OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 6 JULY 1977 [1]

Mr President,
Members of the Court,

As appears from the file forwarded by the national court, the case in which this reference for a preliminary ruling has been made has arisen in the following circumstances:

On 4 September 1976 the Italian undertaking Tedeschi placed an order with Denkavit Commerciale, also an Italian undertaking, for ten quintals (1 metric ton) of powdered milk of the brand-name 'Start', to arrive between 20 and 25 September 1976. The product in question is a complete food for animals, composed partly of skimmed milk powder and partly of powdered whey. Whey is a by-product from the making of cheese. It contains residues of potassium nitrates, which are used in the process for the making of cheese.

On 12 September 1976 Denkavit Commerciale ordered 250 quintals of 'Start' from the undertaking Pesch, in the Netherlands, delivery to take place before 30 September. On 16 September Pesch gave Denkavit Commerciale confirmation that 250 quintals of the complete feeding-stuff of the brand-name specified were being sent by lorry. The next day, 17 September, Denkavit acknowledged receipt of Tedeschi's order and of the deposit paid and confirmed that it would deliver on 20 September.

But the lorry carrying the goods from the Netherlands was stopped at the Italian frontier on 25 September upon an order from the inspector responsible for health controls. Since the goods in question did not comply with the requirements fixed by 'an urgent note' sent out by the Italian Ministry of Health on 7 September, they were refused entry and the lorry returned to the Netherlands. The 'note' in question set the maximum acceptance level of potassium nitrates at 30 parts per million for whole milk or skimmed milk, whether fresh or powdered, and at 50 parts per million for powdered whey. That measure applied both to products intended for human consumption and to those for animal consumption.

On 5 October 1976, Denkavit Commerciale informed Tedeschi of this mishap and offered to return the deposit. But on 21 October 1976 Tedeschi claimed reimbursement from Denkavit Commerciale of a sum equal to twice the deposit for non-performance of the contract. It argued before the Pretore di Lodi, before whom the dispute was brought, that Denkavit had entered into the contract at a time when it had knowledge of the contents of the note from the Ministry. It had thus deliberately taken the risk that its goods might be stopped at the frontier. In its defence, Denkavit argued that the failure to perform the contract was due to an intervention on the part of the Italian authorities, contrary to the Community provisions in force.

Three national associations of manufacturers of feeding-stuffs intervened in support of Denkavit Commerciale. It is in these circumstances that the Pretore di Lodi is asking you whether the prohibition laid down by the Italian authorities against new substances considered harmful and the setting of maximum permitted levels of those substances is compatible with Article 5 of Council Directive No 74/63 of 17 December 1973, the said substances not being mentioned in the annex to that directive.

1 – Translated from the French.

Although Tedeschi has not availed itself of its right to submit observations, the defendant in the main action, supported by the three national associations to which I have referred, the Council, the Commission, the Government of the United Kingdom and, of course, the Government of the Italian Republic, have on the contrary shown great interest in the case.

I should add that there exists an undertaking Denkavit Nederland, whose registered office is at Voorthuizen, at the same address as Pesch. The periodical 'Denkavit Aktualiteiten', No 29, for the month of September 1969, published an article according to which there were — at that time — four different prices for skimmed milk powder: Fl 150 for skimmed milk powder intended for human consumption; Fl 129 for powder intended for the feeding of calves; Fl 42·50 for powder intended for the feeding of pigs and poultry; and finally the price of powder intended for export to third countries. The article goes on: 'anybody who does not understand that this system leaves the door open to fraud must be very naïve'.

Since Regulation No 465/75 of the Council of 27 February 1975 a Community aid has been granted for buttermilk powder used as feed, as it was previously granted for skimmed milk powder, subject to the reservation that 'the skimmed milk and buttermilk resulting from the processing of milk into cream or butter... may not be diluted in any way which is *not normally* part of the production method used, in particular with water and/or whey' (Regulation No 2114/75 of the Commission of 11 August 1975). So far as I know, no Community rules have yet been adopted fixing the proportions in which it is permissible to add powdered whey to powdered skimmed milk in such a way that the latter continues to qualify for Community aids.

