OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 17 JANUARY 1980

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Conseil d'État of France. It raises questions about the earliest of the Community schemes for reducing surpluses in the dairy sector by means of the payment of premiums for slaughtering cows and for withholding milk and milk products from the market. The case is concerned with a premium of the latter kind, which I shall call for short a "withholding premium".

The English texts of the Council Regulations relating to the scheme are defective in places and there appear to be no English texts of the relevant Commission Regulations. I accordingly propose to refer in the main to the French texts of them.

The scheme was established by Council Regulation (EEC) No 1975/69 which entered into force on 11 October 1969 and which I shall call "the first Council Regulation".

In the operative part of that Regulation Title I dealt with slaughtering premiums. The grant of such a premium was subject in particular to the recipient's undertaking to give up milk production entirely and to have all the dairy cows on his farm slaughtered during a period ending not later than 30 April 1970.

Title II contained provisions relating to withholding premiums. They were, so far as here relevant, as follows:

"Article 5

Les exploitants agricoles détenant plus de dix vaches laitières peuvent bénéficier, sur leur demande et dans les conditions définies ci-dessous, d'une prime à la non-commercialisation du lait et des produits laitiers.

Article 6

L'octroi de la prime est subordonné, notamment, à l'engagement écrit du bénéficiaire de renoncer totalement et définitivement à céder du lait et des produits laitiers.

Article 7

1. Le montant de la prime s'élève à deux cents unités de compte par vache laitière détenue dans l'exploitation à la date du dépôt de la demande.

2. L'octroi de la prime est limité au nombre de vaches laitières détenues, à une date de référence déterminée par chaque État membre, dans l'exploitation gérée par le bénéficiaire . . .

Article 8

1. Le montant de la prime est payé en cinq versements.

2. Un montant de cent unités de compte par vache laitière est versé dans les trois mois qui suivent l'engagement écrit visé à l'article 6.

Le solde est payé annuellement en quatre fractions égales, si le bénéficiaire a démontré à la satisfaction de l'autorité compétente, d'une part, qu'il détient un nombre d'unités de gros bovins égal ou supérieur au nombre de vaches laitières détenues à la date du dépôt de la

demande et, d'autre part, que l'engagement visé à l'article 6 a été respecté."

Title III contained general provisions among which I must refer to the following.

Article 9 provided for the adoption of implementing provisions by the "Management Committee procedure", the Management Committee concerned being that for beef and veal.

Article 10 provided that Member States might, by that procedure, be authorized to impose additional conditions for the granting of premiums.

Article 11 provided:

"Si l'engagement visé à l'article ... 6 n'est pas respecté pendant une période de cinq années à partir de la date du dépôt de la demande de la prime, les États membres procèdent au recouvrement de la prime, sans préjudice de sanctions pénales éventuelles."

Article 12 provided that the Guidance Section of the European Agricultural Guidance and Guarantee Fund should reimburse Member States 50% of the premiums paid under the Regulation.

Pursuant to Articles 9 and 10 the Commission adopted Regulation (EEC) No 2195/69, which entered into force on 6 November 1969 and which I shall call "the first Commission Regulation". The provisions of that Regulation that have a bearing on the questions arising in this case are these.

Articles 1 and 2 contained a number of definitions, in particular of the expression "unité de gros bovins" ("adult bovine units").

Articles 3 to 10 laid down in detail the procedure governing applications for and payment of slaughtering premiums. That procedure involved, among other things, that each cow to be slaughtered should be marked and should be accompanied until she reached the slaughterhouse by a kind of identity card ("fiche signalétique"). Payment of the premium to an applicant was to be made when he produced to the competent authority the identity cards of all his cows each bearing a certificate from a slaughterhouse or from an official veterinarian to the effect that the cow was dead.

Articles 12 to 15 laid down the procedure governing applications for and payment of withholding premiums. I need not, I think, go into the details of this except to say that it hinged largely on a count of the number of dairy cows on the recipient's farm at an appointed date ("détenues dans l'exploitation à une date de référence") fixed by each Member State. That, of course, reflected the provisions of Article 7 of the first Council Regulation. By virtue of Article 14 (2) (b) an undertaking to discontinue deliveries of milk and milk products must be complied with at the latest within six months of the date of the undertaking.

