

JUDGMENT OF THE COURT

9 September 2003 *

In Case C-137/00,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office) for a preliminary ruling in the proceedings pending before that court between

The Queen

and

The Competition Commission, formerly The Monopolies and Mergers Commission,

Secretary of State for Trade and Industry,

The Director General of Fair Trading,

* Language of the case: English.

ex parte:

Milk Marque Ltd,

National Farmers' Union,

third party:

Dairy Industry Federation (DIF),

on the interpretation of Articles 12, 28 to 30, 32 to 38, 49 and 55 EC, of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129) and of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), as amended by Council Regulation (EC) No 1587/96 of 30 July 1996 (OJ 1996 L 206, p. 21),

THE COURT,

composed of: M. Wathelet, President of the First and Fifth Chambers, acting as President, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris (Rapporteur), F. Macken, N. Colneric, and J.N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Milk Marque Ltd, by K.P.E. Lasok QC and A. Griffiths, Barrister, instructed by Freshfields, Solicitors,

- the National Farmers' Union by S. Isaacs QC and C. Lewis, Barrister, instructed by C. Holme, Solicitor,

- the Dairy Industry Federation (DIF), by N. Green QC instructed by N. Parr, Solicitor,

- the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by D. Anderson QC and K. Beal, Barrister,

- the Commission of the European Communities, by P. Oliver and K. Wiedner, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Milk Marque Ltd, represented by K.P.E. Lasok, the National Farmers' Union, represented by S. Isaacs and C. Lewis, the Dairy Industry Federation (DIF), represented by N. Green and M. Lester,

Barrister, of the United Kingdom Government represented by G. Amodeo, acting as Agent, assisted by D. Anderson and K. Beal, and of the Commission, represented by P. Oliver and K. Wiedner, at the hearing on 5 February 2002,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2002,

gives the following

Judgment

- 1 By an order of 31 March 2000, received at the Registry of the Court on 11 April 2000, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Court), referred for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 12, 28 to 30, 32 to 38, 49 and 55 EC, of Council Regulation No 26 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129) and of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p.176), as amended by Council Regulation (EC) No 1587/96 of 30 July 1996 (OJ 1996 L 206, p. 21, hereinafter 'Regulation No 804/68').
- 2 Those questions were raised in proceedings between Milk Marque Ltd (hereinafter 'Milk Marque') and the National Farmers' Union (hereinafter 'the NFU') on the one hand, and the Competition Commission, formerly the Monopolies and

Mergers Commission (hereinafter 'the Competition Commission'), the Secretary of State for Trade and Industry (hereinafter 'the Secretary of State') and the Director-General of Fair Trading (hereinafter 'the DGFT') on the other, relating to a report by the Competition Commission recommending that measures be adopted against Milk Marque because of allegedly anti-competitive conduct engaged in by it and to decisions subsequently taken by the Secretary of State on the basis of that report.

Legal background

- 3 Article 33(1) EC provides as follows:

'The objectives of the common agricultural policy shall be:

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.’

4 Under the second subparagraph of Article 34(2) EC, the common organisation of agricultural markets is to be limited to pursuit of the objectives set out in Article 33 EC and to exclude any discrimination between producers or consumers within the Community.

5 Article 36 EC provides as follows:

‘The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council... in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 33.’

6 Regulation No 26 was adopted on the basis of Article 42 of the EEC Treaty (now Article 36 EC) and Article 43 of the EEC Treaty (now, after amendment, Article 37 EC).

7 The first recital of the preamble to Regulation No 26 states that ‘by virtue of Article [36] of the Treaty one of the matters to be decided under the common agricultural policy is whether the rules on competition laid down in the Treaty are to apply to production of and trade in agricultural products’.

8 Article 1 of Regulation No 26 provides that 'Articles [81] to [86] of the Treaty and provisions made in implementation thereof shall, subject to Article 2 below, apply to all agreements, decisions and practices referred to in Articles [81](1) and [82] of the Treaty which relate to the production of or trade in the products listed in Annex [I] to the Treaty'.

9 The products referred to in Annex I to the Treaty include milk.

10 Article 2(1) and (2) of Regulation No 26 provides as follows:

'1. Article [81](1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article [33] of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article [33] of the Treaty are jeopardised.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.'

- 11 The common organisation of the market in milk and milk products was introduced by Regulation No 804/68. Alongside other specific measures, that regulation provides for the setting, at Community level, of a target price for milk. In that connection Article 3 provides as follows:

‘1. Each year a target price for milk shall be fixed for the Community.

2. The target price shall be that price which it is aimed to obtain for the aggregate of producers’ milk sales, on the Community market and on external markets, during the milk year.

3. The target price shall be fixed for milk containing 3.7% fat, delivered to dairy.

4. The target price shall be fixed in accordance with the procedure laid down in Article [37](2) of the Treaty.’

- 12 Council Regulation (EC) No 1190/97 of 25 June 1997 fixing the target price for milk and the intervention prices for butter and skimmed-milk powder for the 1997/98 milk marketing year (OJ 1997 L 170, p. 6) was in force during the 1997/98 period covered by the Competition Commission’s report. The first

recital of the preamble to Regulation No 1190/97 states as follows: 'when fixing the common agricultural prices each year, account should be taken of the objectives of the common agricultural policy;... the objectives of the common agricultural policy are in particular to secure a fair standard of living for the agricultural community and to ensure that supplies are available and that they reach the consumers at reasonable prices'.

The main proceedings and the questions referred for a preliminary ruling

- 13 Milk Marque is a farmers' cooperative society engaged in the collection, distribution and supply of milk. Immediately after the deregulation of the milk market in the United Kingdom in 1994 the members of Milk Marque had some 60% of the supply of milk in Great Britain. In the period 1997/98 to which the Competition Commission's report relates, that figure was 49.6%. During the period from April 1999 to September 1999, it fell still further to 40.8%.

- 14 It is apparent from the documents before the Court, first, that the price obtained by the producers in the United Kingdom for their milk has at all times, both before and after deregulation, been below the target price fixed by the Community legislation and, secondly, that the prices charged by Milk Marque members have always been among the lowest prices offered by producers in England and Wales.

- 15 Milk Marque did not originally have its own facilities for the processing of milk. It acquired one cheese maker in 1997 and another in 1998. It has planned a substantial expansion of its milk processing capacity. The evidence before the High Court showed that there were several dairy cooperatives in other Member States with substantial market shares which were vertically integrated.