On 14 September 1976 Denkavit Nederland complained directly to the Commission in Brussels about the restrictions thus imposed by the Italian authorities on freedom of movement for goods, despite the fact that those goods are covered by common organizations of markets, and the said undertaking did not exclude the possibility that legal action might follow. You have heard the technical explanations of one of its representatives at the oral hearing.

I — As often happens, you are called upon, pursuant to Article 177, to rule on the application of a Community text by the authorities of a Member State to a particular case. Worded in abstract terms, the three questions which have been addressed to you by the Italian court concern the extent of the power which is left to the Member States by Council Directive No 74/63 of 17 December 1973 on the fixing of maximum permitted levels for *undesirable* substances and products in feeding-stuffs.

The Italian court is asking you whether, if it be that Article 5 of that directive gives Member States a discretionary power in that respect, the said Article 5 is not invalid as being contrary to the principle of freedom of movement of goods (Article 30 of the Treaty) and not justified by Article 36 of the Treaty.

There is no point in dwelling at length on the considerations which led to the adoption of the directive in respect of which you are called upon for a ruling. Let me simply remind you that it was not possible for the adoption of the basic regulations on the common organizations of markets in agricultural, vegetable or animal products and in particular Regulation No 804/68 on 'milk and milk products' to settle all the ecological problems relating to the production of, free movement of, and trade in the products covered by those regulations.

As is stated in the preamble to the directive, livestock production occupies a very important place in the agriculture of

the Community and depends to a large extent on the use of appropriate good-quality feeding-stuffs. But the feeding of animals is increasingly connected with the use of *additives* and, moreover, the feeding-stuffs which are fed to them often contain, either naturally or because of the ill-considered addition of certain substances to the basic products of which they are composed, undesirable elements which can endanger animal health and, because of their presence in livestock products, human health.

Now, the legislation concerning feeding-stuffs for animals, which directly affects the functioning of the common market in agriculture (Article 100 of the Treaty) varies considerably from one Member State to another and depends on developments in scientific or technical knowledge. Therefore it is necessary for the national provisions relating to feeding-stuffs to be brought into closer alignment or harmonized at Community level, the rules governing those products being an essential factor in the increase of productivity in agriculture.

Additives in feeding-stuffs have been dealt with by Council Directive No 70/254 of 23 November 1970, as amended by Council Directive No 73/103 of 28 April 1973.

As regards the setting of maximum levels for *undesirable* substances and products in feeding-stuffs, the Commission originally proposed that a *regulation* be adopted under Article 43 and, alongside that regulation, it proposed to the Council that a regulation concerning the marketing of feeding-stuffs be adopted. What actually happened was that the Council adopted a *directive* under Articles 43 *and 100* of the Treaty, and no regulation specifically covering marketing was adopted. On 16 December 1976, the Council adopted Directive No 77/101 on the marketing of *straight* feeding-stuffs for animals. But that directive, published during the course of the proceedings, sets 1 January 1979 as the date by which the Member States must have brought into force the national provisions necessary to comply with it.

The system introduced is as follows: the annex to the directive contains a list of the substances or products the presence of which beyond a certain level, also stated in the annex, in feeding-stuffs renders those feeding-stuffs undesirable and, accordingly, gives rise to a prohibition on the marketing of them. That list was drawn up by experts for each feeding-stuff, and the maximum content has been set in parts per million of unadulterated matter. The fact that a substance was not included in the annex at the time when the directive was adopted does not prevent the later 'aggiornamento' (bringing up to date) of the text. Since it is necessary constantly to adjust the contents of the annex to developments in scientific and technical knowledge 'Member States should retain *the power,* if animal or human health is endangered to reduce *temporarily* the fixed maximum permissible levels or to fix maximum levels for other substances or products, or to prohibit the presence of such substances or products in feeding-stuffs'. That power is to be exercised in accordance with the provisions of Article 5. However 'in order that a Member State should not *abuse* that power, possible amendments to the annex to this directive *based on supporting documents should be decided on by emergency Community procedure*'. The latter procedure is explained in Article 10 and it presupposes action on the part of a 'Standing Committee for Feeding-stuffs', according to detailed rules which are not wholly unlike the detailed rules governing the Management Committees contained in the basic regulations.

II – The Italian Government is arguing that in reality the intention of its officials has been to apply not the directive on 'undesirable substances' but the directive on 'additives', and it is with regard to the

latter that the action of the Italian authorities should really be assessed.

