OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 30 November 1988 *

My Lords,

1. In this case the Court is asked to rule on the interpretation of Community rules concerning aid for the processing of partly skimmed milk powder into compound feedingstuffs. The request for a preliminary ruling arises from a dispute between a Netherlands trader, Trouw & Co. BV ('Trouw') and the Hoofdproduktschap voor Akkerbouwprodukten ('the intervention agency').

Facts

2. It appears from the Order for Reference that between 3 June and 25 August 1985, Trouw processed partly skimmed milk powder into compound feedingstuffs and received aid in respect of the quantities of powder used in accordance with Article 2(1)(e) of the then applicable version of Council Regulation (EEC) No 986/68.

3. Checks revealed that the feedingstuffs produced by Trouw in this period contained between 64.44 and 65.44 kg of partly skimmed milk powder per 100 kg of the finished product. The intervention agency claimed reimbursement of the total amount of aid paid to Trouw on the ground that Article 4 (1) (a) of Commission Regulation No 1725/79, read together with Article 1(5) of the same regulation, as amended, required that per 100 kg of the finished product the feedingstuffs must contain at least 60 kg of partly skimmed milk powder after multiplication by a coefficient of 0.9. In fact, after multiplication by this figure, the quantities of skimmed-milk powder used by Trouw varied between 57.996 and 58.996 kg per 100 kg of feedingstuffs.

4. At the oral hearing, counsel for Trouw stated that the quantity of skimmed-milk powder used per 100 kg of the finished product in the relevant period was in fact 60.5 kg, consisting of 40 kg of ordinary skimmed-milk powder and 20.5 kg of partly skimmed milk powder. The coefficient was applied only to the latter quantity, giving rise to a total of 58.45 (40 + 18.45) kg. However, it appears to be common ground between the parties that the actual quantity used exceeded 60 kg before multiplication by the coefficient, but fell short of that figure after the coefficient had been applied.

5. The figures do not affect the issue before the Court, which is, in essence, whether the coefficient of 0.9 is to be applied only in determining the amount of aid to be granted, or whether the coefficient must be applied in determining whether the quantity

* Original language: English.

of skimmed-milk powder used reached the requisite 60 kg per 100 kg of feedingstuffs in order to qualify for aid. At what stage, in other words, must the coefficient be applied?

6. Trouw sought the annulment of the decision of the intervention agency claiming reimbursement on the ground that the decision was based on an incorrect interpretation of Regulation No 1725/79, in particular as regards the application of the coefficient. By order of 5 June 1987, the College van Beroep voor het Bedrijfsleven requested a preliminary ruling on the following question:

7. 'Must Articles 1 (5) and 4 (1) (a) of Regulation (EEC) No 1725/79, read in conjunction with each other, be construed as meaning that the actual quantities of skimmed-milk powder per 100 kg of the finished product should be multiplied by a coefficient of 0.9 and that the result of that multiplication should be between 60 and 70 kg?'

8. In order to answer this question it is necessary to consider the legislative framework and the arguments of the parties.

Legislative framework

9. Article 10 (1) of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) provides that aid may be granted for skimmed milk and skimmed-milk powder used as feedingstuffs. General rules for the granting of this aid are laid down in Council Regulation No 986/68 of 15 July 1968 (Official Journal, English Special Edition 1969 (I), p. 260). Article 1 (d) of that regulation (as amended by Council Regulation No 472/75 of 27 February 1975, Official Journal 1975, L 52, p. 22) defines skimmed-milk powder as milk or buttermilk in powder form with a maximum fat content of 11%. Article 2 (1) of Regulation No 986/68 describes the categories of skimmed milk and skimmed-milk powder for which aid may be granted.

10. In its original form, Article 2 (1) provided for a single aid for skimmed-milk powder used in the manufacture of compound feedingstuffs. However, Council Regulation No 2128/84 of 17 July 1984 (Official Journal 1984, L 196, p. 6), which amended Regulation No 986/68, introduced a distinction between skimmed-milk powder with a fat content not exceeding 7% and skimmed-milk powder with a fat content between 9 and 11% (a product generally referred to as partly skimmed milk powder). With a view to reducing the amount of butterfat on the Community market, higher levels of aid were provided for the processing or denaturing of the latter product. Specifically, the amended version of Article 2 (1) provided that aid should *inter alia* be granted for:

11. '(e) skimmed-milk powder with a fat content to be determined between 9 and 11%, not containing buttermilk powder, produced in a dairy directly from liquid milk and used in the manufacture of compound feedingstuffs;

(f) skimmed-milk powder with a fat content to be determined between 9 and 11%, not containing buttermilk powder, produced in a dairy directly from liquid milk and denatured according to methods to be determined with a view to its use in the manufacture of compound feedingstuffs'.

12. This case is concerned with the product described at (e) above, i. e. partly skimmed milk powder used in the manufacture of compound feedingstuffs.

