themselves.

The system of monetary compensatory amounts is necessarily applicable to products of first-stage processing such as milk feed which is composed as to 99.7 % of agricultural raw materials subject almost entirely to that system and containing at least 60 % skimmed-milk powder, a product for which intervention measures are laid down by Article 5 *et seq.* of the basic regulation for the milk sector, No 804/68.

This is confirmed by the fact that milk-feed products have always been subject to the system of monetary compensatory amounts since Regulation No 974/71 first came into force.

Once it has been established that the products in question are subject to the system of monetary compensatory amounts, that proves that they are "products whose price depends on the price" of products "covered by

intervention arrangements under the common organization of agricultural markets" and that they "are governed by the common organization of markets or are the subject of a specific arrangement under Article 235 of the Treaty" within the meaning of Article 1 (2) of Regulation No 974/71.

Since milk-feed products are not subject to a specific arrangement under Article 235 of the Treaty it follows irrefutably that they come under the common organization of agricultural markets.

As to *Question 3* it must be emphasized that, as is clear from the first sentence of *Question 1* and from the character of the products in question, it concerns the problem whether a national price freeze may be applied to milk-feed products *at the production and wholesale stages*.

In this connexion the case-law of the Court of Justice regarding the compatibility of national price control measures with the system of the common organizations of agricultural markets may be recalled (judgments in the cases of *Galli* 31/74; *Tasca* 65/75; *Sadam* 88-90/75 and *Dechmann* 154/77).

The conclusions to be drawn from this case-law are that:

- No unilateral intervention of a Member State in the price formation machinery for products coming under a common organization of the markets at the production and wholesale stages is compatible with Community agricultural rules;
- At the stages of retail sale and consumption, national price control rules are incompatible with the common organization only if they are of such a nature as to endanger the objectives and functioning of such an organization.

The categorical non-applicability of national price control rules in the fields covered by the common organizations of

the markets at the production and wholesale stages is moreover recognized in legal theory and even by the French Government as is clear from the written observations submitted by that government in Case 88/77 (*Minister for Fisheries v C.A. Schonenberg and Others* [1978] ECR 473).

In this case the question is of applying those principles to milk-feed products at the production stage. Those products are subject, as has been seen, to the common organization of the market in milk and milk products so that the Member States no longer have any power to intervene in the machinery for the formation of their prices.

The foregoing conclusion is all the more valid inasmuch as the common organization covering the products in question is based on a common price system.

The price level for milk-feed products is in fact decisively governed by the decisions adopted within the framework of the common agricultural policy and in particular by the common price system according to the common organization of the market in milk products.

The following facts which support that statement may be recollected:

(1) Milk-feed products are composed as to 99.7 % of agricultural raw materials, the prices of which are governed by decisions adopted within the framework of the common agricultural policy.

(2) The composition of these feeding-stuffs is — in particular as regards the most expensive raw material, that is to say, skimmed-milk powder — rigorously fixed by Community agricultural rules which make the grant of aid for the skimmed-milk powder used in animal feeding-stuffs dependent on the presence in the finished product of at least 60 %

of that raw material. The amount of that aid is so high that it would be economically impossible to give it up. Producers of milk feed thus have no opportunity to reduce the level of the prices of their finished product by adapting its composition.

(3) In consequence of the need to incorporate at least 60 % of skimmed-milk powder in milk-feed products, the intervention price for that raw material — in combination with the aid referred to above — governs the level of prices of milk feed. The intervention price was increased on 16 September 1976 (one day after the reference date for the price freeze imposed by Order No 76-86 P), which proves *a fortiori* the impossibility of national rules freezing the level of prices of products governed by that Community decision.

(4) If Community aid on the skimmed-milk powder used in animal feeding-stuffs is compared with the price of the finished product during the period in question it will be noticed that that aid is so high that the price of the finished product depends decisively upon it. The amount of the aid is fixed in accordance with the criteria of Article 2a of Regulation (EEC) No 986/68 (Official Journal, English Special Edition (I), p. 260), as amended by Regulation (EEC) No 666/74 (Official Journal L 85, p. 58) and particularly having regard to:

- The intervention price for skimmed-milk powder applicable during the milk year in question;
- The trend of the supply position for skimmed milk and skimmed-milk powder and their use in animal feeding-stuffs;
- The trend of prices for calves;
- The trend of market prices for proteins competing with skimmed-milk powder.

This system of aids therefore itself forms a Community price policy, specifically applicable to cattle feeding-stuffs having a basis of milk powder.

It is clear that a rigid national system of maximum prices is of such a nature as to "distort" an assessment of the criteria indicated above and, consequently, to affect the establishment of the amount of the Community aid in question.

(5) Milk-feed products are subject as such to the system of compensatory amounts laid down to compensate for the differences in the price level of products subject to a common organization which might have resulted between Member States following the monetary measures.

It would be precisely contrary to the purpose of that system if Member States could cause subsequent differences between the price levels of the said agricultural products in the various countries by the application of unilateral measures such as a price freeze.

(6) In trade with non-member countries import levies and export refunds are fixed for milk-feed products. That system can function well only on condition that the price formation machinery for the products concerned within the Community is not altered by the unilateral intervention of a Member State. If the position were different Community rules applicable to the sector in question within French territory would bring about distortions. Aid for milk

powder and monetary compensatory amounts would for example turn out to be too low whilst on the contrary the refunds and levies applicable to trade in the products in question with non-member countries would turn out to be too high.

