

- inevitably present in those feeding-stuffs either in the natural state or as residues from processing previously undergone by those feeding-stuffs or by the constituents of those feeding-stuffs. In these circumstances a substance which, because of a previous admixture, independent of the use for animal feeding, is necessarily present in one of the constituents of the feeding-stuff as a residue from the previous manufacture of another product may not be considered as an additive. The control of the presence of such substances comes within Directive No 74/63 (undesirable substances) and not within Directive No 70/524 (additives).
3. Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article. Where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive.
  4. (a) Even after the entry into force of harmonizing Directive No 74/63, the Member States have, within the context of Article 5 of that directive and subject to the material and procedural requirements laid down therein, the power provisionally to consider as undesirable certain substances which, although known and recognized when that directive was adopted, do not appear in the list annexed thereto, provided that the measures adopted apply on identical terms to both national products and to products imported from other Member States.
  - (b) Subject to the obligation not to discriminate between imported products and national products, Article 5 of Directive No 74/63 enables a Member State to fix, on a provisional basis, the maximum permitted level of a substance contained in imported feeding-stuffs made from powdered milk even though no maximum level has ever been fixed in the past either in the exporting Member State or in the importing Member State.
  - (c) Article 5 of Directive No 74/63 enables a Member State to prohibit the marketing of the products which have been found to infringe the temporary national provisions which it is empowered to adopt. For products coming from other Member States such prohibition on marketing may take the form of a prohibition on importation.

In Case 5/77

Reference to the Court under Article 177 of the EEC Treaty by the Pretura di Lodi for a preliminary ruling in the action pending before that court between

CARLO TEDESCHI

and

DENKAVIT COMMERCIALE S.R.L.

## Interveners

- Intersyndicale des Fabricants d'Aliments d'Allaitement, Paris,
- Fachverband der Futtermittelindustrie e. V., Bonn,
- Vereniging van Nederlandse Mengvoederfabrikanten, The Hague,

on the interpretation of Council Directive No 74/63/EEC of 17 December 1973 (OJ L 38/31 of 11. 2. 1974) and on the validity of Article 5 thereof,

## THE COURT

composed of: H. Kutscher, President, A.M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keefe, G. Bosco and A. Touffait, Judges,

Advocate-General: H. Mayras

Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Facts and issues

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

#### I — Facts and procedure

1. Several Community directives which aim at harmonizing national provisions intended to ensure that feeding-stuffs do not endanger animal and human health have been adopted, *inter alia* Council Directive No 70/524/EEC of 23 November 1970 (OJ, English Special

Edition 1970 (III), p. 840) concerning additives in feeding-stuffs and Council Directive No 74/63/EEC of 17 December 1973 (OJ L 38 of 11. 2. 1974, p. 31) on the fixing of maximum permitted levels for undesirable substances and products in feeding-stuffs.

2. Under Article 3 of Directive No 74/63/EEC Member States must prescribe that the undesirable substances and products listed in the annex shall be tolerated in feeding-stuffs only under the conditions and up to the maximum content therein set out. Article 7 of the directive provides that feeding-stuffs

which conform to these stipulations can no longer be subject to any other marketing restrictions as regards the presence of undesirable substances and products. Article 5 however provides a safeguard clause which reads as follows:

'1. Where a Member State considers that a maximum content fixed in the annex, or that a substance or product not listed therein, presents a danger to animal or human health, that Member State may provisionally reduce this content, fix a maximum content, or forbid the presence of that substance or product in feeding-stuffs. It shall advise the other Member States and the Commission without delay of the measures taken and at the same time give its reasons.

2. In accordance with the procedure laid down in Article 10, an immediate decision shall be made as to whether the annex should be modified. So long as no decision has been made by either the Council or the Commission the Member State may maintain the measures it has implemented.'

3. The procedure laid down in Article 10 entails a decision taken by the Commission after consultation of a Standing Committee for Feeding-stuffs. However if no opinion is delivered, or if the Commission proposes to adopt measures which are not in accordance with this opinion it must submit the proposal to the Council which must adopt the measures by a qualified majority.

If the Council has not adopted any measures within fifteen days, the Commission must adopt the measures and implement them forthwith, except where the Council has voted by a simple majority against such measures.

3. Tedeschi, the plaintiff in the main action, bought from the defendant in the main action, Denkavit, 1 000 kg of feeding-stuffs made from powdered milk

and coming from the Netherlands to be delivered in September 1976, and paid a deposit of Lit 350 000. The feeding-stuffs were not delivered because they were stopped at the Italian frontier by the public health inspector at the frontier on the basis of an urgent note from the Italian Minister for Health of 7 September 1976 prohibiting the entry of feeding-stuffs containing powdered milk or whey having a nitrate content exceeding 30 and 50 parts per million respectively (milligrammes per kilogramme). The defendant in the main action, sued by his purchaser for repayment of the deposit and for damages, and the interveners pleaded before the Pretura di Lodi that the prohibition on importation was illegal.

Since the Pretore di Lodi considered that the Community rules invoked by the parties to the main action before him did not clearly indicate the limits of the powers granted to the Member States to fix the maximum contents or prohibit new substances not mentioned in the annex to Directive No 74/63/EEC, he referred the following questions to the Court by order of 17 December 1976:

'1. Under the terms of the Community harmonizing directive, Council Directive No 74/63/EEC of 17 December 1973 (OJ L 38 of 11. 2. 1974) containing provisions intended to replace national provisions on the fixing of maximum permitted levels for undesirable substances and products in feeding-stuffs, do the Member States, after incorporating all the Community provisions into their national legal systems, still enjoy a discretionary power to consider as undesirable specific substances, in this case nitrates, which, although known and recognized when Directive No 74/63 was adopted and thus when it was incorporated into the national legal systems, were excluded from the list of undesirable substances annexed to the aforesaid directive without any of the Member

States raising objections or lodging complaints as provided for by Community law?

2. Does Article 5 of the above-mentioned Directive No 74/63, having regard to the ninth and thirteenth recitals of the preamble thereto and to Articles 7, 9 and 10 of that directive, and in the light of the provisions of Articles 30 and 36 of the Treaty of Rome, authorize a Member State, after the entry into force of the said directive and its incorporation into the national legal system of the said Member State, unilaterally to fix the maximum permitted level of a substance contained in a product from another Member State, in this case feeding-stuffs made from powdered milk, even if, in the case of this substance which, moreover, is not included in the list of undesirable substances annexed to Directive No 74/63, no maximum permitted level has ever been fixed in the past in either the provisions in force in the importing country or in the exporting country, thereby violating the standstill rule laid down in Article 31 of the Treaty and infringing upon the exclusive powers reserved to the Community institutions in the sectors coming under the common organizations of the market provided for in Articles 39, 40 *et seq.* of the Treaty?
3. Does Article 5 of the above-mentioned Directive No 74/63, having regard to the ninth and thirteenth recitals of the preamble thereto and to Articles 7, 9 and 10 of that directive, and in the light of the abovementioned provisions of Articles 30 and 36 of the Treaty of Rome, authorize a Member State, after the entry into force of the said directive and its incorporation into the national legal system of the said Member State, to prevent the importation of a product from another Member State (in this case feeding-stuffs made from powdered

milk), on the ground that this product contains a substance considered undesirable by the Member State in question, even if this substance is not included in the list of undesirable substances annexed to Community Directive No 74/63/EEC, thereby violating the prohibition on quantitative restrictions contained in Article 30 of the Treaty and infringing upon the exclusive powers reserved to the Community institutions in the sectors coming under the common organizations of the markets provided for in Articles 39, 40 *et seq.* of the Treaty?