- 16 On a reference by the DGFT on 27 January 1998, the Competition Commission, which is the authority responsible for investigating and reporting on monopoly situations as defined by the Fair Trading Act 1973 (hereinafter 'the FTA') and the Competition Act 1998 (hereinafter 'the CA'), carried out an investigation of whether a monopoly situation existed in relation to the supply in Great Britain of raw cows' milk. It completed its investigation on 26 February 1999 and sent its report to the Secretary of State.
- 17 In its report, the Competition Commission stated, first of all, that a scale monopoly situation existed by virtue of section 6(1)(a) of the FTA, in that Milk Marque supplied at least one quarter of all milk which is supplied in Great Britain.
- 18 Secondly, the Competition Commission stated that Milk Marque held a 'powerful position' in the milk market in Great Britain and that 'this has contributed to milk being supplied in Great Britain at a higher price than the level it would have reached under more competitive conditions'.
- 19 Thirdly, the Competition Commission considered that Milk Marque had exercised its 'market power' to exploit or maintain the scale monopoly situation in its favour in that it had:

— raised the average price of milk above levels that would otherwise have been reached by engaging in price discrimination taking various forms;

- inhibited the secondary trade in milk between processors by levying excessive redirection charges on them and placing restrictions on the sale of milk;

- removed milk from the formal selling process and thereby constrained the volumes of milk offered to its customers in the face of largely unchanged demand, thereby raising the marginal price of milk;

- operated its selling system in such a way as to create an asymmetry of information between itself and its customers, thereby generating unnecessary uncertainty for those customers, and so inducing them to purchase milk at higher prices than would otherwise have been the case;

- been slow to recognise the importance of proactive traceability and reluctant to meet its customers' requirements in that regard; and

- paid insufficient regard to the legitimate demand of its customers, both large and small, in respect of the contract types it offered them and other matters.

20 Fourthly, the Competition Commission concluded that the practices and conduct of Milk Marque (with the exception of its conduct in respect of traceability) were

facts found which operated or might be expected to operate against the public interest. According to the Competition Commission's report, the adverse effects were:

- '(i) increases in the price of raw milk, which have at least in part been passed on to consumers so that consumers pay more for fresh milk than they would if Milk Marque had not been able to secure milk prices above competitive levels; and

- (ii) increased costs and greater uncertainty for the dairy processing industry in Great Britain, so that processors in Great Britain have invested less and have become less competitive in internationally-traded products than they would otherwise have been and output in Great Britain is at a lower level and value than would otherwise have been the case.'

21 Also, according to the Competition Commission, Milk Marque's increased processing capacity which its subsidiary MMD was planning was a finding of fact which might be expected to operate against the public interest, with the particular adverse effect that this would give Milk Marque the ability to exploit still further the scale monopoly situation in its favour and ultimately intensify the adverse effects already identified.

22 On the basis of those findings, the Competition Commission made recommendations whose purpose was stated to be 'to eliminate the market power of Milk Marque, to create a more competitive market for the supply of milk and to provide fresh opportunities for producers and processors to develop commercial relationships that serve their interests as well as the interests of consumers'. The

main recommendation was the restructuring of Milk Marque by dividing it into between three and five independent and competing quota-holding bodies, which would be able to sell their milk on an ordinary commercial basis and, if they wished, to engage in milk processing.

23 The Competition Commission also recommended the adoption of a series of 'interim measures', pending implementation of its recommendation that Milk Marque be divided up. Those measures were intended to ensure that Milk Marque would:

- '(a) not take any further steps towards making or carrying out any agreement to acquire or build processing plants;

- (b) not make any further contract processing arrangements, save in an emergency and where the only alternative would be to avoid destruction of milk;

- (c) not enter into any individually negotiated milk supply contracts with processors on terms that are not published and available to all purchasers;

- (d) not enter into any milk supply contracts which contain any restrictions on the use to which the milk is to be put pursuant to those contracts; and

- (e) not place any restrictions on diversions of milk from one delivery point to another and should make no charge for diversions except to cover additional costs actually incurred'.

24 On 6 July 1999, the Secretary of State published the decisions taken by him on the basis of the Competition Commission's report. He accepted all the findings and recommendations in the report with the exception of the recommendation that Milk Marque should be divided up. Instead, he instructed the DGFT to consider and advise him what changes should be made to Milk Marque's sales procedures to remedy the adverse public interest effects specified in the report. However, the Secretary of State accepted the interim measures proposed by the Competition Commission and decided to seek a commitment from Milk Marque to give effect to them within three months and for an unspecified period.

25 As a result of the Secretary of State's decisions, Milk Marque announced, in a press release dated 17 September 1999, its proposal to divide itself into three smaller cooperatives, which would operate from 1 April 2000. That proposal had been developed after consultation with the Department of Trade and Industry and the Office of Fair Trading. In the context of those discussions, the Secretary of State had indicated that he would not pursue the interim measures proposed by the Competition Commission if he received assurances from Milk Marque that:

- the new cooperatives would carry out all policy making and selling of milk independently of each other;

- there would be no joint ventures between the successors in marketing or processing of milk;

- there would be no common directors between the new cooperatives; and

- there would be no shareholdings by any one of the businesses in either of the others.

- 26 On 5 November 1999, the Secretary of State withdrew his requirement for commitments from Milk Marque in respect of the implementation of the interim measures recommended in the Competition Commission's report. However, he stated that his consent to the new cooperatives processing their milk was dependent upon his being satisfied that they would operate independently from one another.
- 27 Despite those events, Milk Marque brought an action before the High Court to contest the Competition Commission's report and the subsequent decisions adopted by the Secretary of State. Subsequently, the NFU, an organisation representing 80% of farmers in Great Britain, also brought an action to contest that report and those decisions before the same court. The two actions were joined by the court.
- 28 Milk Marque and the NFU submitted before the High Court in particular that, in asserting jurisdiction over the activities of the members of Milk Marque and in recommending and taking steps pursuant to the FTA to prevent them from obtaining a higher price for the milk produced by their members, the Competition Commission and the Secretary of State had acted contrary to various provisions of Community law. Milk Marque and the NFU also contended that, by taking such steps in future pursuant to the FTA or the CA, the Secretary of State and/or the Competition Commission would be acting contrary to Community law.
- 29 The High Court considers that, in order to reach a decision on the merits of the applications made by Milk Marque and the NFU and to determine what (if any) relief should be granted to them, it is necessary to seek a preliminary ruling to determine, *inter alia*, whether the national authorities have any jurisdiction to intervene in the common organisation of the market in milk and milk products and, if so, whether there are any legal constraints on the exercise of such jurisdiction.

