On those grounds,

THE COURT (Third Chamber),

in answer to the questions submitted to it by the Verwaltungsgericht Frankfurt-am-Main, by two orders of 11 August 1983, hereby rules:

Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Article 5 (3) (b) of Commission Regulation (EEC) No 2793/77 of 15 December 1955.

Galmot Everling Kakouris

Delivered in open court in Luxembourg on 28 June 1984.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 30 MAY 1984 [1]

Mr President,
Members of the Court,

1. The applicable Community legislation

The common organization of the market in milk and milk products, established by Regulation No 804/68 of the Council (Official Journal, English Special Edition 1968 (I), p. 176), provides for the granting of aid for skimmed milk produced in the Community and used as animal feed. The general rules governing that aid were laid down in Regulation No 986/68 of the Council (Official Journal, English Special Edition 1968 (I),

1 — Translated from the Dutch.

p. 260). The skimmed milk in question is traditionally used for feeding young calves. In order to promote the use of skimmed milk as feed for other animals, in particular pigs, Regulation No 876/77 (Official Journal 1977, L 106, p. 24) introduced a special aid for skimmed milk for animals other than young calves. The rules of application for that special aid were laid down in Commission Regulation No 2793/77 (Official Journal 1977, L 321, p. 30). Provisions were included in that regulation to ensure that the more heavily subsidized skimmed milk is not used for feeding calves, a risk which exists in particular in the case of mixed farms.

Article 3 of the regulation provides that the special aid is to be granted only to a dairy which denatures the skimmed milk in accordance with certain specified processes and applies set maximum prices for supply to farmers. Moreover, the aid applies only to quantities of skimmed milk covered by an undertaking given by the farmer, in regard to which Article 4 lays down a number of conditions: the skimmed milk must be used exclusively as animal feed on the farmer's own farm, and in the case of a specialized farm the farmer must in principle not keep young calves. Pursuant to Article 5 (3) (b), on applying for the payment of special aid the dairy must make a declaration that it:

"will, as appropriate, forgo or repay the special aid wholly or in part to the competent authority if it is found that the farmer has not abided by one of the undertakings referred to in Article 4".

It is that obligation to repay the aid which has led the Verwaltungsgericht to make this preliminary reference.

2. The preliminary question

The Bundesamt für Ernährung und Forstwirtschaft demanded repayment from the plaintiffs, two dairies, of aid paid in respect of skimmed milk which was used by a number of farmers in breach of the regulation. In proceedings brought by the dairies, the Verwaltungsgericht Frankfurt-am-Main considered it necessary to refer the following question to the Court:

"Is Article 5 (3) (b) of Commission Regulation (EEC) No 2793/77 of 15 December 1977 on detailed rules of application for granting special aid for skimmed milk for use as feed for animals other than young calves (Official Journal 1977, L 321, p. 30) valid in so far as it provides that a dairy is responsible for undertakings given by a farmer when it is unable to supervise the farmer's compliance therewith?"

It appears from the remarks it made in regard to the question posed that the Verwaltungsgericht entertains doubts as to the validity of that provision on the ground in particular that it conflicts with general principles of the law of liability. More generally, it queries whether the provision complies with the principle of proportionality.

3. The relationship between the dairy and the farmer

The conflict with what the national court calls general principles of the law of liability is said to arise from two restrictions in the system laid down

by Regulation No 2793/77. First, the Verwaltungsgericht is of the view that there is an obligation for the dairy to enter into a contract if a farmer wishes to take advantage of the special aid. Secondly, in its contractual relationship with the farmer the dairy cannot, according to the Verwaltungsgericht, insist on any provision for inspections or the lodging of securities, since that would amount to the imposition of additional legal prerequisites for the aid.

According to the Verwaltungsgericht, the obligation for the dairy to contract results from the purpose of Regulation No 2793/77. Every farmer who wishes to feed his livestock (with the exception of young calves) with skimmed milk must be able to benefit from that aid, without its depending on the discretion of the dairy.

That view is however incorrect. According to the second sentence of Article 3 (1) of Regulation No 2793/77, special aid for the skimmed milk referred to in Article 2 (1) (a) of Regulation No 986/68 is granted only to a dairy and not to the farmer. The farmer himself is only entitled to aid where he uses skimmed milk produced by him as feed on his own farm (Article 2 (1) (b), Regulation No 986/68), which is not the case here. The first-mentioned aid is granted under such conditions that the dairy is able and is obliged to sell skimmed milk at a price which makes that product competitive with other feedstuffs for the farmer. Nowhere in Regulation No 2793/77 is it indicated that the dairy is obliged to denature the skimmed milk bought or produced by it and then supply it to the farmer as feed. The dairy always has the possibility of converting skimmed milk bought or produced by it into skimmed-milk powder and disposing of it to the intervention agency or selling it with the benefit of the aid measures applicable to skimmed-milk powder. According to the statements of the Bundesamt für Ernährung und Forstwirtschaft, that is in fact done, albeit to a limited extent. The dairy is therefore free to enter into contracts with farmers or not. Its decision may be influenced by the existence of an aid measure, such as the regulation concerned, aimed at reducing the surplus in this sector and thus contributing to the proper functioning of the organization of the market. I should add that the liberty of the dairy under Regulation No 2793/77 is greater than under the previous Regulation No 1089/77 (Official Journal 1977, L 131, p. 34), according to which a supply contract had to be concluded between the dairy and the farmer. That condition was lifted in the amendment made to Regulation No 986/68 by Council Regulation No 2624/77 (Official Journal 1977, L 306, p. 4) with a view in fact to allowing dairies greater freedom to adjust to changed circumstances.