4. If the replies to the first three questions are in the affirmative, can Article 5 of the abovementioned Directive No 74/63 be considered valid within the meaning of Article 177 of the Treaty of Rome, in the light of Article 36 of the Treaty, and of the fact that it extends the powers of the Member States beyond the bounds held to be proper by Article 36 by, in particular, permitting *inter alia* the said States (subject, moreover, to no clearly determined time-limits) to employ a provision contained in a Community directive in order to avoid the obligation to observe the directly applicable provisions in Article 30 of the Treaty relating to the prohibition of restrictions on the movement of goods within the EEC, the analogous provisions contained in the Community agricultural regulations applicable in the present case, namely, Regulations Nos 804/68, 823/68 and 2727/75, and the provisions relating to the common organization of the agricultural markets set out in Articles 39 and 40 *et seq.* of the Treaty?

The order for reference of 17 December 1976 was registered at the Court Registry on 11 January 1977.

After hearing the report of the Judge-Rapporteur and the views of the

Advocate General the Court decided that it was unnecessary to order a preparatory inquiry.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC the Council, the Commission, the Italian Government, the United Kingdom Government and the defendant and interveners in the main action submitted their written observations.

II — Observations submitted to the Court pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — *Observations submitted by the Commission*

The Commission points out that nitrates are not mentioned in the annex to Directive No 74/63/EEC. The question whether nitrates are dangerous or not was discussed on 6 September 1976, the day before the adoption of the Italian measure, within the Standing Committee for Feeding-stuffs. In its view nitrates are harmless. The Commission, before submitting a draft decision on a possible amendment of the annex to Directive No 74/63/EEC to the *Standing Committee for Feeding-stuffs* in accordance with Article 5 of the directive, requested the *Scientific Committee for Feeding-stuffs* to give its opinion; however it has not yet done so as it regards the scientific data at its disposal as either inadequate or too divergent.

On 16 September 1976 the Commission initiated a procedure under the provisions of Article 169 of the EEC Treaty against the Italian Republic at the same time expressing the opinion that the procedure for carrying out controls at the frontier was too onerous and that the maximum permitted levels had been laid down at too low a level.

The first question

According to the Commission, the object of the first question is to find out whether Member States still exercise a discretion in so far as the matters governed by the directive are concerned. It makes the point in its answer that Articles 3 and 7 of the directive make it clear that, save as otherwise expressly provided in the directive, Member States no longer have a margin of discretion relating to the listing of undesirable substances and products in feeding-stuffs and also the laying down of maximum permitted levels for these substances and products.

The second and third questions

The second and third questions are designed to determine the extent of the powers conferred upon Member States by the safeguard clause contained in Article 5 of the directive.

The aim of this clause is to deal at once with situations in which the health of humans and animals appears to be endangered because of the presence of certain substances or products in feeding-stuffs or of permitted levels previously considered tolerable. It follows that the fact — mentioned in the first and second questions — that the substance unilaterally held to be undesirable was already known when the directive was adopted and nevertheless was not mentioned in the annex is immaterial, since Article 5 concedes that evaluations made at the time of the said adoption may be called in question.

In order to know exactly how far they may be called in question the reasons for the adoption of the directive must be analysed. The effect of harmonizing national laws is that the obstacles to trade which previously resulted from differences in the national laws in this field and which were hitherto lawful are now prohibited, since the products

within the Community are, as a result of the directive, subjected from the manufacturing stage to the same requirements in this field.

Article 5 allows measures to be taken which, by way of derogation from the harmonization thus attained, restores provisionally a situation the distinctive feature of which is no more than disparity of provisions.

Therefore the answer to the second question is that Article 5 of the directive authorizes a Member State to lay down unilaterally the maximum permitted level of a substance not listed in the annex to the directive provided that it does not create an obstacle to trade which is prohibited by the Treaty and in particular by Article 30 *et seq.*, provided therefore that the maximum permitted level applies equally to domestic products and that it does not unjustifiably handicap the products of the other Member States. Article 35 of the Treaty cannot justify, in the case of the same substance, a different permitted level according to whether a product is home-produced or imported. The answer to the third question must start with the same reasoning: if the Member State can lay down the maximum permitted level of a substance it may also not allow products coming from other Member States and which do not comply with the limit to enter its territory, provided that it imposes the same limit in the manufacture of the same product in its territory.

It must however be stressed that the power granted to Member States by Article 5 is nevertheless subject to certain obligations and limited in time.

The Member State must advise the other Member States and the Commission without delay of the measures taken and at the same time state its reasons for those measures putting forward adequate guarantees. (Article 5 (1)).

The fourth question

The fourth question asks whether an affirmative answer to the first three questions must not lead to the conclusion that Article 5 of the directive is invalid because it enlarges the powers of Member States beyond the limits permitted by Article 36 of the Treaty or the regulations for the organization of the agricultural markets. According to the Commission, the interpretation of Article 5 of the directive which it proposes implies that this article complies with Articles 30 to 36 of the Treaty. Nor does the safeguard clause infringe the exclusive jurisdiction reserved to the Community institutions in the sectors covered by the common organizations of the market. The misgivings voiced in this connexion by the national court in the second, third and fourth questions are, in the Commission's view, unfounded because the Council, when it exercises its powers in the field of harmonization, is entitled to take the view that it is only possible to undertake harmonization which is incomplete or accompanied by a safeguard clause.

#### *B — Observations submitted by the Council*

Since the Council wishes to defend *in abstracto* the validity of the safeguard clause contained in Article 5 of Directive No 74/63/EEC which has become a standard clause inserted as a matter of principle in directives on the approximation of laws, it examines the function and the place of directives on the approximation of laws in the whole body of Community law.

Whereas secondary Community law is a 'first ring' encircling the central core which the Treaty can be said to represent, national laws which had to be approximated or harmonized pursuant to directives form a second ring. These harmonization measures are of a different kind from those provided for in the

articles of the Treaty prohibiting quantitative restrictions and measures having equivalent effect. They are more flexible and their purpose is to eliminate the centrifugal effect caused by the multiplicity and divergence of national laws or even the existence of a law in one Member State and the absence of parallel rules in another. Since these directives have to take account of factors other than freedom of movement they cannot meet all the requirements 'at one fell swoop'. If the safeguard clause is considered from this point of view it is found not to have any centrifugal effect destroying the objectives sought by harmonization. Although each Member State has some freedom when confronted with certain dangers it only has such freedom on the condition that the Community has the last word.