30 The High Court notes, with regard to the announcement by Milk Marque that it would divide itself up into smaller regional cooperatives after 1 April 2000, each with market shares below the 25% threshold that triggers the operation of the FTA scale monopoly provisions, that it did affect the decisions of the Secretary of State which formed the subject-matter of the action. However, it considers that it should take account of the 'on-going' application of the FTA and of the CA, which entered into force on 1 March 2000.

31 In that legal and factual context, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are Articles 32 to 38... EC, Council Regulation [No 26 of 4 April 1962] and Council Regulation (EEC) No 804/68, as amended, to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to the manner in which producers of milk choose to organise themselves into co-operatives and conduct themselves in regard to the sale and processing of their milk:

(a) in all circumstances; or

(b) where the intended or actual effect is to deprive such producers of the ability to increase the price obtained for their milk; or

(c) where the intended or actual effect is to reduce the price that producers obtain for their milk in circumstances where that price is already below the target price fixed pursuant to Article 3 of Regulation No 804/68; or

(d) in a way which is not consistent with any one or more of the following:

(i) the objectives set out in Article 33 EC...; and/or

(ii) the policy, aims or functioning of the common organisation of the market in milk and milk products: and /or

(iii) the policy of Article 36 EC... and Regulation No 26?

2. Does the function of the target price for milk set by the Council under Regulation (EEC) No 804/68 preclude a Member State from:

(a) making use of the target price as an indicator of the actual price movements due to the common agricultural policy; and

(b) treating the fact that a milk producers' co-operative in that State has achieved for its members milk prices that are below the target price, but are nearer to the target price in one period of time than another, as supporting a conclusion that the co-operative exercises market power which contributes to prices being higher than they would have reached under more competitive conditions?

3. Are Articles 28 to 30, EC... and Articles 49 and 55 EC... to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 in such a way as to prohibit a milk producers' co-operative which has been found to enjoy market power from sending milk produced by its members to be processed by contractors on its behalf, including in other Member States, as a step being taken by the co-operative for the purpose of exploiting its position in the market in its favour?

4. Where large vertically-integrated dairy co-operatives exist and are permitted to operate in other Member States, is the general principle of non-discrimination, whether independently or as a given specific effect in Articles 12 and/or 34 EC..., to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to prohibit a milk producers' co-operative which has been found to enjoy market power from:
 - (a) acquiring or building further plants for the processing of milk produced by its members, which would give the co-operative the ability to exploit still further its position in the market in its favour; or

 - (b) sending milk produced by its members to be processed by contractors on its behalf, whether within the Member State concerned or in other Member States, as a step being taken by the co-operative for the purpose of exploiting its position in the market in its favour?

Admissibility

Observations submitted to the Court

- 32 The United Kingdom Government has doubts as to the admissibility of the questions referred for a preliminary ruling by the national court. The voluntary division of Milk Marque into three cooperatives has removed the market power upon which the Competition Commission's investigation and report and all consequent decisions and recommendations were founded.
- 33 It accepts that the national court does not take the view that Milk Marque's application before it has become lacking in utility, largely on the basis of evidence submitted by Milk Marque as regards the possible future application of United Kingdom competition law to its successors. In particular, Milk Marque submitted that it would be 'commercially and economically rational' for its successor cooperatives to consider joint action, including the development of structural links, joint selling, joint purchasing of processing capability and merger.
- 34 In the light of those matters, the United Kingdom Government submits that, notwithstanding its high degree of generality, an answer to the first question could be of value to national competition authorities, including those in the United Kingdom, in defining the scope of their future action in the agricultural field. It has severe doubts, however, about the utility of the second, third and fourth questions.

- 35 With regard, more particularly, to the second question, the United Kingdom Government considers this question to be entirely academic. It does not, in any event, raise issues of Community law on which the Court of Justice is bound to adjudicate under the preliminary ruling procedure.
- 36 The third and fourth questions, to the extent that they refer back to the Competition Commission's report, have been overtaken by events. To the extent that they refer to some possible future situation in which a cooperative may be said to enjoy market power sufficient for restrictions to be imposed of the type envisaged in the third and fourth questions, those questions are excessively hypothetical.

Findings of the Court

- 37 It is settled case-law that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 59 to 61, Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20, and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 38 and 39).

- 38 It must be observed in this case that, as is clear from the order for reference, the national court has provided the Court with a detailed explanation of the factual and legal context of the main proceedings, and with the reasons why it considers a reply to its questions is necessary in order for it to deliver judgment.
- 39 Furthermore, the national court has pointed out that it does not share the view of the United Kingdom Government that the Competition Commission's report and the decisions of the Secretary of State have been overtaken by subsequent events, and in particular by the voluntary break-up of Milk Marque into three separate cooperatives. It emphasised in that connection that, in order to be able to determine the outcome of the applications brought by Milk Marque and the NFU, it would have to take account of the 'on-going' application of both the FTA and the CA, and that the reference for a preliminary ruling was therefore necessary to enable it correctly to adjudicate on the rights and obligations of the parties, to decide whether the national authorities have jurisdiction, and to rule on the limits on the exercise of that jurisdiction, and on any damages to be awarded to Milk Marque and the NFU.
- 40 The first, third and fourth questions must therefore be declared admissible.
- 41 Finally, with regard to the United Kingdom Government's argument that the second question does not raise legal problems relating to Community law, suffice it to observe that, by that question, the national court is essentially asking whether Regulation No 804/68 precludes the competent national competition authorities from using the target price for the Community for the purposes of reviewing the power enjoyed by an undertaking on the market in the context of national proceedings. It follows that that question does indeed relate to the interpretation of Community law and is therefore also admissible.

- 42 In those circumstances, a reply must be given to the questions referred for a preliminary ruling.

First question

- 43 By its first question, the national court is essentially asking whether Articles 32 to 38 EC and Regulations Nos 26 and 804/68 must be interpreted as meaning that, in the sector governed by the common organisation of the market in milk and milk products, the national authorities have jurisdiction to apply their national competition law to a milk producers' cooperative occupying a powerful position on the national market.
- 44 If they are to be so interpreted, it asks what the limits on any such jurisdiction are and, in particular, whether the national competition authorities are acting outside those limits if they adopt measures such as those at issue in the main proceedings in relation to an agricultural cooperative occupying a powerful position on the market and whose prices during the relevant period have always been lower than the target price laid down pursuant to Article 3(1) of Regulation No 804/68.
- 45 It is therefore necessary to consider, first of all, whether the Member States are in principle competent to take steps under their national competition law in the sector governed by the common organisation of the market in milk and milk products.

