OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 16 June 1999 *

Introduction

1. By an order of 17 September 1997 the Finanzgericht München (Finance Court, Munich) (Germany), referred to the Court of Justice a question for a preliminary ruling on the validity of a provision contained in Commission Regulation (EEC) No 536/93 [1] of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products. In particular, the national court asks the Court to assess the validity of the second subparagraph of Article 3(2) of this Regulation by which the Commission introduced a penalty for purchasers of milk (dairies) which have not observed the specified time-limit for forwarding to the competent authority the statements on the quantities of milk delivered by producers.

The relevant Community provisions

2. In view of increasing overproduction in the milk sector, in 1984 the European Community introduced, in the context of the common organisation of the market in milk and milk products, the mechanism of the additional co-responsibility levy. [2] This mechanism provides for the annual fixing for each Member State of a guaranteed total milk quota which is divided, within each Member State, into individual quotas for each producer. Whenever a producer sells a quantity of milk in excess of the fixed quota, he must pay on the excess a kind of penalty which is this additional levy.

3. As regards the detailed rules for the collection of the levy, as specified in Regulation No 856/84, the Member States could choose either directly to impose the burden of paying for any excess quantities on the producers (Formula A) or could entrust this task to the purchasers who could in turn pass on this burden to the producers (Formula B). [3]

* Original language: Italian.

1 — OJ 1993 L 57, p. 12.

2 — Council Regulation (EEC) No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10) amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

3 — Article 5c of Regulation No 856/84.

4. Initially, the additional levy was specified for five consecutive periods of 12 months. This was then firstly extended to eight periods [4] and subsequently to a ninth period. [5]

5. In 1992, in the context of the reform of the common agricultural policy, Council Regulation (EEC) No 3950/92 [6] (hereinafter the 'basic regulation') generally amended the levy. It replaced the previous regulations and once again extended the application of the levy for seven further consecutive periods of 12 months (up to 31 March 2000). The main aim of the new regulation was to simplify and clarify the 1984 mechanism to make this more effective. For this reason, *inter alia*, the new regulation removed the option for Member States to choose between Formula A and Formula B and made the purchaser solely liable for the burden of paying the levy. As is apparent from the eighth recital, 'in order to avoid, as in the past, long delays between collection and payment of the levy, which are incompatible with the scheme's objective, provision should be made for the purchaser, who seems in the best position to carry out the necessary operations, to be liable for the levy, and for him to be given the means to collect the levy from the producers who owe it'.

6. In accordance with this principle, the first subparagraph of Article 2(2) of the basic regulation establishes that 'as regards deliveries, before a date and in accordance with detailed rules to be laid down, the purchaser liable for the levy shall pay to the competent body of the Member State the amount payable, which he shall deduct from the price of milk paid to producers who owe the levy or, failing this, collect by any appropriate means.'

7. Article 11 of the basic regulation gives the Commission the task of applying this scheme by establishing that 'the detailed rules for the application of this Regulation and in particular the characteristics of milk, including fat content, which are considered representative for the purposes of establishing the quantities of milk delivered or purchased shall be adopted in accordance with the procedure provided for in Article 30 of Regulation (EEC) No 804/68'. [7]

8. In accordance with the provisions of this Regulation, the Commission adopted Regulation No 536/93 [8] laying down detailed rules on the application of the additional levy on milk and milk products (hereinafter the 'implementing regulation'). As is apparent from the second recital of this Regulation, its main aim is to establish the additional factors necessary for the final

4 — Council Regulation (EEC) No 1109/88 of 25 April 1988 (OJ 1988 L 110, p. 27).

5 — Council Regulation (EEC) No 816/92 of 31 March 1992 (OJ 1992 L 86, p. 83).

6 — Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1).

7 — Or according to the procedure established by the Management Committee.

8 — Cited above.

calculation of the levy, the measures to ensure payment of the levy in good time and appropriate verification rules.

9. The fifth recital of the implementing regulation underlines that 'experience gained has shown that major delays in both the transmission of figures on collections or direct sales and payment of the levy, have prevented the arrangements from being fully effective' and that 'the necessary conclusions [should be] drawn by laying down strict requirements as regards notification and payment deadlines and providing for penalties where deadlines are not met'.

The seventh recital of this Regulation also states that 'under Regulation (EEC) No 3950/92 purchasers bear chief responsibility for the correct implementation of the arrangements'.

10. In the light of these two considerations, the Commission drew up Article 3 of the implementing regulation which establishes the requirements for purchasers to forward information on the quantities of milk delivered and to pay the levy. Limiting myself to the provisions relevant to this case, I shall quote the first subparagraph of Article 3(1) which establishes that 'at the end of each of the periods referred to in Article 1 of Regulation (EEC) No 3950/92, the purchaser shall establish a statement for each producer showing, opposite the producer's reference quantity and the representative fat content of his production, the quantity and fat content of the milk and/or milk equivalent which he has delivered during the period.'