The Council then proceeds to consider the first question and points out first of all that Article 7, interpreted in the light of the thirteenth recital of the preamble to the directive, imposes an obligation not to take action, consisting in not subjecting feeding-stuffs which conform to the directive to any marketing restrictions with regard to the presence of undesirable substances and products other than those provided for by the directive. This clause only affects the actual field of application of the directive. In view of Article 7 the answer to the *first question* must be that within the limits of the field of application of the directive (Article 1 (2)) and except in the case of technical adaptations (Article 6) Member States cannot subject feeding-stuffs which conform to the directive to any marketing restrictions with regard to the presence of undesirable substances and products other than those specified in that directive, save as otherwise therein provided, for example by the safeguard clause in Article 5.

The Council takes the view that the second and third questions of the Pretura di Lodi concerning the interpretation of

Article 5 involve an analysis of the relationship between Article 36 of the Treaty and the said Article 5. While Article 36 contains an exception to the fundamental principle of free intra-Community trade in goods, applicable only to goods crossing the frontier, a directive on the approximation of laws — for example Directive No 74/63/EEC — relates to their marketing and not to their importation and therefore according to the same criteria covers domestic products as well as those coming from another Member State.

Even if a Member State proposed to invoke Article 36 it must still apply the directive and in particular permit the marketing of products, whether domestic or imported from a Member State, which are in its territory and conform to the provisions of the directive, except where it has recourse to the procedures provided for in the directive itself, for example the safeguard clause contained in Article 5.

Therefore the question referred by the national judge must not be considered from the standpoint of free movement of goods but from that of the harmonization of laws relating to restrictions on the marketing of certain products for the purposes of the protection of animal and human health.

The Council analyses the safeguard clause contained in Article 5 by comparing it with previous versions in other directives and stresses that:

- (a) the national measures which may be enacted pursuant to the safeguard clause are provisional;
- (b) their purpose, objective and extent are defined by the directive itself;
- (c) Article 5 (2) contains two legal ways of reviewing the national measure, by legislation (a decision adopted by the Commission) and by legal process (should it be decided not to amend the annex to the directive, the Commission may, if the Member State does not give effect to the

- request to amend or abolish the measure, initiate, if necessary, against that State a procedure for a declaration that it has failed to fulfil an obligation under the Treaty (Article 169 of the Treaty);
- (d) maintaining the measure in force pursuant to Article 5 (2) 'so long as no decision has been made by the Council or the Commission' is only justified if the decision is in fact taken to modify the directive.

Accordingly the Council proposes to answer the questions referred by the Pretura di Lodi as follows:

1. First question: Since Directive No 74/63/EEC became incorporated into the legal systems of Member States they do not have the power to consider substances other than those mentioned in the annex to the directive as undesirable within the meaning of that directive, except that they may, on the basis and subject to the terms of Article 5, prohibit the marketing of products containing such substances.
2. A Member State cannot act unilaterally: its decision is only provisional and may be amended by the Community institutions.
3. A Member State cannot 'obstruct' imports: it can only intervene at the marketing level, subject to certain conditions as to the duration and the risks involved, whilst observing the principle of non-discrimination, subject to review by the Commission and in the last resort by the Court.
4. Since the Council's answers to the previous three questions are in the negative it does not consider that it needs to answer the fourth. In any event there are no grounds for holding that the safeguard clause in question is invalid.

*C — Observations submitted by the Italian Government*

The Italian Government explains that the measures taken in September 1976

relating to the permitted level of nitrates in feeding-stuffs result from the finding recorded at the beginning of the summer of 1976, following various laboratory tests on powdered milk and whey coming from the Member States of the Community (in particular from France, the Federal Republic of Germany and the Netherlands) of very high nitrate levels namely 4 000 parts per million, as against a natural nitrate level in cow's milk of less than one part per million. These levels, which are, from the standpoint of toxicology and public health, large, abnormal and disturbing, can only have been caused by an unauthorized treatment of or a fraudulent addition to powdered milk of whey from the caseation brought about by adding nitrates.

By means of a first measure of 5 August 1976 addressed to veterinary surgeons the Italian Government decided to intensify the analytical tests and to permit nitrates only in a quantity of less than one part per million. At the same time the question of the addition of nitrates to the products under consideration was brought to the attention of the EEC institutions, on 26 August 1976 to the Management Committee for Milk, on 6 and 7 September 1976 to the Committee of Experts and to the Standing Committee for Feeding-stuffs. After consulting national experts the permitted limit specified in the measure of 5 August 1976 was increased in the measure of 7 September 1976 to 30 parts per million of nitrates in powdered milk.

The Italian Government lays great stress on the fact that the measure adopted on 7 September 1976 was not based on Directive No 74/63/EEC but on Council Directive No 70/524/EEC of 23 November 1970 concerning additives in feeding-stuffs (OJ, English Special Edition 1970 (I), p. 840) as subsequently amended. The large amounts (40 to 4 000 parts per million) of nitrates found in the products in question indicate, not a natural content of undesirable substances



or products referred to in Directive No 74/63, but deliberate additions of nitrates to the natural milk, that is to say additives which are not allowed under Directive No 70/524. Directive No 74/63/EEC mentioned by the Pretura di Lodi only relates to substances and products naturally and unavoidably present in feeding-stuffs and regarded as undesirable and does not apply if the question to be decided is whether an *additive* is authorized under Community rules. Such a case comes under Directive No 70/524/EEC which does not include nitrates among the additives which it authorizes.

The Italian provision prohibiting the importation of fodder made from powdered milk which contains a larger amount of nitrates than is natural complies in every way with Directive No 70/524/EEC concerning additives in feeding-stuffs and does not therefore contravene Article 30 of the Treaty or the other provisions relating to the common organization of the market in the sector in question.

The Italian Government infers from this that the questions referred to the Court by the Pretura di Lodi are irrelevant.

However that may be, it considers that the first two questions should be dealt with jointly and that the answer must be that there is nothing in Article 5 of Directive No 74/63/EEC to preclude Member States from adopting measures even concerning substances or products which have been 'excluded' from the annex to the directive (first question) or in respect of which the maximum permitted levels have not previously been fixed (second question).