Whether the Member States are competent to take steps under their national competition law in the sector governed by the common organisation of the market in milk and milk products

Observations submitted to the Court

- 46 Milk Marque and the NFU submit that it is clear from the Court's case-law (Case 31/74 *Galli* [1975] ECR 47, paragraphs 26 to 30 and 32; Case 60/75 *Russo* [1976] ECR 45, paragraph 5; Case 10/79 *Toffoli and Others* [1979] ECR 3301, paragraph 12; Case 166/82 *Commission v Italy* [1984] ECR 459, paragraphs 5 and 23; Case 59/83 *Biovilac v EEC* [1984] ECR 4057, paragraph 16, and Case 27/85 *Vandemoortele v Commission* [1987] ECR 1129, paragraphs 20 and 21) that the national authorities are not competent to apply national competition law, such as the FTA or the CA, in a sector covered by a common organisation of the market. They consider that the Community legislation establishing the common organisation of the market in milk and milk products is exhaustive and confers exclusive competence on the Community.
- 47 The Community's exclusive competence precludes the Member States or their emanations from adopting measures which seek to fix, directly or indirectly, a uniform producer price for milk. Furthermore, the national measures do not need to relate directly to prices for them to infringe the exclusive competence of the Community (see *Toffoli and Others*, paragraphs 11 and 12). The Court has recognised that even measures outside the agricultural sector may infringe the exclusive competence conferred on the Community (*Galli*; Case 51/74 *Van der Hulst* [1975] ECR 79; Case 65/75 *Tasca* [1976] ECR 291; Joined Cases 88/75 to 90/75 *SADAM and Others* [1976] ECR 323, and Case 154/77 *Dechmann* [1978] ECR 1573).

- 48 As regards the main proceedings, Milk Marque and the NFU submit that the measures adopted by the Secretary of State constitute unilateral action by the State with a view to affecting price formation and the marketing of milk in a market covered by a common organisation. The aim of the measures is to bring about a fall in average milk prices. According to them, that objective was pursued notwithstanding that the Milk Marque producer price has consistently been significantly below the target price set by the Community. In other words, the national measures seek to establish a producer price at a level that is even lower than the target price.
- 49 Furthermore, the implementation of those measures has as its object and effect the reduction of producer prices and consumer prices to a level which the national authorities have unilaterally determined to be in the national public interest, irrespective of what is in the Community public interest.
- 50 Finally, Milk Marque and the NFU submit that activities undertaken in the context of a common organisation of the market are subject to the application of competition law only by virtue of the first paragraph of Article 36 EC, which acknowledges that the common agricultural policy takes precedence over the objectives of the Treaty in the field of competition (Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 61, Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 31), and of Regulation No 26. The parallel application of national and Community competition law would produce conflicts because the operation of Community competition law must take account of the objectives of the common agricultural policy and accordingly subjects agricultural cooperatives to the regime established by Regulation No 26. The operation of national competition law, on the other hand, is not so limited and allows for the adoption of measures which cannot lawfully be taken under Regulation No 26.
- 51 The United Kingdom Government argues that, if the Community had wished to exclude the application of national competition law from the agricultural sector,

it could have made use of a mechanism which has always been available to it. Community regulations and directives could have been adopted under Article 83(2)(e) EC. However, notwithstanding the existence of that mechanism, no relevant regulation or directive has been adopted. National competition law is therefore, in principle, fully capable of applying to the agricultural sector.

- 52 With regard to the argument that the EC Treaty has effected a complete transfer of competence from national authorities to the Community in relation to the common agricultural policy as a whole and the objectives set out in Article 33 EC in particular, the United Kingdom Government observes that a common organisation of a market cannot exist in a vacuum, divorced from the national laws and measures that are necessary to give it effect. The United Kingdom Government points out, as an example, that the application of national criminal law in a sector covered by a common organisation of the market may not only be permitted but required as a matter of Community law (Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraphs 23 to 25).
- 53 In the same way, Community competition law does not constitute a complete code because it applies only if there is an effect on trade between Member States. To exclude the application of national competition law, and thereby to allow no control in circumstances where there is no effect on inter-State trade, would be to allow even seriously anti-competitive agreements and abuses of power, such as those identified in the Competition Commission's report.
- 54 The Dairy Industry Federation (hereinafter 'the DIF') submits that the relevant Community rules do not preclude the application of national competition law in 'all circumstances' relating to the manner in which producers of milk organise themselves into cooperatives and conduct themselves in regard to the sale and processing of their milk. Referring to the Court's case-law (Case 14/68 *Wilhelm and Others* [1969] ECR p. 1), it submits that the adoption of measures on the

basis of national law is precluded by the existence of Community legislation only where the adoption of such measures would prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.

- 55 The Commission infers in particular from *Wilhelm and Others* and from Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663 that no provision in Community law precludes Article 82 EC from being applied in the normal way in the agricultural sector. By the same token, there is nothing to preclude Member States from applying analogous provisions of national law in that sector.
- 56 According to the Commission, in the main proceedings, the application of the FTA to Milk Marque could not in any way jeopardise the application of the Community competition rules, as the Commission has not initiated any steps against Milk Marque under those rules.

Findings of the Court

- 57 It must first of all be observed that the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy and the common organisation of the relevant markets.
- 58 Whilst Article 36 EC has conferred on the Council responsibility for determining the extent to which the Community competition rules are applicable to the production of and trade in agricultural products, in order to take account of the particular position of the markets for those products that provision nevertheless establishes the principle that the Community competition rules are applicable in the agricultural sector.

- 59 That conclusion is also confirmed both by the first recital in the preamble to Regulation No 26 and by the Court's case-law, according to which the common organisations of the market are based on the concept of an open market to which every producer has free access under effective conditions of competition (see, *inter alia*, Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 57, and Case C-281/87 *Commission v Greece* [1989] ECR 4015, paragraph 16).
- 60 In addition, the importance of competition in the context of the common organisation of the market in milk and milk products is seen clearly in Article 25(3)(a) of Regulation No 804/68, which provides that, where a Member State is authorised to grant to a national organisation the special rights provided for in Article 25(1), it must ensure that the exercise of those rights 'does not affect competition in the agricultural sector more than is absolutely necessary'.
- 61 As the common organisations of the markets in agricultural products are therefore not a competition-free zone, it must be pointed out that, in accordance with settled case-law, Community competition law and national competition law apply in parallel, since they consider restrictive practices from different points of view. Whereas Articles 81 and 82 EC regard them in the light of the obstacles which may result from trade between Member States, national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context (see, *inter alia*, *Wilhelm and Others*, paragraph 3, and Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327, paragraph 15).
- 62 The argument advanced by Milk Marque and the NFU to the effect that that case-law cannot be transposed to the common organisation of the market in milk and milk products cannot be upheld.