The first subparagraph of paragraph 2 indicates the time-limit by which this information must be notified to the competent authority of the Member State. This provision states that 'before 15 May [9] each year, the purchasers shall forward to the competent authority of the Member State a summary of the statements drawn up for each producer or, where appropriate, by decision of the Member State, the total quantity, the quantity corrected in accordance with Article 2(2) and average fat content of the milk and/or milk equivalent delivered to it by producers and the sum of the individual reference quantities and the average representative fat content of such producers' production.'

The second subparagraph of the same paragraph 2 whose validity is the subject of this case establishes a pecuniary penalty if the purchaser fails to observe the time-limit for this notification. According to this provision, 'where that time-limit is not observed, the purchaser shall be liable to

9 — This text was amended by Commission Regulation (EC) No 1255/98 (OJ 1998 L 173, p. 14) correcting the error noted in the Italian version of the first subparagraph of Article 3(2) of Regulation No 536/93 which stipulates that notifications must be made on or before 15 May instead of before 15 May.

a penalty equal to the amount of the levy due for a 0.1% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not exceed ECU 20 000.'

Paragraph 4 of Article 3 provides that 'Before 1 September each year, the purchaser liable for levies shall pay the competent body the amount due in accordance with rules laid down by the Member State.' A penalty is also specified in this case. According to the second subparagraph of this paragraph, 'where the time-limit for payment is not met, the sums due shall bear interest at a rate per annum fixed by the Member State and which shall not be lower than the rate of interest which the latter applies for the recovery of wrongly paid amounts.'

11. It should also be noted that, in May 1998, the Commission amended the provision disputed in this case.[10] Pointing out the absolute necessity for the time-limit fixed for the communication of information to be observed,[11] the Commission reinforced the pecuniary penalties and graduated them according to the extent of the delay. It also introduced a provision to protect smaller dairies. According to the new text of the second subparagraph of Article 3(2) of the implementing regulation, 'where that time-limit is not observed, the purchaser shall be liable to a penalty calculated as follows:

— if the communication referred to in the first subparagraph is made before 1 June, the penalty shall be equal to the amount of the levy due for a 0.1% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not be less than ECU 500 nor more than ECU 20 000,

— if the communication referred to in the first subparagraph is made after 31 May but before 16 June, the penalty shall be equal to the amount of the levy due for a 0.2% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not be less than ECU 1 000 nor more than ECU 40 000,

— if the communication referred to in the first subparagraph is made after 15 June but before 1 July, the penalty shall be equal to the amount of the levy due for a 0.3% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not be less than ECU 1 500 nor more than ECU 60 000,

10 — By Commission Regulation (EC) No 1001/98 of 13 May 1998 (OJ 1998 L 142, p. 22).

11 — In the first recital.

— if the communication referred to in the first subparagraph is not made before 1 July, the penalty shall be that referred to in the third indent plus an amount equal to 3% of that penalty for each calendar day of delay from 1 July. Such penalty may not exceed ECU 100 000.

However, if the quantities of milk or milk equivalent delivered to the purchaser per period of 12 months are less than 100 000 kilograms, the minimum penalties referred to in the first three indents shall be reduced to ECU 100, 200 and 300 respectively.'

The relevant national provisions

12. The relevant national provisions on the additional levy are contained in the Milch-Garantiemengen-Verordnung (Regulation on Guaranteed Quantities for Milk, hereinafter the 'MGVO'). In implementation of the Community provisions, Paragraph 11(3) of the MGVO establishes the time-limit of 15 May for the statements drawn up for each producer by the purchaser to be forwarded to the national body responsible for applying the scheme. In Germany, the competent body is the Hauptzollamt (Principal Customs Office). Paragraph 11(4) of the MGVO also introduces the time-limit of 31 July for the submission to the Hauptzollamt of a notification from the dairy on the levies.

Facts and the question

13. The Molkereigenossenschaft Wiedergeltingen eG (hereinafter the 'dairy') is a milk-processing undertaking established in cooperative form (milk cooperative) whose members are the producers of the milk supplied to it. According to Germany's Genossenschaftsgesetz (Law on Cooperatives), the main object of the cooperative is not to maximise profits but rather to promote the interests of its members. Under the provisions on the additional levy, the cooperative is regarded as the purchaser and is therefore subject to the requirements for the communication of information on the quantities of milk delivered and for the payment of the levy.

14. On 9 April 1997 the Lindau Hauptzollamt (hereinafter the 'Lindau HZA') sent the dairy a reminder that, in accordance with both the national provisions and Article 3(2) of the implementing regulation, the dairy was required to forward before 14 May the summary of the statements on the quantity of milk delivered by each producer.

15. The dairy sent this summary by post only on 16 May 1997. As a result of the Whit Monday holiday on 19 May 1997 this communication did not reach the Lindau HZA until 20 May 1997. In view

of the delay, the Lindau HZA, in accordance with the provisions of the second subparagraph of Article 3(2) of the implementing regulation, imposed a pecuniary penalty of DEM 16 661.80.

16. As it considered this action to be unfair, the dairy lodged an objection on 28 May 1997. This objection was rejected on 5 June on the grounds that it was unfounded.