Contrary to the statement made by the Pretura di Lodi nitrates have not been 'excluded' from the list of undesirable substances annexed to Directive No 74/63/EEC. Their omission is explained by the fact that nitrates normally found in feeding-stuffs do not present any

problems but, even if they had been excluded by a specific decision, a Member State which finds a harmful level of nitrates in feeding-stuffs may, by complying with the formalities prescribed by Article 5 of Directive No 74/63/EEC, prohibit completely the presence of the substance. The Italian Government calls attention to the fact that, although it did not act within the purview of Decision No 74/63/EEC and is therefore not under any obligation to notify national measures taken pursuant to Article 5 of the said directive, it none the less drew the attention of the Community institutions in good time to the question of the presence and addition of nitrates by emphasizing the urgent need to reach a common solution to this problem.

When a Member State has recourse to measures provided for by the abovementioned Article 5 it does not infringe the standstill provision laid down in Article 31 of the EEC Treaty, since the said Article 5 implements Article 36 of the Treaty which permits derogations from the principle of the free movement of goods, including derogations from the standstill provision. It is difficult to imagine a standstill provision applying to the subject-matter of Directive No 74/63/EEC, since it is subject to continuous modifications owing to technical and scientific experiments which may result in regarding as undesirable a substance or product naturally present in feeding-stuffs which has not previously been considered as such. Nor does recourse by a Member State to the measures provided by Article 5 encroach on the Community's jurisdiction. Those are in fact provisional measures adopted as a precaution until the Community institutions decide whether the annex to the directive has to be modified or not in accordance with the procedure laid down in Article 10 of Directive No 74/63/EEC.

In answer to the third question the Italian Government points out that the

measure of 7 September 1976 did not decide to impose a general embargo on all feeding-stuffs made from powdered milk. It was decided to prohibit the importation of specific consignments which were shown by an analytical test to contain more nitrates than can be considered normal.

In view of these considerations the answer to the fourth question concerning the validity of Article 5 of Directive No 74/63/EEC must be in the affirmative.

*D — Observations submitted by the Government of the United Kingdom*

The Government of the United Kingdom confines its observations to the question of the validity of Article 5 of Directive No 74/63/EEC. A safeguard clause such as Article 5 of Directive No 74/63/EEC, as an integral part of the harmonized law, provides a remedy for any lacuna in that law which becomes apparent to a Member State when confronted by a hazard calling for immediate action. The clause permits Member States to be notified speedily of the possible hazard. Moreover any action by the Commission as a result of the initiation of the safeguard powers laid down in the directive and any failure of the Commission to act or any action on the part of a Member State in breach of obligations under the directive would be subject to review by the Court of Justice.

The Government of the United Kingdom does not consider that either Article 5 or any other provision of the Treaty exceeds the bounds of Article 36 of the Treaty which is only relevant in relation to matters covered by Articles 30 to 34.

It would be strange if the Community legislator could not provide for a safeguard clause similar to those which accompany each of the freedoms guaranteed in the Treaty (Articles 36, 48 (3), 56 (1), 66 and 73) when sup-

plementing these freedoms by the abolition, under Article 100, of the technical barriers to trade not referred to in Article 30.

A judicial pronouncement casting doubt on the validity of Article 5 of Directive No 74/63/EEC would be of fundamental importance to the question of the validity of safeguard clauses in directives generally:

- (a) because these clauses are an essential feature of many harmonizing directives as these are the only means whereby in relation to the directive a Member State can legally take action which it considers necessary to protect, for example, human health where such action would otherwise be contrary to the provisions of the directive. If their validity were questioned this would necessitate action by the Community to review every directive affected and amend it as necessary.
- (b) In such circumstances the government of a Member State faced with an unforeseen hazard would be in a very difficult situation. It would have to choose between hazarding the lives and health of its population by accepting the delays involved in procuring the necessary Community legislation and disregarding its Community obligations. Community law should in all cases allow Member States to take the necessary immediate action.
- (c) The importance of safeguard clauses in directives viewed as a whole is such that in their absence harmonization legislation in future might prove impossible or at least very difficult. A safeguard clause could not be struck out of a directive without affecting the validity of the rest of the directive.

*E — Observations submitted by Denkavit*

The defendant in the main action points out in the first place that not only the

*Standing Committee for Feeding-stuffs* but also the *Scientific Committee for Feeding-stuffs* found that there were no toxic effects from potassium nitrate contained in feeding-stuffs and in products which may be used in their manufacture. It goes on to say that in 1974 the Italian Minister of Health announced that 'on the basis of established scientific data potassium nitrate found in quantities of 2 500 and 250 milligrammes per kilogramme respectively in powdered whey and feeding-stuffs manufactured from it must be regarded as a harmless amount for calves given it continually in the form of reconstituted milk during their economic life'.

I — The defendant then examines the principles underlying the rules and regulations on the free movement of goods with reference to the principle of the 'single market' and to the principle that the Community institutions have exclusive jurisdiction in agricultural matters and states that the concept of the 'single market' in the European agricultural organizations implies that the free movement of goods must be understood as having two meanings, on the one hand, freedom of movement between the members of the single market consisting of the various national territories of the Member States and, on the other, freedom for economic operators to put the goods in question onto the market within the single European market without let or hindrance. Any obstacle not pertaining to customs duty found in any part of the common market within the same Member State must also be removed.

II — A single market can only be administered if it is under the exclusive jurisdiction of the Community institutions. Although in the market models which are not completely integrated there is a separation of powers and of Community and national sources in so far as economic policy and the rules adopted for its implementation is

concerned, a European organization of the market of the kind provided for in Article 40 (2) (c) calls for legislative powers for the Community institutions responsible for its functioning excluding the concurrent jurisdiction of the Member State.

III — The argument developed in connexion with the concept of a 'single market' and the grant of exclusive jurisdiction to the Community institutions applies to the sector of products for animal fodder which is mentioned in Annex II to the Treaty under Chapter 23. The fact that the sector in question is governed entirely by Community rules and regulations is confirmed *directly* by EEC provisions (Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Article 1 (g)), OJ, English Special Edition 1968 (I), p. 176) and *indirectly* by the fact that Community rules like the rules on monetary compensatory amounts, which are only applicable to the agricultural sectors, apply to them. In the alternative, the defendant in the main action refers again to the judgment of the Court of 29 May 1974 (Case 185/73, [1974] ECR 607) from which it appears that the products mentioned in Annex II to the Treaty, in so far as they are closely interdependent on the value of the basic products from which they are derived, must be included among the products which may be governed by Community rules and regulations.

IV — The defendant in the main action analyses Directive No 74/63/EEC from this point of view and emphasizes that according to the first reference of the preamble thereto it is linked to both Article 43 and Article 100 of the Treaty. Since it falls within the category of directives adopted for the approximation of laws its interpretation must take account of the general characteristics of such approximation, that is to say, favour Community objectives on the margin of

freedom left to the Member States. The fact that the directive comes within the field of the common organization of agricultural markets leads to the conclusion that the approximation carried out fits into the general plan designed to reproduce conditions similar to those existing in a national market.

(a) Directive No 74/63 is intended to effect complete harmonization of the various national rules and regulations by replacing them with Community rules for the protection of common concerns by means of common measures.