13. Article 2a (1) of Regulation No 986/68, as amended by Regulation No 2128/84, laid down the factors which were to be taken into account when fixing the amounts of aid. In the case of categories (e) and (f) set out above, these factors included the trend in the intervention price for butter and the trend in prices for fats competing with the milk fats used as feed.

14. The differentiated system of aid in Regulation No 2128/84 was introduced only on a temporary basis and lapsed at the end of the 1985/86 milk marketing year.

15. Detailed rules for the granting of aid for skimmed milk and skimmed-milk powder used for the manufacture of feedingstuffs were laid down in Commission Regulation No 1725/79 of 26 July 1979 (Official Journal 1979, L 199, p. 1). In particular, Article 1 specified the general conditions which skimmed milk and skimmed-milk powder had to meet in order to qualify for aid, and Article 4 laid down the compositional requirements for the finished product, i. e. the feedingstuffs.

16. Following the introduction of the differentiated system of aid for skimmed-milk powder referred to above, the Commission adopted Regulation No 3714/84 of 21 December 1984 laying down detailed rules for the granting of aid for the use of partly skimmed milk and partly skimmed milk powder in feedingstuffs (Official Journal 1984, L 341, p. 65). Article 1 provided for a special aid for the fat content of skimmed-milk powder covered by Article 2 (1) (e) and (f) of Regulation No 986/68 and containing at least 10% milk fat.

17. The introduction of the differentiated aid system also necessitated changes to the implementing rules in Commission Regulation No 1725/79. Commission Regulation No 101/85 of 15 January 1985 (Official Journal 1985, L 13, p. 12) amended Article 1 (1) (a) of Regulation No 1725/79 to include partly skimmed milk powder among the products eligible for aid. A reference to partly skimmed milk powder was also added to the definition of compound feedingstuffs in Article 4 (1) of Regulation No 1725/79, which after this addition (shown in italics) read as follows:

'Article 4

18. 1. Compound feedingstuffs within the meaning of Article 2 (1) (d), (e) and (f) of Regulation (EEC) No 986/68 shall be products:

(a) containing, per 100 kg of the finished product:

(i) not less than 60 kg and not more than 70 kg of skimmed-milk powder . . . '

19. In addition, the amendments to Regulation No 1725/79 sought to take account of the fact that, with the adoption of Regulation No 3714/84 referred to above, it was possible for a trader who used partly skimmed milk powder in the manufacture of feedingstuffs to benefit both from the special aid for fat content provided for by that regulation and from the aid for the total quantity of skimmed-milk powder used under Regulation No 1725/79. In order to take account of the possibility of an element of dual aid, a new paragraph (5) was inserted into Article 1 of Regulation No 1725/79:

'5. To calculate the aid payable and to ensure that the requirements of this regulation as regards quantities are observed, the quantities of skimmed-milk powder as referred to in Article 2 (1) (e) and (f) of Regulation (EEC) No 986/68 and skimmed milk as referred to in Article 2 (2) of the said regulation shall be multiplied by a coefficient of 0.9.'

20. The second recital to Regulation No 101/85 explains the purpose of the coefficient:

'Whereas, in calculating the aid payable for skimmed-milk powder under Regulation (EEC) No 1725/79, account should be taken of any aid paid for milk fat under Regulation (EEC) No 3714/84; whereas a coefficient should therefore be fixed establishing the quantity of milk powder contained in the product; . . . '

21. It is, as I have said, the operation of this coefficient which is at issue in this case.

The arguments of the parties

22. From the written and oral observations and from the pleadings in the national proceedings, three views emerge as to the correct application of the coefficient in Article 1 (5) of Regulation No 1725/79.

23. First, a view advanced by the plaintiff company, Trouw, before the national court and in oral observations was that the coefficient should be applied to the actual quantities of partly skimmed milk powder used in the manufacture of feedingstuffs, but that it was sufficient that the feedingstuffs should contain, per 100 kg of the finished product, at least 60 kg of partly skimmed milk powder *before* the coefficient was applied. In practical terms, this approach is equivalent to reducing the amount of aid paid out by 10%, thus meeting the objective of avoiding dual aid. On this view, Trouw should have been eligible for the aid under Regulation No 1725/79, since it is common ground between the parties that the actual quantity of partly skimmed milk powder used by the company per 100 kg of feedingstuffs exceeded 60 kg.

24. An alternative view put forward by Trouw in the national proceedings (but not mentioned in the Order for Reference) was that the coefficient should be applied to the quantitative requirements laid down in Article 4 (1) (a), first indent, of Regulation

No 1725/79. In other words, where partly skimmed milk powder was processed into compound feedingstuffs, it was sufficient for the feedingstuffs to contain, per 100 kg of the finished product, between 54 and 63 kg of partly skimmed milk powder. On this view, Trouw would certainly have qualified for aid.