As regards *Question 4* the accused parties remark that its purpose is to discover, in the event of a negative reply's being given to *Question 3*, whether a national price freeze can be compatible with the rules for the free movement of goods when it freezes not only profit margins but also freezes the level of prices at the level reached on an arbitrary date fixed by internal rules.

After recalling that all national rules capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as a quantitative restriction or a measure having equivalent effect, whether or not there exists, in the sector to which they are applied, a common organization of the markets, they consider the problem in the context of national rules on prices for the products.

In this respect they emphasize that, according to an opinion supported by the Commission during the first years of the existence of the EEC, national provisions on the prices which are applicable both to national products and to imported products do not necessarily constitute quantitative restrictions or measures having equivalent effect. Subsequently, however, the Commission took the view expressed in the case-law of the Court according to which both maximum prices which, because they are too low, oblige importers to sell at a loss and minimum prices which, because they are too high, are apt to eliminate the competitive advantage which importers might have as a result of a cost price lower than that for products manufactured abroad are

contrary to the free movement of goods even if they are applied without distinction both to national products and to foreign products.

According to that case-law which, as it was evolved in cases relating to the stages of retail trade and consumption, applies *a fortiori* to the production and wholesale stages, national price rules, so as not to impede the free movement of goods, must be limited to fixing either a maximum or a minimum margin of profit as the case may be.

It must be concluded therefore that any national price rules which apply without distinction both to national products and to imported products are incompatible with the rules of the free movement of goods inasmuch as they do not permit the variations in the purchase prices of imported products to be reflected in the sales prices of such products.

National rules of the type in question, applicable to agricultural products, are no doubt contrary to the provisions of Articles 30 to 34 of the EEC Treaty.

In fact, the different common organizations to which agricultural products are subjected lay down as a fundamental principle the system of the unity of prices throughout the Community. The absolute level of these prices and its variations are very high in relation to the profit margins of manufacturers of processed products or of wholesalers. Consequently, if the variations in the purchase prices of agricultural products could no longer be reflected in sales prices as a result of the unilateral rules of a Member State such products could no longer be imported except at a loss.

The accused company had in fact to face such a situation although its net profits

— as is usual for trade in agricultural products — formed a very low percentage (1 ½ %) of its turnover.

As emerges from a table illustrating the variations in the prices of the most important raw materials at the end of each quarter in the years 1975, 1976 and 1977, such variations were so high in comparison with Denkavit's net profit margin that the company could not refrain from recouping them by means of its sales prices if it was not to sell at a loss. The general price freeze laid down by Order No 78-76 P in fact stopped it from doing so and thus made it impossible for the company to import raw materials from other Member States in which prices were not frozen.

In the opinion of the accused parties if Question 5 were to be retained as formulated by the court of reference the question would merge with the third question and would no longer need to be considered.

To avoid this it should be understood as inquiring whether a Member State can apply a different price system to agricultural raw materials on the one hand and to products of first-stage processing on the other.

In the context of the third question it has already been proved that the prices for animal feed are governed by decisions adopted within the framework of the Community agricultural policy. However, a still more fundamental question is whether a member State can subject a product of first-stage processing containing 99.7 % of agricultural raw materials to a system of prices other than that for the raw materials themselves.

It could never be accepted under the common organization of the markets

that a Member State should institute an absolute freeze on the prices of a product of first-stage processing within the meaning of Article 38 of the Treaty without controlling the price of the raw materials. Such a practice would automatically compel the producers of animal feed to sell at a loss since the variations in the level of prices for the raw materials are considerably higher than the normal profit margins of the manufacturers and would thus endanger the objectives and functioning of the common organization in question. Since they could no longer be used in the manufacture of milk feed, the raw materials, and in particular the skimmed-milk powder, would be either exported, which would involve an alteration of patterns of trade, or else sold to the relevant intervention body.

The statement that the price system applicable to milk feed must necessarily be the same as that applicable to the agricultural raw materials is also supported by the following considerations:

- If, as Mr Advocate General Warner stated in Case 31/74 (*Galli*), a prohibition on controlling the prices of a basic product must logically imply a prohibition on controlling the prices of the derived products, *a fortiori* that conclusion is valid for a derived product which is itself governed by the common organization of the markets;
- The Community authorities use all the price control instruments which apply to the raw materials equally for milk-feed products;
- Even the consequences of a given temporary set of rules regarding a raw material have been taken into consideration by the Community

authorities for fixing compensatory amounts for milk-feed products.

With regard to *Question 6* the accused parties recall first of all that the authors of the EEC Treaty selected, amongst several possible options, that of a market economy based on the principle of free competition.

To guarantee observance of this principle on the part of undertakings, the EEC Treaty laid down a prohibition on agreements and concerted practices which might affect trade between Member States and which have "as their object or effect the prevention, restriction or distortion of competition within the Common Market".

Article 85 does not merely prohibit undertakings generally from making agreements capable of limiting competition but by way of example it adds a list of prohibited "agreements" amongst which there occur, first, agreements which "directly or indirectly fix purchase or selling prices or any other trading conditions". There is nothing surprising in that in view of the fact that it is precisely in the free determination of the price of a product that the most elementary form of competition between undertakings may be seen.

For that reason the Commission also has been particularly strict with regard to agreements having a bearing on prices, to the point of refusing its authorization to an agreement which provides simply that a producer shall pass on to his competitors the essential elements of his price policy.