Consequently, owing to the adoption of the directive, Member States can no longer exercise the wider power under Article 36 in this matter but only the more limited power derived from the directive itself. There can no longer be a general presumption that the measures taken are lawful if they do not observe the letter and spirit of the directive.

(b) The directive has in fact had an effect on the powers of the Member States. As shown by the sixth recital of the preamble to the directive, the Community now has general jurisdiction in this field and it is clear from the procedures for amending the annexes (Articles 9 and 10) that Member States may only set in motion Community decision-taking machinery by adopting measures which are in essence provisional.

(c) An examination of Article 5 shows that the opportunities of derogating from the directive are strictly limited in time: Article 5 (1) refers to the provisional nature of the derogation and to the duty to advise the other Member States and the Commission without delay of the measures taken; further, Article 5 (2) provides that an immediate decision must be made as to whether the annex should be modified. The defendant in the main action considers that if the entire procedure prescribed by Article 10 is taken into account the period which

should elapse between the provisional national measure and the Community decision is less than 30 days and is clearly shorter than that laid down in Article 9 for the normal procedure for amending the annex.

(d) The defendant in the main action points out that an examination of the last subparagraph of Article 10 of the directive shows that when the Council, as a result of a provisional measure adopted by a Member State on the basis of Article 5, votes by a simple majority against the measures proposed by the Commission, the procedure cannot conclude so that the safeguard measure can be maintained indefinitely even if it was unjustified. The defendant in the main action takes the view that the directive is consequently invalid to the extent to which it permits a quantitative restriction contrary to Articles 30 to 34 to be maintained without any limitation as to time.

V — Before answering the various questions point by point the defendant in the main action considers the limits of the discretion of the Member States in the system introduced by Directive No 74/63/EEC.

— In the opinion of the defendant in the main action, Directive No 74/63/EEC intended to make 'explicit' the limits of the discretion granted by Article 36 of the Treaty in necessarily imprecise terms to the Member States. Although Article 36 may in general be invoked in order to justify by a presumption of legality the measures adopted by Member States for the protection of public health, it cannot on the other hand legitimate measures adopted by the Member States which do not comply with Community regulations which have actually made 'explicit' the discretionary powers laid down in this article.

— It follows therefore that, as the judgment of the Court of Justice of 15 December 1976 in Case 35/76,

*Simmenthal Sp.A. v Italian Minister for Finance*, [1976] ECR 1871, makes quite clear, Article 36 must be given a 'progressive' interpretation. Although it permits Member States to administer a complete system of defence in the various fields which it covers, this is only on a provisional basis since that system is intended to be gradually reduced as the increased guarantees in these fields are offered by Community provisions.

#### VI — The first question

— The defendant in the main action takes the view, in answer to the first question, that although the justification provided by Article 36 could work in favour of the Italian State before the entry into force of Directive No 74/63/EEC, when it was still possible to regard the direct administration of a system of defence by Member States as lawful, this justification can no longer apply after the Italian State and all the other Member States have ceased to consider potassium nitrate as an undesirable substance, by approving either the list annexed to Directive No 74/63/EEC or the list annexed to the Ministerial Decree of 30 December 1975 making EEC provisions enforceable in Italy. Since Community provisions had been adopted national defence measures were therefore no longer necessary or justified by Article 36.

— The fact that the measure taken in September 1976 was unnecessary and therefore unjustified is evident from the finding that the Italian Minister for Health intended to lay down permitted levels for potassium nitrate (50 parts per million for each kilogramme of powdered whey) below those which the same Minister had considered permissible in 1974 (250 parts per million).

If the permitted levels fixed in 1974, which were already at that time the limit of harmfulness, had been rejected by the Council, *a fortiori* the lower permitted

levels of September 1976 could not be accepted. For this reason there are no fresh facts on which to base an action under Article 36 of the Treaty.

It is possible to modify the limits outlined in the directive by adopting the procedures laid down in Articles 9 and 10 but to do this there has to be a reason which is valid and justified *ictu oculi*. There is no such reason where, for the purpose of modifying the Community limits outlined in the directive, arguments are put forward which were already known and had been disposed of when the directive was approved.

#### VII — The second question

The purpose of the second question is to ascertain whether it was lawful for the Italian Government, assuming that it was entitled to avail itself of the safeguard clause, to fix unilaterally the maximum permitted levels for potassium nitrate contained in products imported from other Member States.

The defendant in the main action states that no maximum permitted level for potassium nitrate has been laid down for potassium nitrate by measures having the force of law in Italy either before or after the adoption of Directive No 74/63/EEC. When Directive No 74/63/EEC entered into force on 1 January 1976 potassium nitrate had therefore to be regarded as a harmless substance. The notification of 7 September 1976 at issue therefore directs all veterinary surgeons on the Italian frontier to check imported products for permitted levels which are not laid down by any legislative provision with regard to domestic products. There has clearly been an infringement of the prohibition on discrimination referred to in the second subparagraph of Article 40 (3) of the Treaty since the duty to check goods only applies to those which have been imported (the notice itself refers to 'controlli analitici sui prodotti d'importazione dall'estero ...' (analytical tests on products imported from abroad)).

Furthermore, there has also been an infringement of Article 31 of the Treaty, on the one hand because the national measure imposes a more drastic measure prohibited by the Treaty and also by the specific rules applying to the sector (Article 22 of Regulation No 804/68) and, on the other, because it applies only to products imported from the other EEC countries. This infringement cannot be justified by relying on Article 36 since, except under the conditions laid down by the safeguard clause, the initiation of the procedures for modifying the annex cannot even be justified any longer by the latter.

#### VIII — The third question

— The defendant in the main action, in answer to the *third question*, takes the view that, even if it is accepted that the Italian Government can order analytical tests to be carried out only on imported goods by insisting on compliance with the maximum permitted levels laid down without making the nitrates contained in domestic products comply with the same permitted levels by adopting coercive national measures, the question of the legality of preventing the importation of products from the other Member States remains open. Owing to the special legislative situation relating to this matter in Italy this sanction applies only to imported products. In these circumstances it is certainly impossible to rely upon Article 36 of the Treaty: it is impossible in law to impose a restriction for reasons of public health solely on imported products without having at the same time made domestic products subject to strictly equivalent restrictions.

— The defendant in the main action regards the fact that the procedure laid down by Article 10 of Directive No 74/63/EEC was not followed by a final decision within the prescribed period (30 days according to the defendant in the main action) as an additional ground for the illegality of the measure at issue.

Since the period prescribed by Article 10 elapsed without the Community authorities having taken a decision the restrictive measure adopted by the Italian State can no longer be maintained because it can no longer be justified in the light of Article 36 of the Treaty.