Article 16 was important because it made clear that which was not clear from the first Council Regulation, viz. that a premium paid was to be recovered not only if the recipient failed to honour his undertaking to refrain from marketing milk or milk products but also if he failed to hold the requisite number of "adult bovine units". Article 16 was in these terms:

"Si le bénéficiaire n'a pas démontré à la satisfaction de l'autorité compétente qu'il

détient le nombre d'unités de gros bovins visé à l'article 8 paragraphe 2 deuxième alinéa du règlement (CEE) no 1975/69, les États membres procèdent au recouvrement du montant visé à l'article 8 paragraphe 2 premier alinéa du même règlement."

Article 18 made it clear that a slaughtering premium and a withholding premium could not both be claimed in respect of the same farm. It read:

"Pour une même exploitation, les primes visées aux articles ler et 5 du règlement (CEE) no 1975/69 ne peuvent être cumulées".

Article 19 authorized Member States to impose additional conditions for the grant of premiums, including conditions "relatives à la cession temporaire ou définitive de l'exploitation du bénéficiaire". It is common ground that no such conditions were enacted in France.

The first Council Regulation was amended by Council Regulation (EEC) No 1386/70, which entered into force on 1 August 1970 and which I shall call "the second Council Regulation". The preamble to the second Council Regulation said of the withholding premiums:

"... l'expérience acquise démontre l'opportunité de préciser et de modifier quelques conditions régissant l'octroi de cette prime, notamment pour le cas où l'exploitation n'est pas gérée par le demandeur de la prime pendant toute la période au cours de laquelle s'étend le paiement de la prime et où, en raison de circonstances ne dépendant pas de la volonté du demandeur, celui-ci ne peut respecter ses engagements;

... il paraît équitable de permettre aux bénéficiaires des primes déjà octroyées de bénéficier, sur leur demande, des dispositions prévues au présent règlement".

Essentially the effect of Article 1 of the second Council Regulation was to add to Article 5 of the first Council Regulation a paragraph in the following terms:

"2. Tout successeur à l'exploitation a le droit de s'engager à poursuivre l'exécution des obligations souscrites par son prédécesseur. En ce cas, les acomptes payés restent acquis à ce dernier, et le solde des primes est versé à son successeur."

The effect of Article 2 was to add to Article 9 of the first Council Regulation an express power to legislate for

"les cas de force majeure qui permettent l'annulation ou la suspension des obligations de l'intéressé."

Article 3 provided:

"Sur demande de l'intéressé, les dispositions prévues au présent règlement sont appliquées aux primes octroyées avant la date de l'entrée en vigueur du présent règlement."

Article 1 of Commission (EEC) No 2240/70, which entered into force on 8 November 1970 and which I shall call the second Commission Regulation, amended Article 16 of the first Commission Regulation to read so far as material, as follows:

"1. Si le bénéficiaire ou tout successeur à l'exploitation qui s'est engagé vis-à-vis de l'autorité compétente à poursuivre l'exécution des obligations souscrites par son prédécesseur, n'a pas démontré à la satisfaction de l'autorité compétente qu'il

détient le nombre d'unités de gros bovins visé à l'article 8 paragraphe 2 deuxième alinéa du règlement (CEE) no 1975/69, les États membres procèdent au recouvrement du montant visé à l'article 8 paragraphe 2 premier alinéa du même règlement.

2. Les organismes compétents admettent comme cas de force majeure justifiant le non-recouvrement du montant visé à l'article 8 paragraphe 2 premier alinéa du règlement (CEE) no 1975/69, les circonstances étrangères ayant un caractère anormal, rendant définitivement impossible, au bénéficiaire ou à son successeur, sauf au prix de sacrifices excessifs, le respect de l'obligation visée à l'article 8 paragraphe 2 deuxième alinéa du règlement (CEE) no 1975/69. Peuvent notamment être considérées comme telles, les circonstances suivantes:

a) le décès du bénéficiaire;

b) l'incapacité de longue durée du bénéficiaire d'exercer sa profession;

c) l'expropriation d'au moins 50% de la surface agricole utile de l'exploitation gérée par le bénéficiaire dans la mesure où cette expropriation n'était pas prévisible le jour de l'engagement visé à l'article 6 du règlement (CEE) no 1975/69."