From a consideration of the Commission's attitude as well as of the

case-law of the Court it emerges therefore that competition is the fundamental "asset" which must be protected on the market.

A measure laying down a total price freeze at the level reached by undertakings on a given date gravely affects that "asset". It simply does not distinguish between undertakings which have adapted their own prices to market prices before the date of the freeze and those which were unable to do so, as was the case with Denavit, which had proposed to increase its prices on 20 September 1976 as a result of the increase in the prices of the raw materials used in its products. Other undertakings in the sector which may have increased their prices before 15 September 1976 (the date of the freeze) were thus enabled undeservedly to occupy an advantageous competitive position during the whole period of the price freeze.

Furthermore, observance of the prices imposed by the authorities implies the total and radical elimination of any form of rivalry and competition between undertakings. This amounts to a most serious blow, at the highest level, against competition and is the kind of occurrence against which the Commission and the Court of Justice have taken action even when it has made its appearance in much less striking ways.

One might have been tempted to object in this respect that the Community rules on competition apply only to undertakings and not to States. However, that objection is unfounded. When the Court, in its judgment in Case 40/73 (*Suiker Unie and Others*) annulled the fines inflicted by the Commission on certain Italian sugar undertakings which had been accused of restricting competition

on the Italian market, the Court limited itself to recording the state of necessity in which these undertakings were obliged to operate by reason of the Italian rules then in force, but it by no means recognized the legality of the behaviour of the Italian State,

This position is moreover confirmed by the judgment in Case 13/77 (*GB-INNO-B.M. v ATAB*) in which the Court emphasized that competition will be adversely affected even where the restriction on competition necessarily flows from rules laid down by a Member State.

Under Article 5 of the EEC Treaty therefore Member States are obliged to refrain from adopting internal rules which might have as their effect the elimination of competition between undertakings. In view of the fact that the French rules applicable in this case radically suppress competition between undertakings in the sector in question, a reply should be given in the affirmative to the question put by the court of reference.

After considering the questions on which a preliminary ruling is requested the accused parties observe that they were referred to the Court of Justice by a criminal court. The questions therefore raise the problem of the compatibility of national penal sanctions with Community law.

A system of penalties such as that laid down by the French legislation seems contrary to Community law for various reasons. It diverges in fact from the machinery by which as a rule Community law regulates the operation of the market, that is to say in particular means which do not involve price freezes and a system of penalties intended to guarantee the freeze.

The penalties laid down by French legislation are irreconcilable with

Community law in view of the fact that they produce effects capable of adversely affecting or distorting the operation of the market. They put a particular restraint on the decisions made by traders and are thus all the more contrary to the models of freedom selected by Community law. It may be seen from the case-law of the Court of Justice that Member States, whilst they may ask traders to carry out certain formalities which are not forbidden by Community law, cannot apply, in case of an infringement, anything but administrative sanctions which moreover are not of a compelling nature.

If Community law permits only the application of administrative sanctions which, further, are not forceful ones, that means that the legal "asset" protected by national rules is not particularly appreciable from the Community point of view.

Faced with the fundamental principle of freedom of competition laid down by Community law, Member States, even if they were free to regulate prices rigidly, and also under the threat of penalties, cannot adopt sanctions of such a nature as to prevent traders from observing that principle.

In conclusion, as regards the position of national criminal rules in relation to Community law, three hypotheses may be envisaged:

- The incompatibility with Community law of the national provision (civil or administrative) which forbids certain actions. In that case it is clear that the criminal rule also which provides a penalty for infringement of that provision is not applicable.
- The incompatibility with Community law of the penal provision as such. In this case, too, the internal rule cannot be applied.

- The influence of Community law as regards factors capable of supplying justification or reasons for not preferring a charge. According to legal theory the fact of having acted in conformity with a Community provision might, if such behaviour were penalized by a national provision, involve the existence of a factor capable of supplying justification (for example the exercise of a right) or, at least, a reason for not preferring a charge if the person concerned had acted in the conviction, perfectly justified by Community law, that his conduct was lawful.

Each of the three above-mentioned hypotheses might apply to this case.

B — Observations of the French Government

The *French Government* seeks to show first of all that animal milk-feed products are not subjected to price provisions in the framework of the common organization of the market in milk products and are thus not excluded from the matters to which the Ministerial Order No 76-86 P of 23 September 1976 applies.

In this connexion it observes that, although these products appear in Article 1 of Regulation No 804/68 of the Council on the common organization of the market in milk and milk products,

- They have no Community price guarantee, as an intervention price is laid down simply for the raw material (skimmed-milk powder) which forms a considerable though not a preponderant part of their composition;
- They are not subject to monetary compensatory amounts except to the

level of the incidence in their sale price of the said raw material;

- Under Regulation No 986/68 they benefit from an aid the sole purpose of which is, however, to facilitate the marketing of the surplus skimmed-milk powder.

No price guarantee in the form of an intervention price determined in the context of the common agricultural policy is thus granted to milk-feed products as such, which is explained moreover by the industrial nature of the products concerned. This nature is shown very clearly by the following considerations:

- As milk powder is itself a product of first-stage processing, milk-feed products which result in their turn from the processing of the milk powder can only constitute a product of second-stage processing;
- The extent of the added value (average 35%) shows the complexity of the processes undergone by the raw materials incorporated into the feeding-stuffs and thus shows clearly that the final product is an industrial one.

Having stated that, the French Government observes that the Member States retain without any doubt power in principle to regulate the prices of products not subject to price provisions in the context of the common organizations of the market.