#### IX — The fourth question (the illegality of Article 5 of the directive)

A safeguard clause such as Article 5 may be understandable if it permits Member States to have a special means of defence in the field of public health for the purpose of dealing with unusual and unforeseen cases which cannot normally be disposed of by having recourse to national provisions henceforth replaced by Community provisions.

Beyond these limits the safeguard clause cannot confer on the Member States any other power, either by means of a positive decision adopted by the Community institutions or even less as a result of a failure on their part to adopt measures laid down in order to comply with the provisions of that clause.

However, it follows from the second subparagraph of Article 10 (4) that the Council may be able by a simple majority to paralyse any decision taken by the Commission. According to the defendant in the main action the fact that it is possible to maintain a provision adopted by a Member State, even an illegal one, because the Council has adopted a negative viewpoint, can only make illegal the clause from which that possibility is derived. These considerations are all the more valid since this is an agricultural sector in which the exclusive jurisdiction of the Community institutions and the limitation of the power of the States have been increased to the maximum.

Another reason for the illegality of the safeguard clause, as linked to the procedure laid down in Article 10, is that

it removes from the Commission a *direct* power of control over the activity of the Member States which was expressly laid down in Article 155. This power of control should enable the Commission to institute immediately the procedure against infringements laid down in Article 169 of the Treaty if it considers that restrictive measures adopted by a Member State are incompatible with the Community rules. The only possibility of avoiding this result is to accept, as seems logical, that the Member States become responsible for the paralysis of the procedure; a Member State who has not authorized the conclusion of the procedure would thus have the restrictive national measure adopted provisionally considered to be illegal.

During the hearing on 14 June 1977 the defendant in the main action, represented by Messrs Ubertazzi and Capelli of the Milan Bar, the Italian Government, represented by its Agent, Mr Braguglia, the Commission of the European Communities represented by its Agent, Mr Marengo and the Council of the European Communities represented by its Agent, Mr Sacchetti, developed the arguments put forward during the written procedure.

With regard to the respective fields of application of Directive Nos 74/63 and 70/524 and the distinction to be made between undesirable substances and products on the one hand and additives on the other the following observations were put forward.

Denkavit refers to the work of the Food and Agriculture Organization and of the World Health Organization which shows that an additive is distinguished by two fundamental characteristics:

- (1) it is a substance intentionally added to feeding-stuffs;
- (2) it is a substance added in order to improve the appearance, flavour, consistency and keeping qualities of food products.

The concept of additives therefore does not cover the various substances or residues already included amongst the ingredients necessary to produce the feeding-stuff. The same is true with regard to Community law: a comparison of Directive No 70/524 on additives and Directive No 74/63 on undesirable substances shows that the latter completes Directive No 70/524 by extending the control to substances which, either as additives or as manufacturing residues, are among the ingredients used for the manufacture of the feeding-stuff. A substance contained in a specific product intended for animal feeding cannot at the same time be subject to the directive on additives and to the directive on undesirable substances. If therefore the nitrates contained therein, albeit in small quantities, result from a natural admixture, they cannot be considered as an additive.

The Italian Government considers that Directive No 74/63 on undesirable substances concerns only the substances and products whose presence in feeding-stuffs is natural or inevitable. Directive No 70/524, on the other hand, covers *in abstracto* all substances which may artificially be added to feeding-stuffs. It considers in particular the additives which have a favourable effect on the characteristics of the feeding-stuffs and which do not have a harmful effect on animal or human health. Only the use of such additives is authorized. Therefore the use of additives which, although having a favourable effect on the characteristics of the feeding-stuffs, are harmful as such or above a certain concentration to animal and human health, is in any case prohibited and, *a fortiori*, additives which are harmful to animal and human health without having any favourable effect on the characteristics of the feeding-stuffs.

In this case the presence of the nitrates in the feeding-stuffs is the result of a fraudulent operation at a preceding stage

of the manufacturing process. The nitrates are not added to the powdered milk or to the whey powder as feeding-stuffs. The nitrates are added either to the fresh milk or by adding to the powdered milk whey resulting from caseation treated with potassium nitrate.

These nitrates are therefore not naturally present beyond a certain limit in milk-based feeding-stuffs.

The Commission confirms that whey may contain high nitrate levels as a residue of certain caseation processes employed in particular in the Netherlands using nitrates so as to prevent fermentation. As whey has a commercial value ten times less than that of powdered milk, the temptation is great to add whey powder to the powdered milk as a feeding-stuff and to sell the whole at the price of the powdered milk. Such a fraud, which is difficult to locate if it does not exceed 5 %, does not

however come within Directives Nos 70/524 or 74/63 but within Directive No 77/101 of 23 November 1976 on the marketing of straight feeding-stuffs (OJ, L 32 of 3. 2. 1977).

The nitrates are not therefore added to the feeding-stuffs but are residues from previous stages in the production of the milk, butter or cheese. The Commission considers that they are not therefore additives: what is an additive at one stage becomes a residue at the following stage.

Under the directives in question the additives are deliberately added to the feeding-stuffs so as to improve their characteristics while the undesirable substances are found in the feeding-stuffs by virtue of circumstances which are independent of the production of those feeding-stuffs.

The Advocate General delivered his opinion at the hearing on 6 July 1977.

## Decision

- 1 By order of 17 December 1976, entered in the Register of the Court of Justice on 11 January 1977, the Pretura di Lodi submitted to the Court of Justice several questions relating, on the one hand, to the interpretation of Directive No 74/63/EEC of the Council of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feeding-stuffs (OJ L 38 of 11. 2. 1974), in particular Article 5 thereof, and on the other, to the validity of the said Article 5.
- 2 These questions have been submitted in the context of a dispute concerning the non-performance of a contract for the supply of feeding-stuffs made from powdered milk in which the defendant in the main action maintains, in order to justify its failure to deliver the goods, that they were illegally stopped at the border by the Italian health authorities because their potassium nitrate content exceeded that permitted by those authorities.



- 3 This measure was adopted on the basis of an urgent note (*biglietto urgente*) of 7 September 1976 sent by the Italian Minister of Health to the veterinary authorities at frontiers, ports and airports and to the provincial authorities prohibiting the importation of milk-based feeding-stuffs where the nitrate content of those feeding-stuffs exceeds 30 parts per million in whole milk powder and skimmed-milk powder and 50 parts per million in powdered whey.
- 4 According to the defendant and the interveners in the main action, the Italian measures are incompatible with Directive No 74/63.
- 5 According to the fourth recital of the preamble to that directive, its purpose, taking into account the fact that it is impossible to exclude totally the presence of certain undesirable substances or products in feeding-stuffs, is to reduce their content in order to prevent them from harming animal health or, because of their presence in animal products, human health.
- 6 Under Article 3 of the directive 'Member States shall prescribe that the substances and products listed in the annex shall be tolerated in feeding-stuffs only under the conditions therein set out', that is, below a maximum level.
- 7 According to Article 7 'Member States shall ensure that feeding-stuffs which conform to this directive are not subject to any other marketing restrictions as regards the presence of undesirable substances and products'.
- 8 However, Article 5 (1) provides that: 'Where a Member State considers that a maximum content fixed in the annex, or that a substance or product not listed therein, presents a danger to animal or human health, that Member State may provisionally reduce this content, fix a maximum content, or forbid the presence of that substance or product in feeding-stuffs. It shall advise the other Member States and the Commission without delay of the measures taken and at the same time give its reasons'.
- 9 Under Article 5 (2), where a Member State has recourse to the provisional measure referred to in the first paragraph thereof, a decision must immediately be taken as to whether any modification to the annex should be made in accordance with the procedure laid down in Article 10 of the directive.