The new Article 16 also contained a third paragraph dealing with cases of *force majeure* rendering it temporarily impossible for the person concerned to meet his obligation to hold the requisite number of "adult bovine units." That paragraph gave as examples of such cases severe flooding, accidental destruction of buildings and animal diseases.

Article 2, like Article 3 of the second Council Regulation, enabled a person concerned to request the application of the amended provisions in respect of a withholding premium granted before the Regulation entered into force.

The system of premiums established by those Regulations was abolished by Council Regulation (EEC) No 1290/71 as from 30 June 1971. However, because of continuing difficulties in the milk sector, the Council reintroduced a premium system by Regulation (EEC) No 1353/73. That remained in force until the end of 1974. A third scheme, which is still in force, was introduced by Council Regulation (EEC) No 1078/77.

Our attention was drawn to the provisions of those later schemes, which were more detailed and sophisticated than those of the first scheme. I do not, however, think that subsequent legislation can be invoked as an aid to the interpretation of the Regulations establishing the first scheme.

I turn now to the facts of the case.

The appellant before the Conseil d'État, Madame Marie-Louise Damas, is the owner of a holding of 65 hectares situated at Garderon, Bretagne d'Armagnac, in the Department of Gers. The respondent is the "Fonds d'Orientation et de Régularisation des Marchés Agricoles" (or "FORMA") which was the authority responsible for administering the premium scheme in France.

On 2 April 1970 Madame Dumas and her "métayer" (crop-sharing tenant) Angelo Arbusti signed a declaration with a view to obtaining a withholding premium (Annex 2 to the Observations

of the FORMA). The declaration showed that at the time there were 21 dairy cows and 2 bulls on the holding. A written undertaking to discontinue fully and finally deliveries of milk and milk products, as required by Article 6 of the first Council Regulation, was signed on 8 April 1970 on behalf of Madame Damas and of Angelo Arbusti by Joseph Arbusti, the latter's son (Annex 3 to the Observations of the FORMA). Having regard to the six months' period of grace the undertaking had to be complied with by 8 October 1970.

On 19 October 1970 Madame Damas received from the FORMA the first instalment of the premium, amounting to FF 11 663.84. Your Lordships will remember that the first instalment represented half the total premium.

It seems to have been in June 1971 that the Directorate of Agriculture for the Department of Gers ("Direction Départementale de l'Agriculture") began to suspect Madame Damas and Angelo Arbusti of not complying with their undertaking. That was when a return sent in by the local cooperative dairy, "Tempé Lait", showed them as still delivering milk. Checks were then carried out by officials of the Directorate. (They are described in letters dated 25 May 1972 and 23 September 1972 from the Departmental Director to the Director of the FORMA, Annexes 7 and 8 to the Observations of the FORMA).

From the information relayed to it by the Directorate, the FORMA concluded that Madame Damas had continued to deliver milk after 8 October 1970 and, accordingly, called upon her to repay the first instalment of the withholding premium. She did not comply and, on 14 March 1972, the FORMA issued a formal declaration ("état exécutoire") to the effect that she was indebted to the FORMA in the sum of FF 11 663.84 (Annex 5 to the Observations of FORMA).

Madame Damas applied to the Tribunal Administratif of Pau for the annulment of that "état exécutoire". That Tribunal having found against her, she now appeals to the Conseil d'État.

Madame Damas disputes the facts on which the FORMA based its decision. She was able to produce certificates dated 4 February 1972 and 4 April 1972 from the manager of Tempé Lait contradicting the return of the previous June. They stated that Madame Damas and Angelo Arbusti stopped delivering milk on, respectively, 7 and 8 September 1970. What happened after that, according to Madame Damas, may, I think, be summarized as follows.