The compatibility of such measures with Community law is nevertheless subject, according to the case-law of the Court of Justice, of the condition that they shall not damage the proper functioning and the objectives of the common organizations of the market.

Order No 76-86 P satisfied that condition. An analysis of Denkavit's prime costs and sale prices shows that

skimmed-milk powder, whilst constituting 60% of the raw material, represents only 38% of the sale price of the finished product, which singularly restricts the incidence of the freezing measures.

The rates for skimmed-milk powder intended for animal feeding-stuffs were not affected by the measure in question and even underwent an increase of 7% for the whole of the year 1976. The percentage of milk powder denatured during the period of the price freeze (15 September to 31 December 1976) was slightly higher than the percentages noted during the same periods in the years 1975 and 1977.

Finally, in support of that statement it may be recollected that the Commission of the European Communities also took the view in its reply to a written question from Mr Cointat, a Member of the European Parliamentary Assembly, that the French Order No 76-86 P of 23 September 1976 had not affected the functioning of the common organization of the market in milk and milk products.

For these reasons the French Government suggests that the following reply should be sent to the questions put by the court of reference:

- “(1) Milk-feed products for animals are products of an industrial nature and not subject to any price provision in the context of a common organization of the markets. It was therefore perfectly legal for them to be subjected to the French rules temporarily freezing industrial prices.
- (2) The price freeze for milk-feed products laid down by Order 76-86 P of 23 September 1976 did not run counter to either the objectives or the functioning of the common

organization of the market in milk products.”

C — Observations of the Commission of the European Communities

After recalling the essential aspects of the common organization of the market in milk and milk products, and in particular Community rules determining the price formation of milk-feed products for cattle, the Commission considers the questions put to the Court of Justice by the court of reference.

As regards *Question 1* it remarks that an affirmative reply would allow the Court to give its views on the compatibility of the price freeze measure adopted by the national authorities with the common organization of the market under which the products in dispute are said to come.

In its opinion an affirmative answer is necessary because the products in dispute are products of first-stage processing directly related to basic products within the meaning of Article 38 (1) of the EEC Treaty, in accordance with the criteria for interpretation which emerge from the case-law of the Court. In fact, the price of the basic agricultural raw materials used in the production of milk feed which is composed as to 60% of milk and as to 20% of whey) amounts to 70 to 85% of the price of the products of processing. Far from being marginal, it is therefore altogether decisive, which implies an economic interdependence between the basic products and the products of processing, irrespective of the number of operations involved in the production process. Having regard to the percentage of milk products (more than 50%) which they contain, the products in question come under the common organization of the market in milk and milk products.

To *Question 2*, in which the court of reference asks whether the fixing of monetary compensatory amounts for a product involves its being subject to a common organization of the market, the answer must be that the system which is laid down by Regulation No 974/71 is the converse: monetary compensatory amounts can be applied only to products coming under a common organization of the market. Milk-feed products for calves have always been subject to the system of compensatory amounts.

Once it has been established that the products in question are governed by the common organization of the market in milk and milk products, the question arises whether and to what extent the freezing of prices by a Member State is compatible with the rules of the common organization.

With reference to this problem, which is raised by *Question 3*, the Commission states that, in accordance with the case-law of the Court, although Member States in principle retain the power to regulate the sale prices of agricultural products, they must nevertheless refrain from any action capable of compromising the realization of the common agricultural policy.

The national price freeze measures adopted by the French Government risk, *in abstracto*, a clash with the Community price system.

First, although there is no intervention price for milk-feed products, it must not be forgotten that the intervention price for powdered milk constitutes in this case 70 to 85% of the total cost of the raw materials. If the maximum price fixed by the price freeze measure were lower than that price the Member State concerned would in fact be preventing the obtaining of a price level guaranteed by Community law.

Secondly, although it is true that Community law does not guarantee the realization of the target price, all the machinery for the organization of the markets inescapably aims at obtaining this result. However, it might be that price freeze for milk-feed products, having regard to an increase in the intervention price for skimmed-milk powder, might bring about an excessive reduction in the margin of profit of the manufacturer of these products and consequently might have an indirect incidence on the formation of the price of skimmed-milk powder and consequently on the price of the milk which, thus, could not approach the target price.

Thirdly, it is essential for the Community to be able to dispose of a part of the excess production of milk products in the manufacture of animal feeding-stuffs. This purpose could not be attained if the national price freeze were to restrain or prevent the production of milk-feed products.

Finally, having regard to the interdependence between Community prices and the fixing of refunds and levies, the national price freeze might indirectly affect trade with non-member countries.

In this case, these risks materialized, at least to some extent.

It is possible in fact to take the view that, so as to permit an increase in the price of liquid skimmed milk corresponding to the target price, the market price for skimmed-milk powder would have to be about 5% above the intervention price.

The price freeze in France occurred at a time when the price for skimmed-milk powder was between the intervention price and the presumed level of the

target price for milk. This meant that it made more difficult, on the one hand, the actual realization of the target price and, on the other hand, the sale of skimmed-milk powder in public stores.

Even if the freeze had occurred at a level above the target price for milk it would have had the same consequences. In fact as a result of the operation of the machinery of the common organization, prices tend to fall to reach at most the level of the target price, above which they can only remain for a brief period.

In these circumstances, having regard to the time-lag between the purchase of the raw material and the sale of the finished product, the freeze had the effect in this case also of prohibiting a producer who has purchased the raw material before the price rise from passing the rise on in the sale price of his products during the period in which the prices of the raw material are high.

