OPINION OF ADVOCATE GENERAL JACOBS
delivered on 8 April 1992 *

My Lords,

1. In this case the Pretura Circondariale di Perugia requests a preliminary ruling on the validity of a provision of the regulations on aid for soya beans. The plaintiff in the main proceedings, Mignini SpA (hereafter 'Mignini'), produces animal feedingstuffs, for which purpose it uses, amongst other things, soya beans. The defendant is the Italian intervention agency, the Azienda di Stato Interventi sul Mercato Agricolo (hereafter 'AIMA').

2. The dispute is about AIMA's refusal to pay aid to Mignini in respect of a contract for the supply of soya beans concluded between Mignini and a producer of soya beans. AIMA based its refusal on the ground that the beans in question were stored in a warehousing unit outside the precincts of Mignini's production establishment. It is common ground that the beans were so stored and that that amounted to a failure to comply with the terms of the relevant regulation. However, Mignini contends that the provision requiring it to store the beans within its production establishment is invalid on the ground that it is contrary to the principle of equal treatment and the principle of proportionality.

The relevant legislation

3. Article 2 of Council Regulation (EEC) No 1491/85 of 23 May 1985 laying down special measures in respect of soya beans (OJ 1985 L 151, p. 15), as amended by Council Regulation (EEC) No 2217/88 of 19 July 1988 (OJ 1988 L 197, p. 11), provides:

'1. When the guide price for a marketing year is higher than the world market price for soya beans as determined in accordance with Article 3, aid equal to the difference between these two prices shall be granted for soya beans harvested and processed in the Community.

2. Aid shall be granted to any processor of soya beans who has concluded with individual or associated soya bean producers a contract providing for payment to the producer of a price at least equal to the minimum price referred to in paragraph 3. However, until 31 December 1992, in Member States where the marketing of soya beans is subject to national rules ensuring adequate organization and controls, the aid may be granted to a first purchaser who is not the processor.

* Original language: English.

Where the first purchaser is the processor of the beans, the aid shall be granted once proof of processing has been provided.

In other cases, the aid shall be granted to first purchasers:

— meeting certain conditions to be determined,

— approved by the Member State,

and

— who have furnished proof of sale or delivery of the soya beans to a processor.

3 to 7. *(omissis)*

8. Detailed rules for implementing this article, particularly in respect of the standard provisions with which the contracts referred to in paragraph 2 must comply, shall be determined in accordance with the procedure laid down in Article 38 of Council Regulation No 136/66/EEC.'

4. Article 3 of Council Regulation (EEC) No 2194/85 of 25 July 1985 adopting general rules concerning special measures for soya beans (OJ 1985 L 204, p. 1), as amended by Council Regulation (EEC) No 1231/89 of 3 May 1989 (OJ 1989 L 128, p. 24), provides:

'The aid shall be paid to the first purchaser after verification that the beans have been either:

(a) where the first purchaser is the processor, processed in the Community for the production of oil or for other uses in human food or animal feeding,

or

(b) where the first purchaser is someone other than the processor, sold or delivered to a processor in the Community for the production of oil or for other uses in human food or animal feeding.

However, at the first purchaser's request, aid may be advanced following identification of the seed provided that security is lodged for an amount equivalent to that advanced.'

5. Article 4(1) of Regulation No 2194/85, as amended, provides:

'For the purposes of this Regulation, "identification" shall mean the act whereby the competent agency of the Member State certifies, on application by the interested party, that the aid to be granted for the quantity of soya beans covered by the application shall be that applicable on the day when the application was lodged.

However, the amount of aid applicable on the day on which the application for the advance-fixing part of the certificate referred to in Article 4a was lodged, adjusted in accordance with Article 4d, shall be applied at the interested party's request to beans identified during the period of validity of the advance-fixing part of the certificate.

Identification of the beans shall be carried out once they enter into the processing undertaking but before they are processed.'