17. Subsequently, Genossenschaftsverband Bayern e.V., acting as the dairy's representative, lodged an appeal before the Finanzgericht München asking that the action taken by the Lindau HZA and the decision rejecting the objection should be annulled on the grounds that the penalty was not in line with the principle of proportionality.

During the hearing on the dispute before the Finanzgericht, the Lindau HZA accepted that the penalty which it was required to impose in accordance with the Community provisions was disproportionately high. It therefore asked that a question on the validity of the second subparagraph of Article 3(2) of the implementing regulation, establishing the detailed rules for calculating this pecuniary penalty, should be referred to the Court of Justice for a preliminary ruling.

18. Agreeing that the outcome of the case turned on the validity of the aforementioned provision, the national court stayed the proceedings in order to refer the following question to the Court:

'Is the second subparagraph of Article 3(2) of Commission Regulation (EEC) No 536/93 of 9 March 1993 (OJ 1993 L 57, p. 12), relating to the imposition of penalties on dairies (purchasers of milk), valid?'

The question

19. The case at issue falls within the now extensive case-law of the Court on milk quotas. In this case, the question referred by the national court concerns one of the detailed rules on the application of the additional levy, as established by the Commission within the competence delegated thereto by the Council under Article 11 of the basic regulation.

20. As is apparent from the order for reference, the validity of the provision in question — which establishes a pecuniary penalty, equal to the amount of the levy due if the quantities of milk delivered exceed the individual quotas by 0.1%, to be imposed on the dairy which fails to notify before 15 May the statements on the milk

delivered — is called into question with regard to two aspects. Firstly, the national court raises doubts as to whether the Commission was competent to impose a penalty on milk purchasers as it considers that the regulation in question has no valid legal basis. Secondly, the national court also doubts the legality of the penalty itself as it considers this disproportionate to the objective pursued. Added to these two aspects are another two raised by the dairy, which is the plaintiff in the main proceedings, concerning an alleged infringement of the principles of criminal law inherent in the rule of law and an infringement of the principle of non-discrimination. During the hearing the Commission also asked that, if the Court were to rule that the provision in question was invalid, the retroactive effect of the judgment should be limited to only those cases in which an appeal had already been lodged. Finally, it should be noted that the assessment of the validity requested by the national court concerns the second subparagraph of Article 3(2) of the implementing regulation in the version prior to the amendment made by Commission Regulation No 1001/98. [12] The latter entered into force after the order for reference.

On the absence of legal basis

21. The national court maintains that Article 11 of the basic regulation cannot be regarded as a valid legal basis for an implementing regulation which provides for pecuniary penalties to be imposed on milk purchasers as this implementing regulation exceeds the Commission's competence in this respect.

22. On a preliminary basis, it must be recalled that the Court has on several occasions ruled, particularly with regard to the agricultural sector, that 'the concept of implementation must be given a wide interpretation. More particularly, only the Commission is in a position to keep track of agricultural market trends and to act quickly where necessary and therefore the Council may find it necessary to confer on it wide powers in that sphere; those powers may also apply to some extent to the finding of the basic facts, and the limits to which they are subject must be determined by reference among other things to the essential general aims of the market organisation'. [13]

23. The Court has also explicitly included within the scope of this interpretation the power to impose penalties. [14] The reasoning followed in the judgment on the case of *Germany* v *Commission* [15] seems particularly clear in this respect. In this, the Court

12 — See point 11 of this Opinion.

13 — Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 22. As to the substance, see also Case 23/75 *Rey Soda* [1975] ECR 1279, paragraphs 10 and 11; Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau* [1987] ECR 1069, paragraph 14, and Case 167/88 *Association générale des producteurs de blé et autre céréales* [1989] ECR 1653, paragraph 15.

14 — See Case C-345/88 *Butterabsatz* [1990] ECR I-159, paragraphs 7 to 12, and Case C-357/88 *Hopermann* [1990] ECR I-1669.

15 — Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383.

specified that Articles 145 and 155 of the EC Treaty (now Articles 202 EC and 211 EC), regulating the Commission's implementing power, 'distinguish between rules which, since they are essential to the subject-matter envisaged, must be reserved to the Council's power, and those which being merely of an implementing nature may be delegated to the Commission'. According to the Court, rules which are essential are those which are intended to give concrete shape to the fundamental guidelines of Community policy. However, this definition does not include penalties intended to guarantee the implementation of these fundamental guidelines. Therefore, 'measures consisting of the imposition of penalties ... amount to no more than implementation of the principles established in the basic regulations and, since the Council did not reserve that power to itself, it was properly delegated to the Commission'.

Still in this same judgment, the Court also underlines that the penalties specified by the Commission in exercising its implementing power do not require any explicit authorisation from the Council as, provided that the latter 'has laid down in its basic regulation the essential rules governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act'. [16]

24. Naturally, certain criteria must be obeyed when exercising this implementing power. The Court has on several occasions ruled that 'the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation'. [17] This means that the Commission, when exercising its implementing power, must remain within the framework of the provisions to be implemented, by respecting the guidelines and the objectives of these.