The purpose of *Question 4* is to inquire whether the national measure in question may constitute a measure having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty.

According to the case-law of the Court the answer should be that a general price freeze at an absolute level which completely excludes the passing on in sale prices of the increase in purchase prices of the raw materials or finished products does in fact come within that concept, since it tends to abolish or restrict the opportunities for import both for the finished products and for the raw materials to be used in the manufacture of such products.

As regards *Question 5* it may be noted that the French measures do in fact lay down special provisions for agricultural products the prices of which are

governed by decisions adopted within the context of the common agricultural policy and that it is for the court of reference to determine whether the internal administrative distinctions made in this respect are in conformity with the order bringing the price freeze into effect.

Question 6, asking whether the national measures in question are compatible with the combined provisions of Articles 5 and 85 of the EEC Treaty, does not call for any reply in this case. In fact, the question of the compatibility with Community law of a national measure must above all be assessed, if there is a common organization of the market for a given product, with regard to that organization and to the rules relating to the free movement of goods. The incompatibility of the national measures in question with Community law is already clear from the answers proposed to Questions 3 and 4, so that *Question 6* has lost its purpose.

Having regard to the observations set out above, the Commission proposes that the following answers should be given to the questions referred to the Court:

"1. Milk-feed products for calves coming under tariff subheading 23.07 B and containing more than 50% of milk products are subject to Regulation No 804/68 on the common organization of the market in milk and milk products.

The Community aid provided for in Article 10 of the regulation referred to above is granted to the extent to which such milk-feed products contain *inter alia* at least 60% of skimmed-milk powder.

2. For the marketing year 1976/1977 milk-feed products coming under Regulation No 804/68 were subject to the monetary compensatory

amounts fixed by Regulation No 572/76.

3. Regulation No 804/68 must be interpreted as prohibiting national rules imposing a price freeze on milk-feed products for calves at the production and distribution stages since they endanger the objectives or the functioning of that common organization of the market, in particular of its price rules.
4. Article 30 of the EEC Treaty and Article 22 of Regulation No 804/68 must be interpreted as prohibiting unilateral rules by a Member State to freeze prices which exclude the possibility of passing on, in the sale

price for milk-feed products, the increase in the purchase prices of the raw materials or of the finished products imported from another Member State.

III — Oral procedure

The accused parties and the Commission of the European Communities presented oral argument at the hearing on 3 July 1979.

The Advocate General delivered his opinion at the hearing on 19 September 1979.

Decision

- 1 By judgment of 13 December 1978, which was received at the Court on 3 January 1979, the Cour d'Appel, Rouen, referred to the Court under Article 177 of the EEC Treaty certain questions relating to the interpretation of Regulation (EEC) 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), of Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257) as well as of Articles 5, 30 to 34 and 85 of the EEC Treaty.
- 2 Those questions arose within the context of criminal proceedings brought before the French courts by the Ministère Public against four directors of Denkavit France S.à.r.l. and against the company itself, a producer of animal feeding-stuffs, regarded as civilly liable, who are accused of having infringed Ministerial Order No 76-86/P of 22 September 1976, published in the Bulletin Officiel des Services des Prix on 23 September 1976.

- 3 Article 1 of the aforesaid ministerial order provides that "until 31 December 1976 prices, inclusive of all taxes, charged for products of all kinds are not to exceed, either at the production stage or at the various stages of distribution, the prices lawfully being charged for those products of 15 September 1976 or, failing the latter, on the nearest previous date". Article 2 provides that "the provisions of Article 1 shall not apply to fresh agricultural and fisheries products".
- 4 Guidance as to the scope of the ministerial order in question and the manner in which it was to be put into effect was provided by two press notices published in the Bulletin des Services des Prix on 23 September 1976 and 1 October 1976 respectively.
- 5 As regards in particular the application of the freeze on prices at the production stage, the first press notice explains that *inter alia* Article 1 of Order No 76-86/P does not apply to producer prices

"Of fresh agricultural and fisheries products (cf. Article 2 of the order) and of other products whose producer price is governed by decisions adopted within the framework of the agricultural policy of the European Economic Community.

The term agricultural and fisheries products shall apply only to those products which have not been processed. If such products do not retain their original individual character or are processed in a manner which does not correspond to normal or habitual agricultural practices or which takes place at an industrial or commercial stage they thereby lose their initial character
...

However, as regards milk products in particular it will as an exception be accepted that butter, cream and cheese, whose producer prices could be freely determined at the date of the entry into force of the order, remain agricultural products even after processing or refining. On the other hand, products such as milk powder, concentrated milk and ice cream are industrial in nature, as are manufactured products such as yoghurt, cream cheese and processed cheese".