Certainly, the nitrate in question has been *added* to the milk with a view to turning it into cheese and it is because the powdered whey, a by-product of the process involved, has been *added* to the powdered milk that it is found in the mixture for animals. But it is then found in the *natural state* in that mixture, and it is as such that it is undesirable. Thus although it is certainly not wrong to say that, as part of the whey mixed into the skimmed milk powder, the nitrate present naturally in the whey is *added* to the compound feeding-stuff, that substance has not been so added for the purpose with which the directive on 'additives' is concerned, namely in order to improve or increase the production of livestock and the levels of potassium nitrates found, on which the Italian Government bases its case, are not evidence of the *addition* of a substance not permitted by Community rules (the 'additives' directive).

In other ways, the two directives have many points in common. Both made provision for action on the part of the same Standing Committee for Feeding-stuffs, created by Council Decision of 20 July 1970, and the rules governing action by that Committee have been practically identical in both cases since the time when, by Council Directive of 28 April 1973 (No 73/103), the procedure for amending the annexes to the 'additives' directive has been aligned on the procedure in the 'undesirable substances' directive.

By virtue of Articles 9 and 10 of the latter directive, the Committee exercises a direct influence on the deliberation procedure. Where the procedure laid down in Article 9 is to be followed (*Community* amendment to be made by reason of developments in scientific and technical knowledge, for example the inclusion of sodium nitrates by Commission Directive No 76/934 of 1 December 1976), as also where the procedure laid down in Article 10 is to be followed (unilateral amendment made by a Member State), the Commission may adopt the measures concerned only if the Committee delivers an Opinion in favour of them. If the Committee does not deliver a favourable Opinion or if no Opinion is delivered within the time-limit set by the Chairman (Article 9 (3) or within two days (Article 10 (3)), the Commission shall *without delay propose* to the Council the measures to be adopted; the Council acts without consulting the Parliament. If the Council has not acted within three months (Article 9 (4)) or 15 days (Article 10 (4)), the Commission shall adopt a final decision and implement it *forthwith.*

In practice, the powers of the States are the same: with regard to additives, the directive lists permitted substances; all others are prohibited. A Member State may temporarily suspend authorization for the use of an additive or reduce the maximum permitted level. As regards 'undesirable substances', the directive lists prohibited substances, but this does not mean that the presence of any other 'undesirable' substances is therefore permitted, for there remains the reservation in Articles 5 and 6.

I shall refrain from considering whether the questions which have been referred to you are relevant or necessary, and I shall direct my thinking exclusively to the directive on 'undesirable substances'. In any event, the Italian Government is of the opinion — rightly or wrongly — that beyond a certain level the presence, even natural and involuntary, of potassium nitrates is *undesirable,* which in practice has the same effect as in the case where an unauthorized additive is involved.

III — Whilst I shall refrain from assessing whether the national measure contested in the main action is in accord with the Treaty, I ought nevertheless, in order that the context in which the

questions arise should be perfectly plain, to examine the circumstances in which the Italian measure was adopted.

The Member States were required to bring into force on 1 January 1976 the laws, regulations and administrative provisions necessary to comply with Directive No 74/63.

The Italian Government 'received' the provisions of that directive into the national legal system by Ministerial Decree of 30 December 1975, which entered into force on 1 January 1976. Potassium nitrates do not appear among the substances listed in the annex.

On 5 August 1976 the Italian Ministry of Health, by 'urgent note', ordered veterinary controls on imports of powdered whey and compound feeding-stuffs containing whey, and fixed the maximum tolerable level of potassium nitrate at one part per million. Since that limitation did not result from provisions then in force, it constituted a new measure and the rules in Article 5 of the directive as to the introduction of such measures were applicable to it.

On 7 September the 'urgent note', which is contested in the main action, was adopted as an order by the same Ministry (Directorate General for Veterinary Services).

It appears from the replies and documents produced at the hearing that at Community level those national measures were accompanied by the following actions and interventions:

Starting in July 1976, the Italian Government made representations to the competent authorities in France, the Republic of Germany and the Netherlands concerning the presence of a high level of nitrates in feeding-stuffs because of the addition of powdered whey to those feeding-stuffs.