- 63 Admittedly, in a sector covered by a common organisation of the market, *a fortiori* where that organisation is based on a common price system, the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it (see, *inter alia*, Case 111/76 *Van den Hazel* [1977] ECR 901, paragraph 13, *Pigs Marketing Board*, cited above, paragraph 56, and Case C-462/01 *Hammarsten* [2003] ECR I-781, paragraph 28). In particular, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation at the production and marketing stages established under the common organisation (see, *inter alia*, *Toffoli and Others*, cited above, paragraph 12).
- 64 However, having regard to the fact that, as is clear from paragraphs 57 to 60 of this judgment, the maintenance of effective competition is one of the objectives of the common organisation of the market in milk and milk products, it must be observed that any measure adopted by the authorities of a Member State in application of national competition law cannot be regarded, by its very nature, as undermining or creating exceptions to the functioning of the common organisation of the market. Moreover, national measures which seek to eliminate a distortion of competition which is the result of abuse of the powerful position enjoyed by an agricultural cooperative on the national market cannot *a priori* be regarded as measures affecting the machinery of price formation established under the common organisation at Community level, within the meaning of the case-law cited at paragraph 63 of this judgment.
- 65 Next, if Articles 32 to 38 EC and Regulations Nos 26 and 804/68 were interpreted as meaning that, in the sector governed by the common organisation of the market in milk and milk products, the competence of the authorities of the Member States to act in application of their national competition law is wholly excluded, there would be no means, in that sector, of eliminating distortions of competition where there is no Community dimension.
- 66 Finally, given that the scope of the Community competition rules is not the same as the scope of national competition rules, the mere fact that in Article 36 EC and

Regulation No 26 the Community legislature has endeavoured to reconcile the objectives of the common agricultural policy with Community competition policy does not necessarily mean that any application of national competition law conflicts with Article 36 EC and Regulation No 26.

- 67 Having regard to those considerations, it must be concluded that Articles 32 to 38 EC and Regulations Nos 26 and 804/68 must be interpreted as meaning that, in the sector governed by the common organisation of the market in milk and milk products, the national authorities in principle retain jurisdiction to apply their national competition law to a milk producers' cooperative in a powerful position on the national market.
- 68 It is thus necessary, secondly, to consider the limits of that jurisdiction and whether they are exceeded by the adoption of measures such as those at issue in the main proceedings.

The limits of the Member States' jurisdiction to act under national competition law in the sector governed by the common organisation of the market in milk and milk products

Observations submitted to the Court

- 69 Milk Marque and the NFU submit in the alternative that the competent national authorities of the Member States are authorised to apply national competition law in the area governed by the common organisation of the market in milk and milk products only in so far as their actions are compatible with Articles 32 to 38 EC and Regulations Nos 26 and 804/68.

- 70 With regard to the measures at issue in the main proceedings, they observe, first of all, that by adopting those measures against Milk Marque, the national authorities did not take into account their obligations arising under the common agricultural policy and its objectives with regard to the target price. The Competition Commission and the Secretary of State restricted their analysis to the public interest criteria set out in Section 83 of the FTA. However, the definition of the 'public interest' for the purposes of the FTA does not match the common agricultural policy objectives under Article 33(1) EC.
- 71 Next, according to Milk Marque and the NFU, the national measures in question in the main proceedings jeopardised, affected, undermined, interfered with and altered the common organisation of the market in milk and milk products and the target price for milk.
- 72 In particular, those national measures are designed to deprive the members of Milk Marque of their right to seek to obtain the target price which embodies the Community's balancing of the different objectives set out in Article 33 EC.
- 73 Finally, the national authorities failed to give the correct weight to the competing interests of producers, processors and consumers in accordance with the policy, objectives and criteria established for the common organisation of the market in milk and milk products or to the balance to be attained at Community level through Regulation No 804/68.
- 74 The United Kingdom Government argues that Article 33 EC cannot be interpreted as meaning that the application of national competition law ought to be excluded whenever the object or effect of such application is to deprive producers of the ability to increase their prices. According to it, a national

measure cannot be invalid just because it does not pursue one of the objectives set out in Article 33 EC. On the contrary, those objectives must be approached in a balanced manner, not pursuing one to the exclusion of the others (see *Biovilac v EEC*, paragraph 16).

- 75 Furthermore, the United Kingdom Government observes that, in a case such as this one, characterised by serious abuses of market power, it is the non-application of competition law that infringes Community law, since a failure to use the means at the disposal of a Member State frustrates the objectives of ensuring that supplies are available (Article 33(1)(d) EC) and reach consumers at reasonable prices (Article 33(1)(e) EC).
- 76 Moreover, the word 'thus' in Article 33(1)(b) EC makes it clear that a fair standard of living for the agricultural community is an objective which is to be reached by means of the increase in agricultural productivity referred to in Article 33(1)(a).
- 77 Finally, the United Kingdom Government admits that producers are entitled to seek to obtain the target price. However, the milk price is set by market mechanisms, within the framework of the instruments provided for by the common organisation of the market. According to the United Kingdom Government, whilst Member States must allow their producers to seek to achieve that target price, they are under no obligation to allow them to do so by illegal or anti-competitive means. The application of national competition law to the selling practices of a very large cooperative in no way interferes with the proper functioning of the common market. Indeed, by removing distortions to competition, it contributes to the implementation of the scheme envisaged by Regulation No 804/68.

- 78 The DIF suggests that the answer to this part of the first question should be that Articles 32 to 38 EC, Regulation No 26 and Regulation No 804/68 do not preclude the operation of United Kingdom competition law except where that competition law leads to results which are manifestly contrary to provisions of Community law. In particular, it is not inconsistent with Community law for national competition law to adopt measures which prevent producers of milk from obtaining prices which are close to the target price in circumstances such as those set out in the Competition Commission's report, or in any circumstances.
- 79 The Commission notes the settled case-law that once the Community has established a common market organisation for a given agricultural product, Member States are barred from taking any action which could undermine the operation of that organisation. However, the main proceedings are not concerned with any measure of that kind. According to the Commission, steps taken by the authorities of a Member State to curtail the dominant position on the market for milk and milk products of an undertaking found to have abused that position in a manner contrary to the public interest cannot in principle be regarded as jeopardising the application of the rules on the common organisation of that market. In particular, Regulation No 804/68 does not preclude the competent national competition authorities from taking measures such as those in question in the main proceedings.

Findings of the Court

- 80 It must first of all be observed that, as is clear from the case-law cited at paragraph 63 of this judgment, where there is a regulation establishing the common organisation of the market in a given sector the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it.