- 6 The second press notice sets out in particular the detailed rules for the application of the aforesaid price system at the distribution level and distinguishes between, on the one hand, “fresh agricultural and fisheries products” and, on the other, “other agricultural products subject to the market rules of the Community”, such as are defined in List II of the annex to that notice, which refers to “cereals (except for the residues of husking)” and “milk powder in bulk”. As regards the products on that list it is specified that they “are excluded in implementation of the Community regulations from the scope of Ministerial Order No 76-86/P at both the production and the wholesale stages”, whilst at other stages of distribution they remain subject to the “freeze” introduced by that order.
- 7 The file shows that on 20 September 1976 the accused company increased the prices of its six milk-feed products and that it maintained that increase on sales effected during September and October 1976, after the entry into force of Ministerial Order No 76-86/P. In the course of the present proceedings the accused in the main proceedings have stated — and the point is not contested — that Denkavit delivers the animal feeding-stuffs which it produces exclusively to wholesalers, who resell them to farmers. Furthermore, it is clear from the information as to the composition of those products given in the order for reference together with the details provided in the present proceedings by the accused in the main proceedings and the French Government that the products in question contain a high level of milk products, in particular of milk powder: the level mentioned is 60% according to the order for reference, 60 to 65% according to the accused in the main proceedings and 60% according to the French Government, which, however, refers to a level of 45% skimmed-milk powder as regards the “Denkavit élevage” products. The remaining proportion of the products in question consists of other agricultural products, listed in Annex II to the EEC Treaty, as well as minute quantities of various additives.
- 8 The accused in the main proceedings have maintained that with the exception of the additives each component of the products in question is covered by a common organization of the agricultural markets, in particular that established in the sector of milk and milk products by Regulation No 804/68. In those circumstances price-freezing measures such as those introduced by Ministerial Order No 78-86/P of 22 September 1976 cannot

apply to such products without infringing the Community rules to which they are subject and at the same time the rules in the Treaty relating to the free movement of goods and the system of competition within the common market. On the other hand, the Ministère Public has maintained that milk-feed products for calves have never been regarded as falling within the category of products whose prices are governed by Community provisions, that national price rules are lawful in so far as they do not disturb the formation of the prices of the raw materials used in the products concerned and that milk-feed products for calves must be regarded as products of second-stage processing.

(a) The scope of Regulation No 804/68

- 4 In order to obtain clarification of those points the Cour d'Appel, Rouen, has asked the Court to state first of all whether, "as regards the fixing of prices at the production or wholesale stages", milk-feed products for calves of the nature and composition of the products in dispute are "subject to the rules of the common organization of the agricultural markets" and, in particular, whether they come "either within the definition of milk products (Article 1 of Regulation No 804/68 of 27 June 1968) or within that of animal feeding-stuffs (Article 4 of Regulation No 990/72 as amended by Regulation No. 804/76 of 7 April 1976) or within any other class of agricultural products subject to Community legislation under Article 38 of the Treaty of Rome".
- 12 Article 1 (b) of Regulation No 804/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 176) provides that the common organization of the market in milk and milk products covers products such as "Milk and cream, preserved, concentrated or sweetened" of heading 04.02 of the Common Customs Tariff which, under subheadings A II and B I, includes "Milk and cream, in powder". In addition, Article 1 (g) extends the scope of the said common organization of the market to "preparations of a kind used in animal feeding" containing the aforementioned products.
- 11 As has previously been established the products in dispute are "preparations of a kind used in animal feeding" having a high milk-powder content and otherwise containing other agricultural products, the majority of which are

covered by Regulation No 804/68. In those circumstances it follows that having regard to their composition and the aforementioned provisions of Article 1 (b) and (g) of Regulation No 804/68 those feeding-stuffs fall within the area of application of the said regulation and are thereby subject to the common organization of the market in milk and milk products.

(b) The applicability of Regulation No 990/72

- 12 The fact that those products are subject to the common organization of the market in milk and milk products does not necessarily preclude the application to them of Regulation No 990/72 of the Commission of 15 May 1972 (Official Journal, English Special Edition 1972 (II), p. 428). That regulation is, in fact, only a measure adopted in implementation of Regulation No 986/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 260). Since, as is also shown by its preamble, that latter regulation "laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed" occurs within the context of Regulation No 804/68 and regulates certain specific machinery of the common organization of the market in milk and milk products it follows that, as a measure adopted in implementation of Regulation No 986/68, Regulation No 990/72 also forms part of the rules governing the common organization of the market in milk and milk products. Its application to milk products therefore does not preclude the application of Regulation No 804/68 which established that common organization but, on the contrary, assumes that those products are subject to the latter regulation.
- 13 For all those reasons the reply to the first question must be that milk-feed products for calves of the nature and composition referred to in the main proceedings are milk products within the meaning of Article 1 of Regulation No 804/68 of the Council of 27 June 1968 and are therefore subject to the common organization of the market established by that regulation.

(c) The applicability of Regulation No 974/71

- 14 The national court then asks the Court to state whether feeding-stuffs such as the products in dispute are subject to the compensatory amounts provided for in Regulation No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257) and if so whether this in

itself means that they are subject to the common organization of the markets under Article 1 (1) of the said regulation.

- 15 Article 1 (2) (a) and (b) of Regulation No 974/71 provides that the system of monetary compensatory amounts provided for in Article 1 (1) shall apply *inter alia*

“(a) to products covered by intervention arrangements under the common organization or agricultural markets;

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

It is clear from that provision that the fact that agricultural products are subject to the common organization of the markets is not a consequence of the application to them of the system of monetary compensatory amounts established by Regulation No 974/71 but on the contrary is in principle one of the conditions precedent for the application of that system. Since, as has already been established, feeding-stuffs of the nature of those in dispute are governed by the common organization of the market in milk and milk products established by Regulation No 804/68 it follows from that provision that the system of monetary compensatory amounts established by Regulation No 974/71 is also applicable to them.