6. Article 4a of Regulation No 2194/85, as amended, provides:

'A two-part Community certificate shall be introduced, one part to provide evidence that beans harvested in the Community have been identified and the other to certify, if appropriate, that the aid has been fixed in advance. Both parts of the certificate shall be issued by the Member State to any interested party who requests them and who fulfils the conditions specified in Article 2.'

7. Article 10 of Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans (OJ 1989 L 245, p. 8) provides:

'The two-part certificate referred to in Article 4a of Regulation (EEC) No 2194/85 shall consist of one part, designated AP, certifying the advance fixing of the aid, and one part, designated ID, certifying identification of the beans.

The certificate shall be made out in at least two copies, the first of which shall be issued to the applicant and the second kept by the competent agency.'

8. Article 11 of Regulation No 2537/89 provides:

'1. Application may be made to the competent agency referred to in Article 6 of this Regulation for the ID part of the certificate for a single lot or for several lots. In no case may an application be made for the ID part of the certificate in respect of a lot for which an ID part has already been issued.

"Lot" shall be understood to mean a quantity of seeds covered by a delivery declaration, numbered by the interested party when it enters the undertaking and analysed pursuant to Article 30.

2. The application for the ID part of the certificate shall be considered only if the seeds entered the undertaking at the latest on the day on which it was submitted.

The application must be accompanied by delivery declarations corresponding to the quantities for which identification is applied for.'

9. Article 2(1) of Regulation No 2537/89, as amended by Commission Regulation No 150/90 of 19 January 1990 (OJ 1990 L 18, p. 10), provides:

'For the purposes of this Regulation, "undertaking" means:

(a) an oil mill, including:

— any building or other place within the precincts of the establishment where production takes place,

— any warehousing unit outside such precincts located in the customs territory of the Member State where the production establishment is located in which the stored products can be properly controlled and which has been approved in advance by the authority responsible for that control;

(b) an establishment manufacturing feedingstuffs or foodstuffs intended for use by the final consumer without further processing; it must have, on the premises, storage facilities which are of a capacity determined by the authority responsible for control and which meet the requirements of this Regulation as regards the identification of the beans and the verification of their presence and their use by the undertaking;

(c) any establishment managed by a first purchaser who is not a processor, which is approved within the meaning of Article 2(2) of Regulation (EEC) No 2194/85, including storage installations in which the stored products can be properly controlled and which has been approved in advance by the authority responsible for that control.'

Facts

10. On 3 April 1989 Mignini entered into a contract with a soya bean grower for the supply of 3 770 kg of soya beans. The goods were delivered on 19 October 1989 and were stored in a warehouse belonging to Mignini but situated outside the precincts of its production establishment. Mignini requested AIMA to 'identify' the beans and to issue the ID part of the certificate provided for in Article 10 et seq. of Regulation No 2537/89. AIMA issued the certificate on 12 February 1990 and the following day Mignini requested advance payment of the aid.

11. On 19 February 1990 AIMA wrote to Mignini rejecting its application for advance payment of the aid on the ground that the goods identified were stored in a warehouse situated outside the precincts of Mignini's production establishment. That was, according to AIMA, contrary to Article 2(1)(b) of Regulation No 2537/89, which, it will be recalled, defines an 'undertaking' as an 'establishment manufacturing feedingstuffs or foodstuffs intended for use by the final consumer without further processing' and, as amended by Regulation No 150/90, requires such an establishment to have adequate storage facilities on the premises. In fact, it seems to me that, if that

provision has the meaning attributed to it by AIMA (and the point is not contested), the ID part of the certificate should not have been issued at all, since Article 11(2) of the same regulation states that the 'application for the ID part of the certificate shall be considered only if the seeds entered the undertaking at the latest on the day on which it was submitted'.

12. In any event, it appears to be accepted by all concerned that a processor of soya beans (other than an oil producer) cannot qualify for aid, under the applicable legislation, until the goods in question enter the precincts of the establishment in which the processing is to take place. Mignini contends that that condition is invalid on the ground that it is contrary to the principles of equal treatment and proportionality.