25. It is specifically on this last aspect of the exercise of the implementing power that the attention of the national court is concentrated. Based on a literal interpretation of the eighth recital of the basic regulation, [18] the national court maintains that the Council, by underlining that the only way to avoid repeated long delays, as in the past, between collection and payment of the levy was for the purchaser to be liable for the levy and for him to be given the means to collect the levy from the producers, actually intended to attribute the cause of these delays to the fact that the

16 — Paragraphs 36 to 41.

17 — Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraph 31. See also Case 121/83 *Zuckerfabrik* [1984] ECR 2039, paragraph 13, and, outside the agricultural sphere, Case C-159/96 *Portugal* v *Commission* [1998] ECR I-7379.

18 — See point 5 of this Opinion.

dairy, in the past, did not have sufficient means to meet in good time the requirements imposed on it by the Community provisions. In the national court's opinion, this should be interpreted as meaning that the Council, in reforming the additional levy, favoured an approach aimed at strengthening the position and rights of the purchaser. The national court also considers this to be the most 'appropriate' interpretation given that, with the reform of the additional levy, the dairies assumed the burden of all the administration in managing the milk quotas which, particularly for the smaller dairies, can be particularly onerous.

The national court also believes that the Commission, when implementing the basic regulation, took a completely different approach. It concludes from the fifth and seventh recitals of the implementing regulation [19] that the Commission blamed the dairies for the delays in the past thus necessitating, in order to guarantee the proper functioning of the scheme, particularly decisive action aimed at requiring the dairies to carry out their tasks promptly. According to the national court, this stance taken by the Commission therefore resulted in the particularly onerous penalty imposed on dairies in the second subparagraph of Article 3(2) of the implementing regulation.

The national court concludes therefore that the difference between the guidelines followed by the two institutions means that Article 11 of the basic regulation cannot be regarded as a valid legal basis for the penalties in question. Also, given that adequate legal bases cannot be found in the Treaty either, it follows that the Commission, in order to establish such a provision, would have required special authorisation from the Council through a regulation adopted under Article 145 of the Treaty.

26. In my opinion, the arguments put forward by the national court cannot be accepted. As the Commission underlines in its observations, the eighth recital of the basic regulation, which establishes that purchasers must be given the means to collect the levy, simply refers to the content of the first subparagraph of Article 2(2) of the basic regulation which grants dairies a wide choice of means at their disposal to collect the levy. [20] Therefore, there is no reason to think that the Council, in adopting its regulation, wanted in any way to protect the position of purchasers just as there is no reason to consider that the Council felt obliged to 'compensate' for the onerous administration imposed on purchasers under the regulations on milk quotas. In my opinion, it appears from all the rules specified by the basic regulation that the Council, when it made purchasers liable for the levy and gave them, at the

19 — See point 9 of this Opinion.

20 — See point 6 of this Opinion.

same time, wide freedom as regards the means for collecting this, intended to give these purchasers chief responsibility for the correct application of the additional levy. Consequently, it must be considered that the introduction of a penalty such as that in this case is perfectly in line with the guidelines established by the Council. This penalty is therefore fully within the implementing powers given to the Commission by Article 11 of the basic regulation which constitutes a valid legal basis.

On the infringement of the principle of proportionality and non-discrimination

27. The second question raised in the order for reference concerns the legality of the second subparagraph of Article 3(2) of the implementing regulation with regard to the principle of proportionality. Six arguments have been put forward in this respect.

28. Firstly, the national court and the dairy, in particular, claim that the penalty specified by the disputed provision does not take any account of the extent of the delay in forwarding the information on the milk delivered. This means that the amount of the pecuniary penalty is always the same whether this involves a delay of a few days or much longer delays, or even in the absence of any communication. According to the national court, this disproportion is worsened by the fact that, in view of the numerous requirements imposed on dairies, the period of time between the end of the milk year on 31 March and the time-limit of 15 May for forwarding the statements on the quantities of milk delivered can be particularly short for the dairies. It is therefore very difficult for the latter to observe the time-limit specified by the Commission. Furthermore, the dairy maintains that the situation described above also infringes the principle of non-discrimination as, by not graduating the amount of the penalty according to the extent of the delay, this has the effect of treating in the same way situations which are actually very different in terms of the negative consequences on the scheme.

29. Secondly, the German Government and the dairy maintain that the date of 15 May is completely arbitrary and unrelated to the other requirements imposed by the scheme. Consequently, failure to meet this time-limit by just a few days does not have any effect on the implementation of the provisions on payment of the levy. Based on this, they consider that specifying particularly high pecuniary penalties in the event of

failure to observe this time-limit is excessive and violates the principle of proportionality.

30. Thirdly, according to the national court and the dairy, a further cause of disproportion lies in the fact that the pecuniary penalties are calculated based on the quantities of milk delivered and not on the amount of the additional levy which may be due. Also in this respect, this choice has the effect that the sum to be paid if the time-limit is exceeded is too high in proportion to the objective pursued by the Commission of rapid communication and punctual payment of the levy.