As regards the 1976-1977 marketing year — during which Ministerial Order No 76-86/P of 22 September 1976 was published — the compensatory amounts applicable to such products were fixed by Commission Regulation No 572/76 of 15 March 1976 (Official Journal L 68, p. 5) which was supplemented as regards France by Commission Regulation No 652/76 of 24 March 1976 (Official Journal L 79, p. 4).

- 16 In the light of those factors the answer to the second question must be that the milk-feed products in question were subject, at the time of the application of the disputed national price-freeze measures, to the system of monetary compensatory amounts established by Regulation No 974/71.

(d) The scope of Regulation No 804/68 in relation to national price-control measures

- 17 In its third question the national court asks the Court to state whether the common organization of the market in milk and milk products laid down in Regulation No 804/68 of 27 June 1968, either alone or in conjunction with the common organization of the market in beef and veal laid down in Regulation No 805/68, prohibit Member States from applying national price-freeze rules to the milk-feed products for calves in question. In its fifth question the national court also asks whether the common organization of the market referred to above prohibits Member States from applying national price-freeze rules which do not contain special provisions for agricultural products governed by decisions adopted by the Community.

Since the content of those two questions is related they must be considered together.

- 18 The Court has consistently held (cf. judgment of 23 January 1975 in Case 31/74, *Galli* [1975] ECR 47; judgments of 26 February 1976 in Case 65/75, *Tasca* [1976] ECR 291, and in Joined Cases 88 to 90/75, *SADAM* [1976] ECR 323; judgment of 29 June 1978 in Case 154/77, *Dechmann* [1978] ECR 1573, and judgment of 12 July 1979 in Case 223/78, *Grosoli* [1979] ECR) that in sectors covered by a common organization of the market — even more so when that organization is based on a common price system — Member States can no longer interfere through national provisions taken unilaterally in the machinery of price formation as established under the common organization. That case-law has made clear that the provisions of a Community agricultural regulation establishing a price system which is applicable at the production and wholesale stages leave Member States free — without prejudice to other provisions of the Treaty — to take the appropriate measures relating to price formation at the retail and consumption stages, on condition that they do not jeopardize the aims or functioning of the common organization of the market in question.

14 In the same case-law the Court has also stated that in every case it is for the national court to decide whether the national measures taken in relation to prices which it is called upon to consider produce such effects as to make them incompatible with the Community provisions on the matter. In that connexion the particular nature of the organization of the markets in the sector in question must be taken into account.

20 As regards the particular characteristics of the common organization of the market in milk and milk products set up by Regulation No 804/68 it must be pointed out that that organization involves a price system and a trading system. The price system is based upon a "target price" for milk, a "threshold price" for certain milk products, including the feed preparations referred to under subheading 23.07 B of the Common Customs Tariff, and an "intervention price", applying in particular to butter and skimmed-milk powder, which are fixed annually by the Council for the following milk year. In addition, provision is made for the adoption of intervention measures by the said common organization if market prices fall to a level which does not allow the target price to be reached. Such measures include *inter alia* aid for private storage and, in particular, the granting of aid "for skimmed milk and skimmed-milk powder which are produced in the Community and are for use as feeding-stuffs if these products reach certain standards" (Regulation No 804/68, Article 10 (1)). As is shown by Article 2 a of Regulation No 986/68 of the Council of 15 July 1968, which was added by Regulation No 666/74 of the Council of 28 March 1974 (Official Journal L 85, p. 58), such aid shall be fixed each year taking account *inter alia* of the intervention price and trends in the market prices of competing products compared with that of skimmed-milk powder.

Finally, the trading system provides for a system of levies, fixed on the basis of the threshold price, which covers feeding-stuffs, and for the grant of refund aid, also for preserved milk and cream. Furthermore, as has already been established, milk products, including feeding-stuffs, are subject to the system of monetary compensatory amounts.

21 The constituent elements of that common organization show it to be based upon a system of Community prices which are closely linked to one another. The proper functioning of the common organization of the markets

presupposes that none of those prices shall be distorted, as regards the conditions under which they are formed, by the effect of measures adopted unilaterally by a Member State. It is established that with effect from 16 September 1976, that is, from the day following that on which the price freeze introduced by Ministerial Order No 76-86/P of 22 September 1976 took effect, the target price for milk and the intervention price for skimmed-milk powder were increased by Council Regulation No 558/76 of 15 March 1976 (Official Journal L 67, p. 4). In addition, Council Regulation No 560/76 of 15 March 1976 (Official Journal L 67, p. 10) also increased the threshold price for compound feeding-stuffs with effect from 16 September 1976.

- 22 The fact, pointed out by the French Government, that milk-feed products for calves do not in themselves benefit from a price guarantee in the form of an intervention price fixed within the context of the common agricultural policy cannot preclude the risk of a conflict between the national measures freezing the prices of those products and the Community rules governing the common organization of the market in milk and milk products. Although it is true that there is no intervention price for milk-feed products for calves, the intervention price fixed for milk powder is, as a result of the composition of those products, a constituent element of their price. Furthermore, the fact, emphasized by the French Government, that the national price-freeze rules concerned in this instance constitute a short-term economic contingency measure which in itself has no appreciable influence on the market in question cannot rule out their proving to be incompatible with the provisions of Community law dealing with agricultural matters, since even if it is merely a temporary contingency measure a price freeze may jeopardize the objectives and functioning of the common organization of the market in question. Finally, the distinction drawn by the said Government between those national measures which apply to raw materials subject to the common organization of the market and those which apply to preparations obtained from such materials is not decisive as regards the exclusion of all conflict between the national rules on prices and the rules governing the common organization of the market, since the raw materials and the compound products containing those materials are both covered by the common organization of the market and they are closely related as regards price.