Her intention had been to convert her dairy herd to beef production. To that end she sold some of her cattle, in fact to Joseph Arbusti, who removed them to his own farm and went on selling their milk. To that end also she bought calves for fattening. However, the conversion plan had to be abandoned because of the retirement in November 1970 for reasons of health of Angelo Arbusti. A lease dated 27 August 1971 was granted by Madame Damas to a certain Monsieur Jegerlehner and was said to have been made retrospective to 1 November 1970. The lease, it seems, applied to the entire holding but Madame Damas retained the right to use certain fields until her stock-raising business could be wound up. The milk produced by what remained of her dairy herd had been used exclusively for feeding calves. As from November 1970,

except for the purpose of winding up the business, Madame Damas and Angelo Arbusti ceased to farm.

The Conseil d'État, in the Order for Reference, formulates its questions in this way:

"In order to resolve the dispute, it is necessary to know what is the scope of the undertaking specified in the above-mentioned Regulations, and in particular (1) whether that undertaking is of a personal nature or whether it attaches to the land ("s'il est lié au fonds") and what are the consequences, as regards entitlement to the premium, of a disposal of the property or of the right to farm the land; (2) whether the undertaking attaches to the cattle and whether, if the dairy cows for which the premium was granted are disposed of, the seller's obligation is transferred to the buyer."

I can deal quite shortly with question (2). In its written observations the FORMA submitted that that question should be answered in the affirmative, but at the hearing Counsel for the FORMA candidly admitted that he could not maintain that submission. In the result Counsel were, at the hearing, unanimous that the undertaking could not attach to the cattle in a buyer's hands. That, in my opinion, must be right. One has only to think of the procedure prescribed for the payment of slaughtering premiums, involving the marking of each cow concerned and her being accompanied, in whosoever's hands she should come, by her death warrant in the form of a "fiche signalétique", and to contrast with it the procedure for the payment of withholding premiums, which involved no such continuing identification of the cows concerned. It must also be borne in mind that the twin obligations assumed by an applicant for a withholding premium were to refrain for five years from marketing milk or milk products and to keep for the same period the requisite number of "adult bovine units". In most cases compliance with those obligations must necessitate the sale of dairy cows and the purchase of beef cattle. To whom could a dairy cow be sold (otherwise than for slaughter) if not to another dairy farmer? But perhaps it is enough to say that one scours the Regulations in vain for any suggestion that the burden of the undertaking not to market milk or milk products ran with the cows.

One scours them in vain also for any provision that that burden ran with the land so as automatically to bind a successor to the land. Indeed it seems doubtful, in view of Article 222 of the EEC Treaty, whether it would have been within the powers of the Council to create an incumbrance of that nature.

Thus the undertaking was of a personal nature and the real question in this case is that raised by the second limb of the Conseil d'État's question (1), viz. "what are the consequences, as regards entitlement to the premium, of a disposal of the property or of the right to farm the land"?

It is manifest that the authors of the second Council Regulation and of the second Commission Regulation proceeded on the assumption that the effect of the first Council Regulation and of the first Commission Regulation was that an applicant for a withholding premium could not fulfil his obligations

unless he continued to farm his holding for the whole of the five-year period. That is why they introduced an option for a successor to the farm to take over the obligations, and provided that, if the option were exercised, the applicant would be entitled to retain the instalments of the premium that he had received and the successor would be entitled to subsequent instalments; that is why they introduced the provisions to which I referred at some length for cases of *force majeure*, and in particular for cases of the death or prolonged incapacity of the applicant; and that is why they provided for the option or the provisions for cases of *force majeure* to apply, at the request of the person concerned, to any premium granted before the entry into force of those Regulations.

Your Lordships will remember that the second Council Regulation entered into force on 1 August 1970 and the second Commission Regulation on 8 November 1970. There is however no suggestion that Madame Damas sought to avail herself of the benefit of either of them. She relied on a statement contained in a circular issued by the French Ministry of Agriculture on 26 January 1970, the gist of which was repeated in a letter written to her on 6 April 1970 by the Director of Agriculture for the Department of Gers. That statement was in these terms:

"J'attire votre attention sur l'une des conséquences du caractère individuel des engagements que devront souscrire les bénéficiaires de primes à la non-commercialisation du lait et des produits laitiers.