13. On 28 June 1990 Mignini commenced proceedings against AIMA before the Pretore di Perugia, who was invited to declare Article 2(1)(b) of Regulation No 2537/89, as amended, invalid (having first obtained a preliminary ruling from the Court of Justice) and to order AIMA to pay Mignini the aid in question.

14. By order of 6 August 1990 the Pretore stayed the proceedings and asked the Court for a preliminary ruling 'on the validity of Article 2(1)(b) of Commission Regulation No 2537/89 of 8 August 1989, as supplemented by Regulation No 150/90 of 19 January 1990'.

15. It is to be noted that the question as put refers specifically to Regulation No 2537/89 as amended by Regulation No 150/90, even though the latter regulation entered into force only on 23 January 1990 while the facts giving rise to the reference occurred in part before that date. It appears from the terms of the order for reference and is made clear by the observations submitted to this Court by Mignini that these proceedings have been brought as a test case to challenge the validity of the legislation as amended.

The principle of equal treatment

16. Mignini submits that the contested provision is contrary to the principle of equal treatment laid down in Article 40(3), second subparagraph, of the Treaty, inasmuch as it imposes on undertakings that process soya beans into animal feedingstuffs or food for human consumption a requirement that is not imposed on undertakings that use soya beans to produce oil. According to Mignini, the various types of undertaking are in similar situations and there is no objective justification for treating them differently.

17. I do not think that this submission can succeed. According to the case-law of the Court, the principle laid down in the second subparagraph of Article 40(3) of the Treaty, which constitutes a specific enunciation of the general principle of equality, prohibits dissimilar treatment of producers who are in similar situations. For the principle to apply to producers, their products must be in competition with each other: see, in

particular, Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, paragraphs 7 and 8, and Joined Cases 103 and 145/77 *Royal Scholten-Honig* v *Intervention Board for Agricultural Produce* [1978] ECR 2037, paragraphs 27 to 32 and 59 to 62. The basic principle was summed up succinctly by Advocate General Capotorti in his Opinion in *Ruckdeschel* (at pp. 1782 and 1783):

'In a case where two commercially different products are put to the same use the principle of equality of treatment means that the producers concerned must not be subjected to rules which are so different that their competitive relationship is distorted.

...

... in the absence of specific reasons capable of justifying a difference of treatment, the provision in Article 40 prohibiting discrimination stands in the way of any measure the effect of which is to place one group of producers in a privileged position compared with another group of undertakings which are their competitors.'

18. It is clear that, for the principle of non-discrimination to be applicable at all, it is not sufficient for the raw materials — here, soya beans — to be identical or similar products. It is necessary for the end-products to be in competition with each other. Mignini makes no attempt to show that oil produced from soya beans is in competition with other food products or animal feedingstuffs produced from soya beans. It seems unlikely that such products would generally be in competition with each other. More than a limited degree of interchangeability is required if the principle of non-discrimination is to apply. Otherwise the principle would have an impossibly broad scope.

19. The Commission does not take the point that the products are not in competition but seeks instead to show that the various types of producer are not in the same situation inasmuch as less stringent supervisory measures are required in relation to oil producers than in relation to producers of other foodstuffs or animal feed. That is so, according to the Commission, because the former are much less numerous than the latter and because it is easier to check the quantity of soya beans used to produce a given quantity of the end product, the yield being more regular.

20. The Commission's assertions were challenged but in my view it is unnecessary for the Court to resolve the issue. The issue would only arise if it were accepted that the principle of non-discrimination is capable of applying, that is if the products are in competition. But if the view is taken that they are not, then there is no need to show objective justification for the difference in treatment.