- 23 The foregoing characteristics of the common organization of the market in milk and milk products are among those which the national court would be free to take into consideration, together with the other features of that organization, in order to decide whether national measures, such as those in dispute, imposing a price freeze at the distribution stage for products coming under such an organization jeopardize the objectives or the functioning of that organization.
- 24 The answer to the third and fifth questions must therefore be that Regulation No 804/68 of the Council of 27 June 1968 must be interpreted as prohibiting national rules, such as those referred to by the national court, imposing a price freeze at the distribution stage for milk-feed products for calves coming under the common organization of the market established by that regulation where the application of such rules endangers the objectives or the functioning of that organization, in particular of its price rules.

(c) Articles 30 to 34 of the EEC Treaty

- 25 The fourth question asks the Court whether the rules on the free movement of goods laid down in Articles 30 to 34 of the EEC Treaty, and more particularly Article 22 of Regulation No 804/68 as regards milk products, prohibit the application to the said products of national price-freeze rules which prevent increases in the purchase price of raw materials or finished products from being passed on in selling prices.
- 26 Article 30 of the EEC Treaty prohibits in trade between Member States all measures having an effect equivalent to quantitative restrictions and that prohibition is repeated in Article 22 of Regulation No 804/68 as regards the market in milk and milk products. For that purpose it is sufficient that the measures in question are likely to constitute an obstacle, directly or indirectly, actually or potentially, to imports between Member States. Although price-freeze rules applicable without distinction to domestic and imported products do not in themselves constitute a measure having an effect equivalent to a quantitative restriction, they may have such an effect, however, when prices are fixed at a level such that the sale of imported products becomes either impossible or more difficult than that of domestic

products. That is in particular the case of national price-freeze rules which, by preventing increases in the prices of imported products from being passed on in selling prices, freeze prices at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the product in question into the Member State concerned can do so only at a loss or, in the light of the level of the frozen prices of national products, are induced to give preference to the latter.

27 It is for the national court to decide whether those conditions are satisfied in this instance.

28 In the light of those considerations the reply to the fourth question must be that the rules of the free movement of goods set out in Articles 30 to 34 of the EEC Treaty prohibit the application to milk-feed products for calves coming under the common organization of the market established by Regulation No 804/68 of national price-freeze rules which exclude the possibility of passing on in selling prices the increase in the purchase prices of the raw materials or of the finished products imported from another Member State when, as a result of the freeze, prices are at such a level that the marketing of the imported products becomes either impossible or more difficult than that of national products.

(f) Articles 5 and 85 of the EEC Treaty

29 Finally, the national court asks the Court to state whether the combined provisions of Articles 5 and 85 of the EEC Treaty prohibit Member States from applying national rules freezing the prices of products subject to Community legislation.

30 The second paragraph of Article 5 of the EEC Treaty lays down the principle that the Member States shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. Article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practice" showing certain specific characteristics in

relation to the system of competition which is the aim of the Treaty. National rules freezing the prices of products subject to Community legislation which cannot be regarded as an agreement between undertakings, a decision by an association of undertakings or a concerted practice are therefore not covered by the terms of the aforementioned Article 85. If the application of such rules by a Member State to products subject to a common organization of the market contravenes the principle laid down in Article 5 of the Treaty by jeopardizing the objectives or the functioning of that common organization the assessment of the compatibility of those rules with Community law does not depend on the provisions of Article 85 of the Treaty but rather on the provisions governing the said organization.

- 31 In those circumstances it is sufficient to reply to the sixth question that having regard to its material sphere of application, Article 85 of the EEC Treaty does not relate to national price-freeze rules.

Costs

- 32 The costs incurred by the French Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings 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 referred to it by the Cour d'Appel, Rouen, Chambre Correctionnelle, by judgment of 13 December 1978, hereby rules:

1. Milk-feed products for calves of the nature and composition referred to in the main proceedings are milk products within the meaning of Article 1 of Regulation No 804/68 of the Council of 27 June 1968 and are therefore subject to the common organization of the market established by that regulation.

2. The milk-feed products in question were subject, at the time of the application of the disputed national price-freeze measures, to the system of monetary compensatory amounts established by Regulation No 974/71.
3. Regulation No 804/68 of the Council of 27 June 1968 must be interpreted as prohibiting national rules, such as those referred to by the national court, imposing a price freeze at the distribution stage for milk-feed products for calves coming under the common organization of the market established by that regulation where the application of such rules endangers the objectives or the functioning of that organization, in particular of its price rules.
4. The rules of the free movement of goods set out in Articles 30 to 34 of the EEC Treaty prohibit the application to milk-feed products for calves coming under the common organization of the market established by Regulation No 804/68 of national price-freeze rules which exclude the possibility of passing on in selling prices the increase in the purchase prices of the raw materials or of the finished products imported from another Member State when, as a result of the freeze, prices are at such a level that the marketing of the imported products becomes either impossible or more difficult than that of national products.
5. Having regard to its material sphere of application, Article 85 of the EEC Treaty does not relate to national price-freeze rules.

Kutscher

O'Keeffe

Touffait

Mertens de Wilmars

Pescatore

Mackenzie Stuart

Bosco

Delivered in open court in Luxembourg on 18 October 1979.

A. Van Houtte

Registrar

H. Kutscher

President