Il résulte du caractère individuel de cet engagement qu'en cas de cessation d'activité des bénéficiaires et quelle qu'en soit la cause (décès, départ en retraite, expropriation des terres . . .) avant la fin de la période de cinq années au cours de laquelle sont payées les 4 fractions successives du solde des primes, les sommes perçues par les bénéficiaires leur restent acquises.

Par contre, l'article 16 du règlement 2195/69 s'applique aux bénéficiaires qui, restant agriculteurs, cesseraient de produire de la viande bovine, ou ne détiendraient pas le nombre d'unités de gros bovins exigé pour le paiement du solde."

The question is whether that statement is correct, so that the authors of the second Council Regulation and of the second Commission Regulation were under a misapprehension as to the effects of the first Council Regulation and of the first Commission Regulation.

In my opinion it would be strange if they were, because it would mean that the Community had committed itself to paying out sums of money, not only in order to secure that the marketing of milk and milk products from particular farms should cease for five years, but also, and alternatively, in order to provide retirement gratuities for individual dairy farmers, each of them being free, after receipt of one or more instalments of the premium, to part with his farm to someone else who could at once resume the marketing of milk and milk products therefrom.

Nor do the terms of the first Council Regulation seem to me consistent with that view.

Those of the preamble to the first Council Regulation are particularly significant. After making it clear that the purpose of the scheme established by that Regulation was to encourage the discontinuance of milk production and the discontinuance of the marketing of

milk and milk products, and referring to slaughtering premiums as one means of achieving that purpose, the preamble continued:

"considérant qu'il est possible d'atteindre le but poursuivi en octroyant, en outre, des primes aux exploitants agricoles qui, sans pour autant cesser leur production, renoncent totalement et définitivement à la commercialisation du lait et des produits laitiers; qu'il est, toutefois, nécessaire de limiter l'octroi de cette prime aux exploitations dont la productivité laitière est relativement importante."

Thus, from the outset, it was envisaged that withholding premiums would be paid to farmers who did not cease production and that such premiums would be paid in respect of particular farms ("exploitations").

Moreover the existence of a specific and continuing "exploitation" in respect of which a withholding premium was to be paid seems to have been assumed in many of the operative provisions of both Regulations.

The only provision in either Regulation that expressly envisaged the possibility of the recipient of a premium ceasing to farm was Article 19 (1) (b) of the first Commission Regulation, authorizing Member States to impose additional conditions "relatives à la cession temporaire ou définitive de l'exploitation du bénéficiaire." No doubt that provision, if read in isolation, could be taken as an indication that a recipient of a premium was free to part with his farm subject only to any special conditions imposed by the Member State concerned (of which there were none in France). But I think it more consistent with the scheme as a whole to interpret the provision as empowering Member States to legislate specifically for cases of the kind to which it refers. On that view the power was taken back from Member States by the Council when it enacted its second Regulation.

In the result I agree with the submission of the FORMA that, whilst the obligations assumed by an applicant for a withholding premium were personal to him, compliance with them necessitated his doing and refraining from doing things in relation to a particular farm (keeping the requisite number of "adult bovine units" on it and refraining from marketing milk or milk products from it) so that any disposal by him of the farm must entail a breach of those obligations except where the provisions of the second Council Regulation or of the second Commission Regulation applied.

I am accordingly of the opinion that, in answer to the questions referred to the Court by the Conseil d'État, Your Lordships should rule that:

(1) The obligation to refrain from delivering milk or milk products for a period of five years and the obligation to keep for a similar period a number of adult bovine units equal to or greater than the number of dairy cows kept at the date of the application, which were imposed on the applicant for a withholding premium by Council Regulation (EEC)

No 1975/69 and Commission Regulation (EEC) No 2195/69, did not attach to his land so as automatically to bind any purchaser of it. However, if the applicant disposed of his land or of the right to farm it during the five-year period, he would, subject to the provisions of Council Regulation (EEC) No 1386/70 and of Commission Regulation (EEC) No 2240/70, make it impossible for himself to comply with those obligations so that he would forfeit his right to future instalments of the premium and become liable to repay instalments already received.

(2) The obligations did not attach to the cattle so as to bind purchasers of cows for which the premium was granted.