On 27 July 1976, the Permanent Representation of the Italian Republic in Brussels asked the Chairman of the Standing Committee for Feeding-stuffs, who is a representative of the Commission, for the presence of potassium nitrates at a level of 40 to 4 000 parts per million in powdered whey coming from France, the Netherlands and Germany to be put on the agenda for the next meeting of the Committee, arranged for 6 and 7 September.

On 9 August 1976, the Commission's Directorate General for Agriculture asked the Italian Government for explanations concerning the controls carried out at the Italian frontier with a view to detecting the presence of potassium nitrates or sodium nitrates in powdered milk intended for human and animal consumption, in powdered whey and in feeding-stuffs. It reminded the Italian Government that for the purpose of the Community procedure under Article 5 (2) of Directive No 74/63 the other Member States and the Commission must be *advised* and that *reasons must be given.*

On 10 August, the Italian Minister of Health asked the Commission whether it was aware of the presence of potassium nitrates in the products in question and requested it to study the problem.

On 20 August, the Directorate General for Agriculture, addressing itself to the Italian Permanent Representation and referring to Article 7 of the Directive, requested the Italian Government to supply explanations before 26 August.

On 6 and 7 September, the Standing Committee met to examine the controls carried out by the Italian authorities since the month of July. It would appear from a telex sent to its members by the European Federation of Compound Animal Feeding-stuffs Manufacturers, 223, Rue de la Loi, Brussels, that during that meeting the Commission put forward a proposal for fixing limits for the levels of nitrates. Since the Committee refused to accept that proposal, the Commission with-

drew it and decided to address itself to the 'Scientific Committee for Animal Nutrition', which I shall be mentioning again later.

On 17 September, the Directorate General for Agriculture, referring to the meeting of the Standing Committee of 7 September, requested the Italian Permanent Representation, with a view to solving the problem within the Community, to let it have, before 24 September, certain information on the controls carried out and on the scientific reasons for them, and on the proof of the presence of whey in the consignments refused entry.

On 27 September, the Italian Permanent Representation, referring to the meeting of the Standing Committee of 6 and 7 September, during which the Italian experts supplied justifications, renewed its request to the Commission to draft concrete proposals in order 'to harmonize the sector' in accordance with the requirements of public health.

Finally, on 7 October 1976, the Italian Permanent Representation made it known that documents as to toxicity had been sent off to the Commission the previous day and that the latter would receive them in the near future. The said documents contained the 'reasons' referred to in Article 5 (1) of the directive.

IV — From this detailed exposition the following findings, it seems to me, may be arrived at:

Starting in July 1976, the Italian authorities adopted a measure analagous to the measure contested (observations of the Commission, p. 5).

On 19 July, 22 July and 31 August, the Italian Government informed the competent authorities of the Federal Republic of Germany, the French Republic and the United Kingdom of its problem.

In any event, the question as to the possible harmfulness of residues, to be explained on technological grounds, of potassium nitrates in powdered whey and in compound feeding-stuffs containing whey was undoubtedly submitted to the Standing Committee for Feeding-stuffs on 6 September, namely on the day before the Italian 'urgent note' was adopted as an order, and it was only on 25 September that the goods were stopped at the frontier.

Although the Italian 'documents as to toxicity' were not officially submitted to the Standing Committee before 7 October, it appears that prior to that date the Commission was well aware of the problem because it 'accelerated' the establishing of the Scientific Committee for Animal Nutrition (Decision of 24 September 1976, published in the Official Journal of 9 October 1976), for the specific purpose of submitting this problem to it. That Committee, composed of highly qualified scientists, only has a consultative function, unlike the Standing Committee which takes part in the decision-making process. The Commission has confirmed that as at 9 March 1977 the said Scientific Committee, which met several times during the last quarter of 1976, was not yet in a position to report.

In any event, from the time when the Standing Committee officially received the Italian Government's statement of reasons, the procedure under Article 5 of the directive was properly set in motion, and only at the end of that procedure will it be possible to say whether the Italian measure was justified.

Is it possible to say that from 7 September to 7 October the Italian measure was 'invalid', but that since the latter date has become 'provisionally valid' again until such time as the procedure under Articles 5 and 10 of the directive ends in a way unfavourable to the Italian Republic? I cannot state my views on this point in the context of the present dispute.