21. According to the Commission's observations the referring court sees a further potential breach of the principle of equal treatment in the fact that the regulations governing the granting of aid for sunflower seed and rape seed apply the extended definition of an 'undertaking' both to oil producers and to producers of animal feedingstuff. Thus undertakings that produce animal feedingstuff from sunflower seed or

rape seed are treated more favourably than undertakings that produce animal feedingstuff from soya beans. According to the Commission, that difference in treatment is justified because the risk of fraud is much less significant in relation to sunflower seed and rape seed. That is so, according to the Commission, for two reasons: on the one hand, far smaller quantities of sunflower seed and rape seed are used in the manufacture of animal feedingstuff and, on the other hand, sunflower seed and rape seed are imported in far smaller quantities than soya beans and such imports as do take place are subject to a rigid system of administrative control, including a system of deposits. When asked by the Court in a written question why such a system had not been set up for imports of soya beans, the Commission replied that the administrative burden would be disproportionate in view of the large volume of soya bean imports.

22. It does not seem to me that either the national court or Mignini is arguing that the legislation is invalid on account of a difference in treatment between the two types of animal feed producers, i. e. those who use soya and those who use sunflower or rape seed. The only difference in treatment that they regard as a breach of the principle of equal treatment is that between undertakings which produce animal feed from soya beans and undertakings which produce oil from soya beans. It is true that the national court and Mignini refer to the aforesaid difference between the rules on soya beans and the rules on sunflower and rape seeds, but they do so solely with a view to suggesting that the difference in treatment between oil producers and animal feed producers cannot be objectively justified. The argument is that, if it were necessary to treat oil producers and animal feed processors differently, the Community legislature would have provided for a similar difference in treatment in the regulations governing the granting of aid to processors of sunflower or rape seed.

23. If the different treatment of the two types of animal feed producer were relied on as a breach of the principle of equal treatment, Mignini would be on stronger ground than when it relies on the different treatment of animal feed producers and oil producers. The two types of animal feed producer are presumably in competition with each other. I consider, however, that for the reasons given by the Commission, which I have summarized above in paragraph 21, the difference in treatment accorded to animal feed producers who use soya beans and those who use sunflower seed or rape seed is objectively justified. One should, moreover, be wary of the argument to the effect that, because the institutions have opted for a particular system of control for imports of one agricultural product, which makes it possible to apply less stringent requirements when paying production aids to domestic producers, they are bound to accord the same treatment to domestic producers of another product which is not subject to the same system of import controls. The institutions must be accorded a certain margin of appraisal in determining which system of

control is best suited to each agricultural product, having regard to the characteristics of the market in question.

The principle of proportionality

24. Mignini contends that the requirement that the soya beans should be stored within the production establishment at the time of 'identification' is contrary to the principle of proportionality because it is useless from the point of view of surveillance and it imposes an excessive burden on the undertakings concerned.

25. According to Mignini, storage of the goods within the production establishment does not help to prevent fraud. Since the production processes are standardized and transparent, adequate surveillance could be exercised by checking accounting documents and warehouse records. The requirement in question imposes an excessive sacrifice on processors such as Mignini because a modern, well-equipped producer of feedingstuffs operates a 'just-in-time' system of stock management under which warehousing at the processing plant is kept to a minimum. Mignini claims that the requirement results in the exclusion of feedingstuff producers from the system of aid for soya beans for the following reasons. The contracts for the purchase of soya beans are entered into at the time when the seed is sown. Feedingstuff producers are only able to buy such amount as they can store at their production establishment. That amount is very small in relation to their annual requirements.

26. According to the Commission, the requirement that soya beans should be located within the production establishment is designed principally to ensure that aid is granted only in respect of beans grown in the Community. Effective supervision can only be carried out at the stage when the beans that are to be processed are identified. Therefore the requirement that the beans can be identified only when they are physically present at the place where they will be incorporated into foodstuff or animal feed is necessary for the purpose of preventing fraud. The Commission contests Mignini's assertion that adequate surveillance can be exercised on the basis of accounting documents and warehouse records. Such surveillance would not be effective because it is difficult to check the soya bean content of animal feedingstuffs. There is therefore a danger that undertakings might engage in 'carrousel' operations, whereby aid is claimed more than once in respect of the same quantities of soya beans.