31. Finally, the dairy puts forward three other arguments according to which the second subparagraph of Article 3(2) of the implementing regulation infringes the principle of proportionality. The first argument concerns the fact that, in the event of a delay, the pecuniary penalty is imposed even if the subsequent statements reveal that the dairy is not liable for the levy. The second argument is linked to the fact that the penalty specified in the disputed provision is imposed as soon as a delay is noted in the communication of the information without considering whether this delay is within the control of the dairy or results from circumstances not attributable thereto, such as delays by the national computer centres in communicating the information needed to establish the statements. The third argument concerns the fact that, when imposing the penalty, no account is taken of the possible difficulties which may arise in the relations between the state authorities responsible for implementing the additional levy and the dairies.

32. It should firstly be recalled that, according to settled case-law, 'the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'. [21]

33. It must also be noted that, as regards the subject-matter in this case, the Court has on several occasions specified that 'when a situation necessitates the evaluation of a complex economic situation, as is

21 — Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4863, paragraph 40. As to the substance, see Case 122/78 *Buitoni* [1979] ECR 677, paragraph 16; Case 266/84 *Denkavit France* [1986] ECR 149, paragraph 17; *Hopermann*, cited above, paragraph 14; Case C-319/90 *Pressler* [1992] ECR I-203, paragraph 12, and Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 49.

the case concerning the common agricultural policy, the Community legislature enjoys a wide discretion as to the nature and scope of the measures to be taken'. [22]

34. Particularly in terms of provisions which provide for penalties, the recognition of this wide discretion has often led the Court to consider even particularly severe and dissuasive penalties as completely lawful. This is true, in particular, in those cases where the penalty was linked to a principal obligation or to an obligation whose observance was of fundamental importance to the functioning of a Community system such as a common organisation of the market. [23]

35. This case undoubtedly falls within the context just described. I have already partly shown, in setting out the relevant Community provisions, how the additional levy is based not on the quantity of milk produced but rather on the quantity sold. A guaranteed total annual quota is fixed for each Member State. This is then divided into individual quotas for each producer. As is apparent in particular from the third recital of the basic regulation, these individual quotas are separated into quantities of milk for delivery to the dairies and quantities of milk for direct sale. The first of these destinations accounts for almost all the milk production. [24] It is evident from this brief description that the quantities of milk delivered to the dairies are the element on which the whole system is based. These quantities are used as a real and appropriate 'unit of measurement' for the scheme. Consequently, the obligation imposed on the dairies to communicate to the competent national authorities the quantities of milk delivered by the producers must be regarded as a principal obligation in that the infringement of this may jeopardise the whole functioning of the additional levy scheme and the functioning of the common organisation of the market in milk and milk products.

36. With regard therefore to the first of the reasons why the provision disputed in this case is disproportionate, an assessment must be made of whether the fact that the penalty contained in this provision does not

22 — Case 84/87 *Erpelding* [1988] ECR 2647, paragraph 27. See also Case 29/77 *Roquette* [1977] ECR 1835, paragraphs 19 and 20; Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22; Case C-8/89 *Zardi* [1990] ECR I-2515, paragraph 11, and *National Farmers' Union*, cited above, paragraph 50.

23 — See in particular *National Farmers' Union*, cited above, paragraphs 51 to 53. See also *Buitoni*, cited above, paragraph 20; Case 21/85 *Maas* [1986] ECR 3537, paragraph 15, and Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraphs 24 and 25.

24 — See the statements of the Court of Auditors in its Special report No 4/93 on the implementation of the quota system intended to control milk production (OJ 1994 C 12, p. 1).

provide for pecuniary penalties differing according to the extent of the delay with which the dairy has forwarded the statements to the national authority should be regarded as an infringement of the principle of proportionality and in particular of the criterion of necessity or whether this can be regarded as justified in the light of the discretion which, based on the case-law cited above, the Commission must be allowed.

37. I consider that the first proposal is most appropriate. The Court has clearly established that, even in relation to penalties linked to principal obligations, the wide discretion enjoyed by the Community legislature on agricultural policy must, however, remain within the limits imposed by the principle of proportionality. [25]

38. Given the way that the Court has applied this principle in these cases, it follows in my opinion that, in the event, as in this case, of an obligation which requires compliance with a time-limit, a penalty linked to this, which does not specify pecuniary penalties differing according to the extent of the delay, does not infringe the principle of proportionality if this time-limit is essential, that is if it can be demonstrated that any delay, regardless of its extent, produces specific effects likely to jeopardise the proper functioning of the Community scheme in question. This means that, if this time-limit is not essential, the negative effects produced on the scheme by the infringement of the obligation will vary according to the delay. Therefore, a penalty which does not take account of this circumstance must be regarded as disproportionate in that it is not necessary to attain the objective pursued. [26]

39. In this respect, the judgment of the Court in the case of *Lingenfelser* [27] is particularly relevant. This concerned a Commission provision on the preventive distillation of table wine which specified that the distiller had to pay the producer a minimum buying-in price for the wine

25 — In other words, the Court, even in the event of penalties linked to principal obligations, has always ensured that criteria of proportionality were respected. As to the substance, see *National Farmers' Union*, cited above, paragraph 49; *Pressler*, cited above, paragraph 12; Case 66/82 *Fromançais* [1983] ECR 395, paragraph 8, and Case C-199/90 *Italtrade* [1991] ECR I-5545, paragraph 10.