- 10 Article 5 (2) continues: 'So long as no decision has been made by either the Council or the Commission the Member State may maintain the measures it has implemented'.
- 11 The file shows that as early as 27 July 1976 the Italian authorities drew the attention of the Commission to the presence 'in certain consignments of whey from France, the Netherlands and the Federal Republic of Germany of potassium nitrate in levels varying from 40 to 4 000 parts per million (milligrammes per kilogramme), residues from the manufacture of certain types of cheeses' and asked 'that the problem of the harmonization of national legislation concerning the presence of that substance be examined'.
- 12 After deciding by an urgent communication of 5 August 1976 to intensify laboratory tests on imported consignments of whey and compound fodder containing whey and initially fixing the maximum nitrate level at one part per million, the Italian authorities adopted the contested measure on 7 September 1976.
- 13 After exchanges of notes between the Community authorities and the Italian authorities during the months of August and September, on 7 October 1976 the latter sent the Commission documents as to toxicity by way of the statement of reasons referred to in Article 5 (1) of the directive.
- 14 The Italian Government contests the relevance of the questions referred to the Court with regard to the outcome of the main action and observes that the measure in question was not adopted on the basis of Article 5 of Directive No 74/63 but in accordance with Council Directive No 70/524 of 23 November 1970 concerning additives in feeding-stuffs (OJ, English Special Edition 1970 (III), p. 840).
- 15 The distinction between the field of application of these two directives is important because all marketing of feeding-stuffs containing unauthorized additives is clearly prohibited whereas in so far as undesirable substances are concerned the prohibition on marketing concerns only feeding-stuffs containing the undesirable substances expressly listed in the annex to the directive, unless Article 5 and the procedure laid down in Article 10 are applied.

- 16 If it were necessary to consider as an unauthorized additive the potassium nitrate whose presence in the imported feeding-stuffs has been established it would follow that the Italian measure prohibiting it was absolutely justified and, moreover, that there was no need for the measure to be followed by the implementation of the procedure laid down in Article 10 of Directive No 74/63 in order to decide whether or not it is necessary to complete the list of undesirable substances.
- 17 Article 177 is based on a distinct separation of functions between national courts and tribunals on the one hand and the Court of Justice on the other, and it does not give the Court jurisdiction to take cognizance of the facts of the case, or to criticize the reasons for the reference.
- 18 Therefore, when a national court or tribunal refers a provision of Community law for interpretation, it is to be supposed that the said court or tribunal considers this interpretation necessary to enable it to give judgment in the action.
- 19 Thus the Court cannot require the national court or tribunal to state expressly that the provision which appears to that court or tribunal to call for an interpretation is applicable.
- 20 The Court may however provide the national court with the factors of interpretation depending on Community law which might be useful to it in evaluating the effects of the provision which is the subject-matter of the questions which have been referred to it.
- 21 Directive No 74/63 (undesirable substances) specifies that it applies 'without prejudice' to the provisions concerning, in particular, additives in feeding-stuffs and it is therefore important, in order to reach a useful interpretation of the provisions thereof, to state precisely its field of application in relation to Directive No 70/524 (additives).
- 22 Under Article 2 of Directive No 70/524, 'additives' are substances which, *when incorporated* in feeding-stuffs, are likely to affect their characteristics or livestock production.

- 23 The fifth recital of the preamble to that directive specifies that additives mean: 'as a general rule . . . substances which improve both the feeding-stuffs in which they *are incorporated* and livestock production'.
- 24 Although Directive No 74/63 does not define the concept of 'undesirable substances and products', the third and fourth recitals of the preamble thereto specify however that undesirable substances or products which 'feeding-stuffs often contain' are involved and that 'it is impossible to exclude totally the presence' of them.
- 25 The file and the observations submitted by the parties during the hearing show that the presence of potassium nitrate in the imported feeding-stuffs in excess of the maximum levels fixed by the Italian Government results from the fact that a quantity of whey, which is a by-product of the manufacture of cheese, during which the nitrate is used as a preservative, is mixed with the skimmed-milk powder.
- 26 The Italian Government considers that the nitrate added during the caseation process continues to be an additive in the subsequent stages of the use of the whey and may not be considered as a substance which is naturally or inevitably present in the feeding-stuffs to which the whey has been added.
- 27 On the other hand, the defendant in the main action and the Commission claim that the nitrate may not be considered as an additive because it was not intentionally added to the feeding-stuffs made from powdered milk but was already there as a residue from a previous stage in the production of powdered milk and cheese.
- 28 A comparison of the abovementioned recitals of the preambles to the directives shows that Directive No 70/524 (additives) and Directive No 74/63 (undesirable substances) although both relating to the composition of feeding-stuffs make, as regards their respective fields of application, a distinction between certain substances which are intentionally added to those feeding-stuffs so as to produce a favourable effect on their characteristics and, on the other, undesirable substances which are inevitably present in those feeding-stuffs either in the natural state or as residues from processing previously undergone by those feeding-stuffs or by the constituents of those feeding-stuffs.

- 29 In these circumstances a substance which, because of a previous admixture, independent of the use for animal feeding, is necessarily present in one of the constituents of the feeding-stuff as a residue from the previous manufacture of another product may not be considered as an additive.
- 30 The control of the presence of such substances comes within Directive No 74/63 (undesirable substances) and not within Directive No 70/524 (additives).

### The first question

- 31 The first question asks in substance whether, under the terms of Directive No 74/63 and in view of a possible application of the provisional measure referred to in Article 5 thereof, the Member States still have the power to consider as undesirable substances certain substances (in this case nitrates) which, although known when Directive No 74/63 was adopted and incorporated into the national legal systems, were excluded from the list of undesirable substances annexed to the directive.
- 32 Under Article 1 (g) of Regulation No 804/68 of the Council of 27 June 1968 on the common organization on the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), dairy-based feeding-stuffs come within that organization of the market and must, under Article 22 of the same regulation, be admitted to free circulation between the Member States.
- 33 National measures regulating the composition of feeding-stuffs may in certain cases constitute measures having an effect equivalent to quantitative restrictions which are however capable, where they are justified by the protection of animal or human health, of coming within the application of Article 36 of the Treaty.
- 34 Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that Article.
- 35 Where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the

protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive.