- 81 Secondly, it is also clear from settled case-law that, even in regard to the competition rules of the Treaty, Article 36 EC gives precedence to the objectives of the common agricultural policy over those in relation to competition policy (see to that effect Case 139/79 *Maizena v Council* [1980] ECR 3393, paragraph 23, and *Germany v Council*, cited above, paragraph 61).
- 82 With regard to measures such as those at issue in the main proceedings, it is common ground that they do not undermine an express provision of the rules establishing the common organisation of the market in milk and milk products.
- 83 The question then arises as to whether such measures, in the light of the means employed to implement them, produce effects which are likely to impede the functioning of the mechanisms provided for by the common organisation concerned (see to that effect Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 19).
- 84 As is clear from the documents before the Court, the purpose of the national measures at issue in the main proceedings is to reduce the market power of Milk Marque and its ability to increase the price of milk charged by member producers beyond levels judged to be competitive, and to do so in the interests of both producers and consumers.
- 85 As the Court has already held, the essential aim of the machinery of the common organisation of the market in milk and milk products is to achieve price levels at the production and wholesale stages which take into account both the interests of Community production as a whole in the relevant sector and those of consumers and which guarantee market supplies without encouraging overproduction (see *Irish Creamery Milk Suppliers Association and Others*, cited above, paragraph 20).

- 86 In consequence, the objectives of that common organisation cannot be compromised by national measures such as those at issue in the main proceedings since they do not as such affect the fixing of prices but rather seek to safeguard the proper working of the machinery for setting prices in order to achieve price levels which serve the interests of both producers and consumers.
- 87 With regard, in particular, to the question whether national measures such as those at issue in the main proceedings infringe the relevant Community legislation because the milk price of Milk Marque producers was lower than the target price laid down by Regulation No 1190/97 before the national authorities took action, it must be observed that that fact alone is not sufficient to render those measures unlawful under Community law.
- 88 First of all, this sort of price guideline is a political objective at Community level and is not a guarantee to all producers in every Member State that they will earn an income corresponding to the target price.
- 89 Secondly, given that, as is clear from paragraphs 57 to 60 of this judgment, the maintenance of effective competition is one of the objectives of the common organisation of the market in milk and milk products, Article 3(1) of Regulation No 804/68 cannot be interpreted as meaning that producers of milk have the right to seek to earn an income corresponding to the target price by any means, including those that may constitute abuses or be anti-competitive.
- 90 The arguments advanced by Milk Marque and the NFU, however, seem to imply that the Competition Commission in its report and the Secretary of State in the subsequent decisions adopted by him failed to have regard to the fact that one of

the objectives of the common agricultural policy is to ensure a fair standard of living for the agricultural community, in particular, by increasing the individual earnings of persons engaged in agriculture, and gave too much weight to the objective of ensuring that supplies reach consumers at reasonable prices.

- 91 In that connection, it must be observed that, in pursuing the various aims laid down in Article 33 EC, the Community institutions have a permanent duty to reconcile the individual aims. Although that duty to reconcile any contradictions means that no single aim may be pursued in isolation in such a way as to make the achievement of the others impossible, the Community institutions may allow one of them temporary priority in order to satisfy the demands of the economic or other conditions in light of which their decisions are made (see, to that effect, in particular, *Vandemoortele v Commission*, cited above, paragraph 20).
- 92 Whilst it is true that that case-law has been developed in relation to acts by the Community institutions in the area of the common organisation of the agricultural markets, the fact remains that it may be applied by analogy to acts of the national authorities in the exercise of their jurisdiction in the area of national competition policy. Given that, as is clear from paragraphs 80 and 81 of this judgment, in the course of those acts, the national authorities are under an obligation to respect the objectives of the common agricultural policy as set out in Article 33 EC, they must also ensure that any contradictions between those objectives are reconciled.
- 93 In this case, in order to reply to the question whether the Competition Commission's report and the decisions of the Secretary of State reconciled, in an acceptable manner, the various objectives laid down in Article 33 EC or whether in fact they had the effect of favouring the objective of ensuring reasonable prices in supplies to consumers to the point of rendering the realisation of the other objectives impossible, a thorough investigation is required in particular into the

situation in the milk market in the United Kingdom during the relevant period and into the effects on that market of the application of the measures at issue. Since such an investigation necessarily involves the finding of facts in the main proceedings, it is for the national court to undertake it.

- 94 Having regard to all of those considerations, the reply to the first question must be that Articles 32 to 38 EC and Regulations Nos 26 and 804/68 must be interpreted as meaning that, in the sector governed by the common organisation of the market in milk and milk products, the national authorities in principle retain jurisdiction to apply national competition law to a milk producers' cooperative in a powerful position on the national market.

Where the national competition authorities act in the sector governed by the common organisation of the market in milk and milk products, they are under an obligation to refrain from adopting any measure which might undermine or create exceptions to that common organisation.

Measures taken by national competition authorities in the sector governed by the common organisation of the market in milk and milk products may not, in particular, produce effects which are such as to impede the working of the machinery provided for by that common organisation. However, the mere fact that the prices charged by a dairy cooperative were already lower than the target price for milk before those authorities intervened is not sufficient to render the measures taken by them in relation to that cooperative in application of national competition law unlawful under Community law.

Furthermore, such measures may not compromise the objectives of the common agricultural policy as set out in Article 33(1) EC. The national competition

authorities are under an obligation to ensure that any contradictions between the various objectives laid down in Article 33 EC are reconciled where necessary, without giving any one of them so much weight as to render the achievement of the others impossible.

Second question

- 95 By its second question the national court is essentially asking whether the function of the target price for milk laid down in Article 3(1) of Regulation No 804/68 precludes the national competition authorities from using that price for the purposes of investigating the market power of an agricultural undertaking by comparing variations in actual prices with the target price.

Observations submitted to the Court

- 96 Milk Marque submits that the function of the target price precludes national authorities from using it as an indicator of actual price movements due to the common agricultural policy. Furthermore, given that the prices achieved by the dairy cooperatives have always been below the target price, those authorities may not infer from the fact that those prices are nearer the target price at one particular time than another that market power exists.
- 97 The DIF, the Commission and, in the alternative, the United Kingdom Government submit that no provision of Community law precludes a Member State's

authorities from using the target price set out in Regulation No 804/68 as an historic point of comparison for actual price movements or for statistical, comparative or econometric purposes.