26 — In addition to the judgments cited above, see *Fromançais*, cited above, paragraphs 9 to 14; Case 9/85 *Nordbutter* [1986] ECR 2831, paragraphs 12 and 13; *Hopermann*, cited above, paragraphs 8 and 9, and *Italtrade*, cited above, paragraphs 13 and 14. By way of clarification, it should be underlined that the cited judgments concern provisions in which the infringement of the obligation has effects consisting of the confiscation of a deposit or the loss of a benefit. However, these effects have always been treated like penalties where they are not explicitly characterised as such (see, for example, *Italtrade*, cited above, paragraph 10). Therefore, I consider that the case-law cited is totally relevant to this case.

27 — Case C-118/89 *Lingenfelser* [1990] ECR I-2637, paragraphs 13 and 14.

within a certain time limit. If this time-limit was exceeded, a penalty was specified which consisted in the total recovery of the aid paid in the past to the distiller by the intervention agency. Called to rule on the validity of this provision, the Court started from the consideration that the purpose of prescribing this time-limit was 'to ensure that the minimum price guaranteed to the producer is paid to him, as a general rule, within a period which will enable him to obtain a profit comparable to that which he would have obtained from a commercial sale'. In the light of this, the Court therefore considered that 'any period by which the time-limit for payment is exceeded, which does not result in the transactions being carried out under conditions which are appreciably different from those of normal commercial transactions, to the extent of discouraging the producer from offering his wine for distillation, cannot be regarded as jeopardising the very objective of the distillation scheme'. For this reason, the Court concluded that 'a provision which penalises with a total loss of aid any period, no matter how brief, by which the time-limit is exceeded must, therefore, be regarded as disproportionate to the objective pursued by the introduction of the time-limit'.

40. It is also interesting to consider the Court's judgment in the case of *Pressler*, [28] also on the preventive distillation of wine. In this case, the disputed provision concerned the requirement for traders to declare each year, before 7 September, to the competent national authorities the stocks of concentrated grape must and wine held by them. Persons subject to this obligation who did not submit such declarations by the specified date were subject to a penalty consisting of total exclusion from the benefit of the measures provided for preventive distillation. In this case too the Court ruled that the penalty was invalid. It stated that 'it does not appear that strict observance of the date of 7 September ... is indispensable in order to ensure that the Commission has adequate information about production and stocks in the wine sector ... . It follows from the foregoing that the reply to be given to the question referred to the Court ... should be that Article 10a of Commission Regulation (EEC) No 2102/84 is invalid inasmuch as it excludes traders from the benefit of an aid for distillation, irrespective of the extent to which the time-limit of 7 September ... is exceeded'. [29]

41. As regards the case in question, the specific objective of the penalty contained

28 — *Pressler*, cited above, paragraphs 16 and 17.

29 — For the sake of completeness, it should be noted that the Court regarded the obligation to submit the stock declaration before the time-limit to be a secondary obligation and not a principal obligation. However, at the time, Advocate General Tesauro, in his Opinion on the case of *Pressler*, underlined that 'the most recent case-law shows the traditional distinction between principal and secondary obligations to have been surpassed, inasmuch as, in regard to the former, it is considered whether the means employed are appropriate to attain the objective pursued and whether or not they go beyond what is necessary to do so' (point 6 of the Opinion). Therefore, the principles set out by the Court in this judgment can safely be extended to the case in question.

in the second subparagraph of Article 3(2) of the implementing regulation on the additional levy is to induce dairies to submit the statements on the milk delivered by producers before the specified time-limit of 15 May each year. This is just one of the time limits for the administrative obligations specified by the additional levy scheme which occur in succession up to 31 August, the date for payment of the levy. During the hearing the Commission maintained that, where the dairies do not respect the time-limit of 15 May, the resulting delay affects the next time limit, thereby setting up a chain reaction which delays all the obligations, including the payment of the additional levy. The Commission therefore maintains that a delay by the dairies in forwarding the information is likely, for the reasons set out above, to jeopardise the functioning of the whole scheme.

Although the above considerations show that the date of 15 May is an important and fully justified time-limit in view of the rules on the additional levy, it must, however, be added that the Commission has not put forward any argument which leads to the conclusion that this time-limit must be regarded as essential. The Commission has not demonstrated that any delay, even a brief one, actually affects the next time-limit resulting in the negative effects described. Therefore, in my opinion, these effects are purely hypothetical. This conclusion is further supported by the fact that in this case, as is apparent from the order for reference, when the communication from the dairy was forwarded to the competent national authority, the latter had not even started on the national statements.

Given that it has not been demonstrated that, where the time-limit specified for dairies to forward information has been briefly exceeded, this is likely to jeopardise the functioning of the additional levy scheme, it must be concluded that a penalty which punishes this brief delay with the same severity as a longer delay is not necessary for the objective of rapid communication of information pursued by the Commission.