27. I cannot accept Mignini's submission that the contested provision has the effect of excluding it from the aid system altogether. It reduces the extent to which such an undertaking can claim advance payment of the aid. But it is clear from the regulations that, processors such as Mignini may contract to buy a year's requirements of soya beans in the planting season, take delivery of the beans when they are harvested, store them wherever they like and claim payment of the aid as and when the beans are transferred to warehouses

located within their production establishment.

28. Obviously they would be in a more favourable situation if they could have the beans 'identified' in a warehouse located outside their production establishment and claim advance payment of the aid much earlier. They would then also have the advantage, as the Italian Government points out in its observations, of being able to choose the precise moment at which the beans are identified and would of course be free to choose a moment when the aid is particularly high. The loss of that advantage, which is apparently enjoyed by oil producers, may be a serious matter but it falls a long way short of total exclusion from the aid scheme.

29. As to whether the requirement imposed by the contested provision is disproportionate in relation to the aim of preventing fraud, it must be borne in mind above all that the institutions are under a duty to exercise the utmost vigilance in ensuring that the beneficiaries of production aids and other subsidies payable under the common agricultural policy are prevented from indulging in fraudulent practices. The Community legislature is manifestly entitled to impose on the recipients of subsidies any reasonable condition that is likely to protect the Community budget from fraud. There is of course no suggestion that Mignini itself has perpetrated fraud or would be likely to do so if the requirement in question were removed. That there is, however, an inherent potential for fraud in the system of production aids is only too evident.

30. Application of the principle of proportionality implies a balancing exercise: the burden imposed on the undertakings concerned must be weighed against the benefit accruing to the Community in terms of combating fraud. If the contested provision imposed a really severe burden on processors of soya beans it would be necessary to show that the provision made a correspondingly significant contribution to the prevention of fraud. Conversely, if the burden imposed on undertakings were slight it would suffice to show that the provision was not arbitrary and was likely to render surveillance more effective, even if only to a limited degree. As I have already sought to show, the burden imposed on undertakings like Mignini in the present case is not overwhelming. They can continue to benefit from the aid scheme. The burden that they complain of is in reality simply a reduction in the extent to which they may benefit from a generous arrangement whereby Community funds are handed out to processors of soya beans in order to enable growers in the Community to compete with importers of soya beans. There is a considerable difference between that type of burden and the burden imposed on undertakings which forfeit very large securities because documents are inadvertently lodged late (e. g. Case 181/84 *Man (Sugar)* v *IBAP* [1985] ECR 2889) or undertakings which are required to pay huge import levies that they might not have expected to incur when entering into the commercial transactions in

question (e. g. Case C-24/90 *Faust* [1991] ECR I-4905 and Cases C-25/90 and C-26/90 *Wünsche* [1991] ECR I-4939).

31. Hence, the question that must be asked is whether the contested provision facilitates effective supervision and thus contributes, albeit only modestly, to the fundamental aim of preventing the fraudulent misappropriation of Community funds. I think it is clear that that question must be answered in the affirmative. Nor has it been shown that that aim could be achieved by other means less burdensome to the undertakings concerned. Certainly, I cannot accept Mignini's assertion that a system of control based on accounting documents and warehouse records would be adequate. Such documents and records could all too easily be falsified. If soya beans awaiting processing could be stored in a number of locations situated outside the production establishment, it would be more difficult for the authorities to monitor their movements. Effective surveillance is obviously facilitated, at least to some degree, by the requirement that the beans should be physically present within the processing establishment before the production refunds may be claimed.

Conclusion

32. Accordingly, I am of the opinion that the question referred to the Court by the Pretore di Perugia should be answered as follows:

Consideration of the matters examined has disclosed no factor of such a kind as to affect the validity of Article 2(1)(b) of Commission Regulation No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans, as amended by Commission Regulation No 150/90 of 19 January 1990.