Findings of the Court

- 98 Under Article 3(2) of Regulation No 804/68, the target price is to be that price which it is aimed to obtain for the aggregate of producers' milk sales on the Community market and on external markets during the milk year.
- 99 It follows from that provision, read in the light of Article 33(1) EC, that the essential function of the target price is to define, at Community level, the desirable point of equilibrium between the objective of ensuring a fair standard of living for the agricultural community on the one hand, and that of ensuring that supplies reach consumers at reasonable prices on the other.
- 100 It must be observed that for the national competition authorities to use the target price as an indicator when examining the power of an agricultural undertaking on the national market in no way interferes with the essential function of the target price.
- 101 Nor, furthermore, is there any provision of Community law, whether primary or secondary, which prohibits the target price being used in that way.

- 102 The reply to the second question must therefore be that the function of the target price for milk laid down in Article 3(1) of Regulation No 804/68 does not preclude the national competition authorities from using that price for the purposes of investigating the market power of an agricultural undertaking, by comparing variations in actual prices with the target price.

Third question

- 103 By its third question the national court is essentially asking whether, in the context of the application of national competition law, Articles 28 to 30 EC and/or Article 49 EC preclude the competent authorities of a Member State, from prohibiting a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings established in other Member States, for the processing on its behalf of milk produced by its members.

Observations submitted to the Court

- 104 Milk Marque and the NFU point out that the measures proposed by the Competition Commission and accepted by the Secretary of State include the requirement that Milk Marque should not make any further contract processing arrangements, save in an emergency and where the only alternative would be the destruction of milk. That requirement constitutes a restriction on the export of raw milk from the United Kingdom and on the import or export of milk products from one Member State to other Member States. It is therefore contrary to Articles 28 and 29 EC. Consequently, since that measure obliges Milk Marque to obtain processing services only from processors established within the United Kingdom, it also constitutes a restriction contrary to Article 49 EC.

- 105 According to Milk Marque and the NFU, those measures cannot be justified under Articles 30 and 46 EC because aims of a purely economic nature, such as those envisaged by the Secretary of State, can never justify an obstacle to the fundamental principles of free movement (Case 288/83 *Commission v Ireland* [1985] ECR 1761, paragraph 28; Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 11, and Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 39) and recourse to Treaty derogations is not possible where the Community provides for harmonisation of the measures necessary to achieve the specific objective pursued by such derogations (Case C-5/94 *Hedley Lomas* [1996] ECR I-553, paragraph 18), in the present case, the fixing of the target price and the common organisation of the market in milk and milk products.
- 106 The United Kingdom Government, on the other hand, submits that if the measures referred to in the third question constitute an obstacle to the free movement of goods or the freedom to provide services, that obstacle is indistinctly applicable. It is therefore capable of justification on a number of established grounds, such as the prevention of unfair competition, the fairness of commercial transactions and the protection of consumers. Moreover, in the light of the careful analysis of the Competition Commission, the United Kingdom Government can see no reason for suggesting that these legitimate and genuine aims were pursued in anything other than a proportionate manner.
- 107 Referring especially to Case 237/82 *Jongeneel Kaas and Others* [1984] ECR 483, and Case 229/83 *Leclerc and Thouars Distribution* [1985] ECR 1, the DIF submits that the national measures which prohibit Milk Marque from sending milk to be processed on its behalf either in the United Kingdom or in other Member States are not prohibited by Articles 28 to 30 EC since they are indistinctly applicable. They do not constitute a difference in treatment between the domestic trade of the United Kingdom and its export trade, amounting to a

special advantage for United Kingdom production or for the United Kingdom milk market. The rules relating to the free movement of goods within the Community do not preclude the application of national competition law in those circumstances and to that effect.

- 108 With regard to the compatibility of the measures in question with the Treaty provisions on the freedom to provide services, the DIF relies on Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 12, Case 96/85 *Commission v France* [1986] ECR 1475, paragraphs 10 and 11, and Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, to conclude that objective criteria such as, in the present case, national competition laws, applied on a non-discriminatory basis, which are designed to perfect the market and protect consumers, cannot be considered to be contrary to Articles 49 and 55 EC.
- 109 Referring to *Leclerc and Thouars Distribution*, the Commission argues that measures such as those in question in the main proceedings do not come under Article 28 EC because the goods in question are exported for the sole purpose of reimportation in order to circumvent a rule of national law. Furthermore, those measures are not contrary to Article 29 EC because their effect is not to restrict specifically exports and thus to establish different treatment between the domestic market of a Member State and exports from that Member State.

Findings of the Court

- 110 It must be observed, by way of preliminary observation, that the processing of milk cannot be classified as a provision of services within the meaning of Article 50 EC since it leads directly to the manufacture of a physical object which itself is intended to be sold as a product. In any event, under Article 50 EC,

services are to be considered to be ‘services’ within the meaning of the Treaty where they are provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons (see Case 18/84 *Commission v France* [1985] ECR 1339, paragraph 12).

- 111 Moreover, it is clear from the documents before the Court that the measures to which the third question refers related only to the processing of milk for the manufacture of products in which Milk Marque retained title and which would then be marketed by MMD, Milk Marque’s subsidiary. It follows, with regard to processing contracts entered into with undertakings established in other Member States, that although the measures in question covered exported goods, those goods were exported with a view to processing and subsequent reimportation into the United Kingdom.
- 112 It is therefore necessary to consider the third question from the point of view of Articles 28 to 30 EC alone.
- 113 With regard, first of all, to the question whether measures such as those described in the third question constitute measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, it should be noted that it is settled case-law that that provision is intended to prohibit all rules or other measures enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, *inter alia*, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).
- 114 However, it is also settled case-law that a Member State is entitled to take measures to prevent certain of its nationals, under cover of freedoms created by the Treaty, from wrongfully evading the application of their national legislation

(see, *inter alia*, in relation to the freedom to provide services *Van Binsbergen*, paragraph 13; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 12; Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 21; in relation to freedom of establishment, Case 115/78 *Knoors* [1979] ECR 399, paragraph 25; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14; and Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24; in relation to social security, Case C-206/94 *Paletta* [1996] ECR I-2357, paragraph 24; in relation to free movement of workers, Case 39/86 *Lair* [1988] ECR 3161, paragraph 43; in relation to the common agricultural policy, Case C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21; in relation to company law, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20).

- 115 With regard more particularly to the free movement of goods, the Court has already held that restrictive measures concerning goods which have been exported for the sole purpose of being reimported in order to circumvent a national rule do not constitute measures having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC (see, to that effect, *Leclerc and Thouars Distribution*, paragraph 27). The same must be true in relation to the export of goods followed by their reimport for the purpose of avoiding the application of measures adopted under national competition law.
- 116 That is the case with regard to measures such as those referred to in the third question.
- 117 If the prohibition on entering into processing contracts on its behalf which was imposed on Milk Marque applied only to contracts entered into with undertakings established in the United Kingdom, Milk Marque could, by entering into contracts with undertakings established in other Member States, have circumvented that legislation, which would thereby have been rendered ineffective.