42. In my opinion it seems, *inter alia*, that the Commission itself implicitly confirmed this conclusion when in 1998 [30] it amended the provision disputed in this case by introducing pecuniary penalties differing according to the extent of the delay recorded by the dairies in forwarding the statements. The fourth recital of the new regulation expressly indicates that 'the more a purchaser delays communication of the information, the more serious are the consequences for the competent authorities which have to ensure payment of the levy before the time limit'. In addition, the fifth

30 — By Regulation No 1001/98, cited above.

recital establishes that experience shows that 'to make the penalty more effective and to ensure that the size of the penalty is *in proportion* to the seriousness of the offence, the penalty applicable where the delay exceeds 15 days should be increased and provision should be made for increasing penalties for additional delays'.[31] It therefore seems clear to me that the Commission itself recognises that, in order to ensure the proper functioning of the additional levy, not only is it necessary to specify penalties which take account of the extent of the delay but also that a graduation in this respect makes these penalties more effective.

43. If the considerations set out up to this point have led to the conclusion that the penalty specified in the second subparagraph of Article 3(2) of the implementing regulation is disproportionate, for the reasons cited above, in that it does not take account of the extent by which the time-limit is exceeded, it must also be concluded for the same reason that this penalty infringes the principle of non-discrimination which, in the sector of the common agricultural policy, is expressly set out in Article 40(2) of the EC Treaty (now, after amendment, Article 34 EC). As it is established that the harm caused to the additional levy scheme by the time-limit of 15 May being exceeded is not always the same, but depends on the extent of the delay, it must also be accepted that the disputed provision treats equally, without any justification, situations which must actually be regarded as different.[32]

44. As regards the second argument put forward that the provision in question is disproportionate in view of the alleged arbitrariness of the date of 15 May, I would refer to what has just been stated.

45. On the other hand, I consider that all the other arguments put forward by the national court and the parties should be rejected.

With regard to the argument put forward by the national court and the dairy relating to the fact that the pecuniary penalty is calculated based on the quantities of milk delivered and not on the amount of the levy, it must be underlined that, as already recalled, the penalty specified in the second subparagraph of Article 3(2) of the implementing regulation has the specific objective of inducing the dairies to respect the obligation to communicate the information on the quantities of milk delivered by producers. It is clear that this obligation does not directly relate to the obligation, which is linked but separate, for payment of the levy. It follows that, if this criterion were used to determine the amount of the penalty, this would exclude from the payment of the penalty all those dairies which,

31 — The italics are mine.

32 — See, in all respects, Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28.

although late in forwarding their information, are not liable for the levy according to the statements. This circumstance would not only be discriminatory but would also hinder attainment of the objective for which the penalty is specified. As underlined by the Commission, in order to be able to carry out the national calculations, the communications from the dairies which have not exceeded the individual reference quantities and therefore are not liable for the levy are just as important as the communications from the dairies which have exceeded these quantities. Finally, it should also be taken into account that, by linking the calculation of the penalty to the quantities of milk delivered, it is possible to introduce an element of graduation allowing the amount of the penalty to differ according to the turnover of the dairy. In the light of these considerations, it must therefore be concluded that the criterion chosen by the Commission for the calculation of the penalty specified by the disputed provision is in proportion to the objective pursued.

46. Finally, with regard to the last three arguments put forward by the dairy, I consider that it is sufficient, as regards the fact that in the event of delay the pecuniary penalty is imposed regardless of whether or not the dairy, according to the statements, is liable for the levy, to refer to the above statements on the criterion for calculating the penalty. However, as regards the other two arguments put forward by the dairy, in my opinion both of these, although not correctly reasoned, concern potential problems which may arise between the dairies and the competent national authorities in respect of the additional levy scheme. Despite this, these arguments cannot be regarded as relevant as these types of problem are irrelevant for the purpose of assessing the proportionality of a Community provision.

On the infringement of principles of criminal law

47. The final defect in the act claimed by the dairy in relation to the validity of the second subparagraph of Article 3(2) of the implementing regulation concerns the alleged infringement of the principles of criminal law inherent in the rule of law. As to the substance, the plaintiff in the main proceedings maintains that, due to its extent and importance, the penalty which is the subject of this procedure is criminal in nature. In the plaintiff's opinion, a penalty assumes this nature when it exceeds certain limits. In this case, according to the dairy, the limits in question should be regarded as being exceeded as the penalty specified by the disputed provision does not take account of whether or not the dairy, according to the statements, is liable for the levy and establishes the calculation of the penalties solely based on the quantities of milk delivered. In addition, the dairy maintains that, given the huge administrative costs to which it is subject under the additional levy scheme, the fact of having to pay a pecuniary penalty of a considerable amount for barely exceeding a secondary time-limit is undoubtedly criminal.