Since the aid is granted, not to the farmer but to the dairy, the Verwaltungsgericht is also mistaken in its view that the requirement by the dairy of rights of inspection and guarantees would entail an extension of the conditions for the granting of aid laid down in the regulation. The relationship between the dairy and the farmer is governed ex-

clusively by private law and where such a relationship exists the regulation lays down a number of requirements in order to ensure that the object of the aid system is not defeated. Nothing in Regulation No 2793/77 prevents the dairy from stipulating, in addition to those minimum requirements, conditions with regard to inspections at the farmer's premises and other guarantees. According to the statements of the Bundesamt, that is in fact done. Particular examples are the right of the dairy to inspect the farmer's premises, to examine his books and to obtain information. In addition the farmer is required to pay amounts which are reclaimed from the dairy. In practice further provisions in that regard can be agreed upon by contract, for example the establishment of a bank guarantee.

The view of the Verwaltungsgericht that because of the obligation to contract and the impossibility of requiring contractual guarantees the dairy cannot protect itself against the misconduct of the farmer or against the financial consequences of such misconduct is therefore also incorrect. That also disposes of that court's argument that there is a fundamental distinction between the cases with which we are now concerned and Joined Cases 99 and 100/76 *(Beste Boter and Hoche* v *Bundesanstalt für landwirtschaftliche Marktordnung,* [1977] ECR 861) and Case 77/81 *(Zuckerfabrik Franken* v *Germany,* [1982] ECR 681).

4. The liability of the dairy

It appears from the remarks made by the Verwaltungsgericht that its more general doubt as to the validity of Regulation No 2793/77 is prompted above all by its view that in the aid system in question there is no compensation from the authorities in the form of a benefit for the dairy. That is seen to give rise to doubts, in particular from the point of view of the principle of proportionality.

The notion that the dairy acts only as a pipeline conveying the special aid to the farmer is however incorrect. As the Commission showed in its written observations, by denaturing skimmed milk and selling it for feed the dairy can make a greater profit than by producing skimmed-milk powder from skimmed milk and disposing of it to the intervention agency. That incentive was deliberately provided in order to restrain the increase in intervention for skimmed-milk powder. That is made clear in the preamble to Council Regulation No 876/77 (Official Journal 1977, L 106, p. 24), which amended Regulation No 986/68 to include the aid system for skimmed milk now in question. It cannot therefore be said that the principle of proportionality is infringed because the dairy derives no advantage from Regulation No 2793/77. I should add that even if the aid system were of such a nature that the dairy derived no direct advantage there would still be no reason to assume that there was a breach of the principle of proportionality. In order to achieve the objectives set out in Article 39 of the Treaty, common organizations of the market may impose on traders such charges and obligations as are required (first sentence of Article 40 (3)). It is not necessary that they be compensated for by any direct benefit, or that such intervention be carried out in

the manner least burdensome for the trader. That is because the trader derives an *indirect* benefit inasmuch as such charges or obligations serve to ensure the proper functioning of the organization of the market. In several judgments, and I refer in particular to the judgment in Case 11/70 *(Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* [1970] ECR 1125), the legality of such intervention measures has been reviewed with reference to the principle of proportionality.

With regard to the question whether it is consistent with the principle of proportionality that the dairy is liable, as against the agencies charged with the implementation of the regulation, for the use of denatured skimmed milk in breach of the regulation, I would like to refer to the judgment of the Court in Case 77/81 *(Zuckerfabrik Franken* v *Germany,* already cited). In that case the Court held (paragraph 28) that the key issue was the legal ground for the payment of the premium. If that legal ground does not exist, that is to say, in this case, if the undertakings referred to in Article 4 of Regulation No 2793/77 are not complied with, then, according to Article 5 (3) (b), the aid paid must be reclaimed from the recipient and aid due is not paid out. Since it is to the dairy that the aid is granted, it is also the dairy that is obliged to repay or forgo it. Such a construction was expressly held by the Court to be appropriate and necessary in order to achieve the end in view. As I have already pointed out, the dairy has ample opportunity to protect itself against any improper conduct on the part of the farmer.

5. Summary

Since the Verwaltungsgericht is mistaken in its view that under the system of Regulation No 2793/77 the dairy is subject to an obligation to contract and is not in a position to require contractual guarantees against any improper conduct on the part of farmers, I conclude that there are no facts or circumstances giving rise to doubt as to the validity of Articles 5 (3) (b) of Commission Regulation No 2793/77 of 15 December 1977.