- 118 With regard, secondly, to the question whether measures such as those referred to in the third question constitute measures having an equivalent effect to quantitative restrictions on exports for the purposes of Article 29 EC, it must be observed that it is settled case-law that that provision concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question (see, *inter alia*, Case 155/80 *Oebel* [1981] ECR 1993, paragraph 15; *Jongeneel Kaas and Others*, paragraph 22, and Case C-388/95 *Belgium v Spain* [2000] ECR I-3123, paragraph 41).
- 119 However, that is not the case with regard to measures such as those referred to in the third question, which come within national competition policy, are designed to limit anti-competitive practices engaged in by just one agricultural cooperative and apply indistinctly to processing contracts entered into with undertakings established in the United Kingdom and those entered into with undertakings established in other Member States.
- 120 The reply to the third question must therefore be that, in the context of the application of national competition law, the Treaty rules on the free movement of goods do not preclude the competent authorities of a Member State from prohibiting a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings established in other Member States, for the processing, on its behalf, of milk produced by its members.

Fourth question

- 121 By its fourth question, the national court is essentially asking whether Article 12 EC and the second subparagraph of Article 34(2) EC preclude the adoption of

measures such as those at issue in the main proceedings in relation to a dairy cooperative which enjoys market power where large vertically-integrated dairy cooperatives are permitted to operate in other Member States.

Observations submitted to the Court

- 122 Milk Marque and the NFU submit that it is incompatible with the principle of non-discrimination and the common organisation of the markets laid down in Article 12 EC and the second subparagraph of Article 34(2) EC for the national authorities to use national law to restrict the ability of one set of producers, such as the members of Milk Marque, to engage in processing milk, when that restriction does not apply to the other producers in the United Kingdom or elsewhere in the European Union. They emphasise the fact that the national measures in question in the main proceedings do not apply to all producers in the United Kingdom and have not been adopted on the basis of objective criteria. In effect, those measures are based on a policy that has been adopted deliberately in favour of milk processors at the expense of members of Milk Marque.
- 123 The United Kingdom Government contends that the principle of non-discrimination has no application as regards the different treatment of agricultural cooperatives by national authorities of the Member States, or when the discrimination complained of is not practised by the same authority. Furthermore the United Kingdom Government, the DIF and the Commission submit in particular that to single out an undertaking for particular treatment on the ground that it has exercised its dominant position contrary to the public interest does not constitute an act of discrimination against that undertaking but rather an objectively justified act.

Findings of the Court

- 124 Whilst it is true that Article 12 EC prohibits every Member State from applying its competition law differently on grounds of the nationality of the parties concerned, the fact remains that Article 12 EC is not concerned with any disparities in treatment which may result, for persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them, in accordance with objective criteria and without regard to their nationality (see *Wilhelm and Others*, cited above, paragraph 13).
- 125 In the light of that case-law, it must be observed that, with regard to measures such as those at issue in the main proceedings, whose purpose is to prohibit the extension of the activities of a dairy cooperative to the processing of milk because of its powerful position on the market and its use of that power contrary to the public interest, the mere fact that there are vertically-integrated cooperatives in other Member States is not sufficient to establish that the adoption of those measures amounts to discrimination on grounds of nationality.
- 126 With regard to the second subparagraph of Article 34(2) EC, that provision, which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment, which requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified (see, in particular, Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 25; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39, and Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49).

127 Suffice it to observe in the present case that, as the order for reference makes clear, the measures at issue in the main proceedings were adopted on the basis of rules of general application and the reason for their adoption was the powerful position of Milk Marque on the market and its use of that position in a manner contrary to the public interest. It follows that a cooperative such as Milk Marque is not in a comparable situation to the other milk producers established in the United Kingdom or in other Member States.

128 In those circumstances, the reply to the fourth question must be that Article 12 EC and the second subparagraph of Article 34(2) EC do not preclude the adoption of measures such as those at issue in the main proceedings against a dairy cooperative which enjoys market power and exploits that position in a manner contrary to the public interest, even though large vertically-integrated dairy cooperatives are permitted to operate in other Member States.

Costs

129 The costs incurred by the United Kingdom Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), by order of 31 March 2000, hereby rules:

1. Articles 32 to 38 EC, Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products and Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, as amended by Council Regulation (EC) No 1587/96 of 30 July 1996, must be interpreted as meaning that, in the sector governed by the common organisation of the market in milk and milk products, the national authorities in principle retain jurisdiction to apply national competition law to a milk producers' cooperative in a powerful position on the national market.

Where the national competition authorities act in the sector governed by the common organisation of the market in milk and milk products, they are under an obligation to refrain from adopting any measure which might undermine or create exceptions to that common organisation.

Measures taken by national competition authorities in the sector governed by the common organisation of the market in milk and milk products may not, in particular, produce effects which are such as to impede the working of the machinery provided for by that common organisation. However, the mere fact that the prices charged by a dairy cooperative were already lower than the target price for milk before those authorities intervened is not sufficient to render the measures taken by them in relation to that cooperative in application of national competition law unlawful under Community law.

Furthermore, such measures may not compromise the objectives of the common agricultural policy as set out in Article 33(1) EC. The national competition authorities are under an obligation to ensure that any contradictions between the various objectives laid down in Article 33 EC are reconciled where necessary, without giving any one of them so much weight as to render the achievement of the others impossible.

2. The function of the target price for milk laid down in Article 3(1) of Regulation No 804/68, as amended by Regulation No 1587/96, does not preclude the national competition authorities from using that price for the purposes of investigating the market power of an agricultural undertaking by comparing variations in actual prices with the target price.

3. In the context of the application of national competition law, the Treaty rules on the free movement of goods do not preclude the competent authorities of a Member State from prohibiting a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings established in other Member States, for the processing, on its behalf, of milk produced by its members.

4. Article 12 EC and the second subparagraph of Article 34(2) EC do not preclude the adoption of measures such as those at issue in the main proceedings against a dairy cooperative which enjoys market power and exploits that position in a manner contrary to the public interest, even though large vertically-integrated dairy cooperatives are permitted to operate in other Member States.

Wathelet	Schintgen	Timmermans
Gulmann	Edward	La Pergola
Jann	Skouris	Macken
Colneric	Cunha Rodrigues	

Delivered in open court in Luxembourg on 9 September 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President