As a result of this, the dairy maintains that, for the purpose of assessing the validity of the penalty in question, the principles of criminal law, and particularly the principle of *nulla poena sine culpa*, should be applied. Therefore, given that, when imposing the pecuniary penalties, no account is taken of whether or not there is any fault on the part of the dairy which has exceeded the specified time limit, it must be concluded that this penalty is unlawful.

48. The argument put forward by the dairy is totally unfounded. The amount of a Community penalty cannot affect the nature of this penalty by giving it a criminal nature where the sum to be paid is particularly high.

49. In general, it must be noted that the Court has never found it necessary to define specifically the nature of the European Community's power to impose penalties and has avoided distinguishing between administrative penalties and criminal penalties. [33] The Court has preferred to mark out the outlines of this power by establishing its main characteristics. In this respect the Court has used the attainment of the objectives set out in the Treaty as the main guiding criterion.

50. Among these characteristics, as I have already mentioned, [34] the Court has included the dissuasive nature of a penalty, that is the capacity of the penalty to constitute a valid deterrent against infringement of the obligation linked to this penalty. It is particularly clear from the case-law on fines imposed by the Commission on competition matters that, for the Court, this nature justifies the existence of particularly high penalties, [35] without this having any effect on the nature of the penalty itself. In this respect it must be noted that the Court has explicitly excluded the fines imposed by the Commission on competition matters as having a criminal nature. [36] The only limit established is that these amounts should be commensurate with the seriousness of the offence and that the latter should be assessed taking into account, in particular, the harm caused to the Community system. [37]

51. It must therefore be considered that the argument put forward by the dairy simply raises in another form the problem of the proportionality of the disputed penalty. In my opinion, it is therefore unnecessary to dwell any further on this question as

33 — In those cases in which the Court has been called to rule on the criminal nature or otherwise of Community penalties, the Court has never proposed a 'positive' definition but has limited itself to excluding in the case in question the criminal nature of the disputed penalty. See, as to the substance, *Germany* v *Commission*, cited above, paragraphs 24 and 25, and Case T-83/91 *Tetra Pak* [1994] ECR II-755, paragraph 235.

34 — See, as to the substance, point 34.

35 — See Joined Cases 100/80 to 103/80 *Musique Diffusion française* [1983] ECR 1825, paragraphs 106 and 107, and Case T-15/89 *Chemie Linz* [1992] ECR II-1275, paragraphs 355 to 364.

36 — See *Tetra Pak*, cited above, paragraph 235.

37 — See Case 183/83 *Krupp* [1985] ECR 3609, paragraph 40; *Musique Diffusion française*, cited above, paragraph 109; Case T-77/92 *Parker Pen* [1994] ECR II-549, paragraph 92, and Joined Cases T-213/95 and T-18/96 *Stichting* [1997] ECR II-1739, paragraphs 146 and 147.

reference can be made to the conclusions already reached above.

On the request to limit the effects of the judgment

52. One final question remains on this issue. During the hearing the Commission asked that, if the Court were to rule that the disputed provision was invalid, it should limit the effects of its judgment to future cases only, with the exception of those in which appeals have already been lodged. This request is intended to prevent the confidence which the Member States place in the principle of equality and the proper functioning of the Community from being compromised.

53. In this respect, it must be recalled that, according to settled case-law, 'a judgment of the Court in proceedings for a preliminary ruling declaring a Community act to be invalid takes effect, like a judgment annulling an act, from the date on which the act entered into force ... . The Court may, however, limit in the judgment itself the temporal effects of a preliminary ruling declaring a Community regulation invalid, where that is justified by overriding considerations of legal certainty'. [38]

54. It therefore results from this case-law that the possibility of limiting the retroactive effects of a judgment declaring an act to be invalid must be regarded restrictively. Such a decision is justified only in exceptional cases where this is necessary to protect interests considered, according to the circumstances of the case, as being so important that they must prevail over the requirement to ensure effective judicial protection.

55. As regards this case, in my opinion these conditions are not met. Given the rules in question and the importance of the case, the danger of severely disrupting legal relations established in good faith, which is regarded by the Court as a precondition for accepting the existence of possible harm to the principle of legal certainty, is not evident. [39]

56. I therefore consider that the request by the Commission to limit the retroactive effects of any judgment by the Court declaring the disputed provision to be invalid should not be accepted.

38 — Case C-212/94 *FMC* [1996] ECR I-389, paragraphs 55 and 56. See also Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraph 51; Case 41/84 *Pinna* [1986] ECR 1, paragraph 26, and Joined Cases C-38/90 and C-151/90 *Lomas* [1992] ECR I-1781, paragraphs 23 and 24.

39 — See Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 49, and Case C-262/96 *Sema Sürül* [1999] ECR I-2685, paragraphs 107 and 108.

57. I therefore propose that the Court give the following answer to the national court's question:

The second subparagraph of Article 3(2) of Commission Regulation (EEC) No 536/93, relating to the imposition of penalties on dairies, is invalid in that it does not provide for a graduation of this penalty according to the extent by which the time-limit of 15 May specified in the first subparagraph of Article 3(2) of this Regulation is exceeded for the forwarding of the statements on the quantities of milk delivered by producers.