But this I can say:

Whilst it is a fact that before even receiving the Italian Government's 'statement of reasons', the Commission chose to consult the Scientific Committee, though not in any way obliged to do so, that fact did not relieve it of the duty to seek a swift end to a situation which traders could hardly be expected to tolerate. Its duty was to submit a 'draft of the measures to be adopted' to the Standing Committee and to get its Opinion. If the measures were not in accordance with the Opinion of the Committee or 'if no Opinion' was delivered, it was the Commission's duty to propose *without delay* the measures to be adopted. If the Council did not, by qualified majority, adopt *the* measures proposed by the Commission, or did not adopt *any* measures, and unless the Council had voted by a simple majority against the measures proposed, it was again the Commission's duty to adopt the measures proposed and to implement them *forthwith*. The procedure instituted by the Commission on 16 December 1976 against the Italian Republic for failure to act, the length and result of which cannot be foreseen, has not the purpose of, and cannot replace the procedure under, Articles 5 and 10 of the directive. Moreover, so long as a decision has not been adopted by the Commission, the Member State 'may maintain the measures it has implemented' (Article 5 (2)).

V – The system provided for by Article 5 of the directive may interfere with Article 30 of the Treaty, but the latter provision is only applicable 'without prejudice' to Article 36. Admittedly, the absolute priority given to the protection of the health of consumers and of animals can in fact conceal economic motives. Then again, Article 36 provides that any prohibitions or restrictions introduced 'shall not... constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. Article 5 itself does not cover this question fully and it has to be examined as part of the Standing Committee Procedure to prevent *abuse* by Member States. The very purpose of Article 10, and the time-limits which it prescribes, are intended to prevent such abuse.

It is possible the Italian Government may have availed itself of the directives on 'additives' or on 'undesirable substances' in order to combat commercial fraud which ought rather to be dealt with by the Management Committee for Milk and Milk Products. However, the inappropriate use of the two directives on harmonization or the fact that the procedure under Article 10 of the directive on 'undesirable substances' may not have been or may not have been fully observed, or that it has not yet come to anything, cannot affect the validity of Article 5.

It remains necessary that this procedure should function. The European Parliament has, on several occasions, vigorously opposed allowing experts to limit the Commission's decision-making power. It has emphasized that the creation of such committees must not bring about any limitation on the latter's responsibilities. Accordingly, it does not seem to me that there is anything illegal in the system organized by Article 5 of the directive.

VI – As to the arbitrary nature of the discrimination which may thus be exercised at the *frontier* and only at the frontier, on trade between Member States, I shall confine myself to pointing out that Article 7 provides: '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', and that under Article 8 (1): 'Member States shall take all necessary measures to ensure that feeding-stuffs are officially controlled, *at least by random sampling*, to verify whether the conditions laid down in this

directive are satisfied'. Given that the conditions required in order that feeding-stuffs may be made directly available for consumption by animals must be satisfied at all stages of trading up to delivery to the final user, they must be satisfied when they are first put into circulation and when they are introduced into a Member State. It is natural for official controls to start at the frontier not only for obvious practical reasons, but also because trading or marketing begins at the frontier, particularly in the case of a product which is not manufactured on the same scale or under the same conditions as within the country.

In any event, to use the standard wording, it is in the first place for the national court to assess whether the controls carried out were indeed in the nature of random sampling, were not arbitrary, and did not give rise to a 'disguised' restriction on trade between Member States, and whether the setting of the levels in question was not adopted in such a way as to put at a disadvantage, in law or in fact, imports from other Member States.

I am of the opinion that you should rule that:

1. Even after incorporating the 'harmonizing' Directive No 74/63 into their legal system, the Member States have the power to consider provisionally as undesirable certain substances which, although they were known about when Directive No 74/63 was adopted, do not appear in the list annexed to the said directive;

2. In this connexion, the procedure under Articles 5 and 10 must be followed, in order that the compatibility of the unilateral measure adopted by the Member State with the rules of the Treaty shall be ascertained as quickly as possible;

3. So long as no decision has been made by either the Council or the Commission, the Member State may maintain the measure which it has implemented and whereby it has set a maximum level for a substance which it has considered undesirable, and may adopt such restrictions on marketing as give effect to that measure, provided that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

4. Examination of the file has disclosed no factor of a kind such as to affect the validity of Article 5 of Council Directive No 74/63.