- 36 Directive No 74/63 was adopted and a Community control procedure was introduced for the purpose of harmonizing the national provisions.
- 37 Within the context of the harmonization which has been brought about, Article 5 however permits Member States provisionally to prevent the marketing on their territory of feeding-stuffs which contain substances which may be undesirable for animal or human health although they are not mentioned in the annexes to the directive.
- 38 Although Articles 6 and 9 of the directive provide that, following a Community procedure, it will be possible to amend the list of undesirable substances on the basis of the development of scientific or technical knowledge, it was however justified in also providing for the means of remedying a lacuna in the harmonized legislation when a danger requiring immediate action arises.
- 39 The eventuality provided for in Article 5 covers the case in which substances which were previously considered not to be harmful prove to be so, in particular if, considered in a previous stage as not harmful because they are only present in minute quantities, it appeared that in other feeding-stuff mixtures or in mixtures made in new proportions, they are present in a proportion which may make them undesirable.
- 40 It is therefore necessary to reply to the first question that even after the entry into force of the harmonizing directive, Directive No 74/63, the Member States have, within the context of Article 5 of that directive and subject to the material and procedural requirements laid down therein, the power provisionally to consider as undesirable certain substances which although known when that directive was adopted, do not appear in the list annexed thereto, provided that the measures adopted apply on identical terms to both national products and to products imported from other Member States.

### The second question

- 41 The second question asks in substance whether Article 5 of Directive No 74/63 enables a Member State to fix unilaterally the maximum permitted level of a substance contained in imported feeding-stuffs made from powdered milk when in the past no maximum level had ever been fixed either in the exporting Member State or in the importing Member State.
- 42 Subject to the obligation not to discriminate between imported products and national products, it is necessary, for the reasons put forward in reply to the first question, to reply to the second question in the affirmative.
- 43 In fact, although substances have not been recognized as undesirable because in a previous stage the composition of feeding-stuffs was such that those substances only appear in minute quantities, it is possible that different mixtures may contain the same substances in quantities such that because of their level they may be considered as undesirable.

### The third question

- 44 The third question asks in substance whether Article 5 of the directive enables the Member State, when applying Article 5 (1), to prevent the importation of the product concerned from another Member State.
- 45 In so far as Article 5 (1) of Directive No 74/63 enables the Member State to fix provisionally with regard both to national products and to imported products conditions other than those laid down in Directive No 74/63, it must also be possible for it to prohibit the marketing of the products which have been found to infringe the temporary national provisions.
- 46 Such a prohibition on marketing on the national market may, for products coming from other Member States, take the form of a prohibition on importation, since importation may be treated, for the purposes of the application of the directive, as the first marketing on the territory of the Member State.
- 47 Such a prohibition may not however be issued in a general manner and may concern only consignments of goods from which it appears as the result of a

check, even a random sampling, that they contain substances considered provisionally as undesirable within the context of Article 5 of the directive.

#### The fourth question

- 48 If the Court replies in the affirmative to the first three questions, the next question asks whether Article 5 of Directive No 74/63 must be considered as valid to the extent to which it extends the powers of the Member States beyond the limits justified by Article 36 and permits them, by means of the last sentence of Article 10, to escape, without any limitation as to time, the directly applicable provisions of Article 30 of the Treaty and those concerning the common organization of the agricultural markets.
- 49 The directive, whilst obliging the Member States to adopt common provisions in relation to the presence of harmful or undesirable substances in feeding-stuffs leaves those Member States, by means of Article 5, a discretionary power to implement provisional supplementary measures relating to other substances or to the level of the substances listed in the annex to the directive.
- 50 Under Article 5 (2), when a Member State has brought into force provisionally a measure such as that referred to in Article 5 (1), an immediate decision must be made as to whether the annex should be modified in accordance with the procedure laid down in Article 10.
- 51 The defendant in the main action alleges in support of its statement that Article 5 of the directive is invalid that the procedure laid down in Article 10 might in certain cases lead to an indefinite extension of the provisional measure by virtue of the last sentence of that article.
- 52 Article 10 (4) provides that a decision on the modification of the annex must be adopted either by the Commission in accordance with the opinion of the Standing Committee for Feeding-stuffs or, if the Commission is not in accordance with that opinion or if the Committee does not deliver an opinion, by the Council at the proposal of the Commission.
- 53 Article 10 (4) continues by specifying that: 'If the Council has not adopted any measures within fifteen days of the proposal being submitted to it, the Commission shall adopt the proposed measures and implement them



forthwith, except where the Council has voted by a simple majority against such measures'.

- 54 It is true that the last sentence of Article 10 prevents the Commission from implementing the proposal rejected by the Council where its proposal has been rejected by the Council and even where, in that case, the latter does not put forward an alternative solution.
- 55 However the Commission still has jurisdiction to issue, in accordance with the procedure laid down in the first subparagraph of Article 10 (4), any other measure which it considers appropriate.
- 56 The final paragraph of Article 10 therefore does not have the effect of paralysing the Commission or of enabling the national measure adopted provisionally to be prolonged indefinitely.
- 57 It is therefore necessary to conclude that consideration of the fourth question has disclosed no factor of such a kind as to affect the validity of Article 5 of the directive.

#### Costs

- 58 The costs incurred by the Government of the Italian Republic, the Government of the United Kingdom and the Council and 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 action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

#### THE COURT

in answer to the questions referred to it by the Pretura di Lodi by order of 17 December 1976 hereby rules:

- (1) Even after the entry into force of harmonizing Directive No 74/63, the Member States have, within the context of Article 5

of that directive and subject to the material and procedural requirements laid down therein, the power provisionally to consider as undesirable certain substances which, although known and recognized when that directive was adopted, do not appear in the list annexed thereto, provided that the measures adopted apply on identical terms to both national products and to products imported from other Member States;

- (2) Subject to the obligation not to discriminate between imported products and national products, Article 5 of Directive No 74/63 enables a Member State to fix, on a provisional basis, the maximum permitted level of a substance contained in imported feeding-stuffs made from powdered milk even though no maximum level has ever been fixed in the past either in the exporting Member State or in the importing Member State;
- (3) Article 5 of Directive No 74/63 enables a Member State to prohibit the marketing of the products which have been found to infringe the temporary national provision which it is empowered to adopt. For products coming from other Member States such prohibition on marketing may take the form of a prohibition on importation;
- (4) The consideration of the fourth question has disclosed no factor of such a kind as to affect the validity of Article 5 of Directive No 74/63.

Kutscher	Donner	Pescatore	Mertens de Wilmars	Sørensen
Mackenzie Stuart		O'Keeffe	Bosco	Touffait

Delivered in open court in Luxembourg on 5 October 1977.

A. Van Houtte  
Registrar

H. Kutscher  
President