25. Finally, the view defended by the Commission was that the coefficient should be applied to the actual quantities of partly skimmed milk powder used, but that the feedingstuffs must still contain, per 100 kg of the finished product, at least 60 kg of partly skimmed milk powder after the notional reduction of the quantities used by the application of the coefficient. Like the first view, this approach would have led to a reduction in the amount of aid by 10%, but it would have had the further practical effect that if a trader was to meet the 60% minimum requirement after application of the coefficient, he had to use a minimum of 66.67 kg of partly skimmed milk powder per 100 kg of compound feedingstuffs. In other words, the indirect effect of this approach was to tighten the compositional requirements laid down in Article 4 (1) (a), first indent, of Regulation No 1725/79. On this interpretation, Trouw was not eligible for aid.

26. I would add that the intervention agency, while it originally applied the Commission's interpretation and sought recovery of the aid paid to Trouw, subsequently submitted written observations attacking that interpretation on the grounds that it resulted in an aid scheme that was economically unattractive to traders and therefore ineffective, and that the objective of avoiding dual aid could more simply have been achieved by reducing the amount of aid by 10%.

Evaluation

27. In order to decide on the correct interpretation, it is necessary to take into account the wording of the relevant provisions, the purpose of the coefficient and the underlying objectives of the Community legislation.

28. In this perspective, it is plain that the second view set out above cannot be supported and that the coefficient in any event had to be applied to the actual quantities of skimmed-milk powder used. Article 1 (5) of Regulation No 1725/79 as amended required that the coefficient should be applied to '. . . the quantities of skimmed-milk powder as referred to in Article 2 (1) (e) of Regulation (EEC) No 986/68 . . . ', in other words, to the quantities of partly skimmed milk powder '*used* in the manufacture of compound feedingstuffs' (emphasis added). The second part of the second recital to Regulation No 101/85 also makes it plain that the coefficient operates to establish 'the quantity of milk powder contained in the product'. Moreover, the view that the coefficient be applied to reduce the quantitative prescriptions rather than the actual quantities used cannot be said in any way to further the avowed purpose of the coefficient, i. e. the avoidance of dual aid, and runs counter to the general objective of the legislation

which was to encourage an increase in the processing of partly skimmed milk powder.

29. The first and third interpretations set out above both proceed from the assumption (correct, in my view) that the coefficient had to be applied to the actual quantities of partly skimmed milk powder used in producing compound feedingstuffs. Where they differ is on the question whether the finished product had to meet the 60% minimum requirement before or after the application of the coefficient.

30. Essentially, the point at issue between the two interpretations is the purpose of the coefficient. Was that purpose, as Trouw maintains, solely the avoidance of dual aid, or was the coefficient, as the Commission argues, also intended to adjust the compositional requirements for the finished product?

31. The wording of Article 1(5) of Regulation No 1725/79 (as amended) might at first sight appear to support the Commission's view. The opening words of that provision suggest that the object of the coefficient was indeed twofold, namely,

'To calculate the aid payable and to ensure that the requirements of this regulation as regards quantities are observed . . . '.

32. However there is, in my view, nothing in the language of the provision to suggest that the coefficient was intended to alter the quantitative requirements laid down in Article 4 (1). If anything, the language used indicates that the coefficient was intended to reinforce, or at any rate not to prejudice, those requirements. The terms of Article 1 (5) must on their face value be taken to mean that the quantities as originally prescribed should be multiplied by the coefficient in order to determine the amount of aid payable.

33. The recitals to Regulation No 101/85 moreover do not indicate that the purpose of the coefficient was anything other than the avoidance of dual aid. The second recital falls into two parts. The first part sets out the object to be attained, i. e. that:

'. . . in calculating the aid payable for skimmed-milk powder under Regulation (EEC) No 1725/79, account should be taken of any aid paid for milk fat under Regulation (EEC) No 3714/84.'

34. The second part sets out the means:

'Whereas a coefficient should therefore be fixed establishing the quantity of milk powder contained in the product.'

35. There is nothing in this wording to suggest that a tightening of the compositional standards was also intended.

36. The argument (advanced by the Commission in its written observations) that the third interpretation better serves the underlying objectives of the Community legislation, can of course be turned both ways. Since the practical effect of this view was that it required traders to use a greater quantity of skimmed-milk powder in order to meet the minimum compositional standard, on the face of it, it clearly furthered those objectives. If, on the other hand, the consequences for traders were so onerous that there was practically no

take-up of the aid scheme (which, according to the written observations of the intervention agency, appears to have been the case, at any rate in the Netherlands) then it is not clear how the objectives of the legislation were in fact furthered by this approach.

37. In support of the third interpretation the Commission further advances in its written observations the argument that an indirect tightening of the compositional requirements was necessary in order to prevent the increase in the processing of milk fat, which was anticipated as a result of the introduction of the higher aid for partly skimmed milk powder, being offset by a corresponding decrease in the use of the non-fat constituents of milk in favour of cheaper substitute products. In the Commission's view, the effect of the third interpretation was to guarantee that per 100 kg of the finished product, feedingstuffs would still have to contain a minimum of 60 kg of non-fat (protein or sugar) milk elements.

38. This argument, although ingenious, cannot be accepted. Article 4 (1) (a) of Regulation No 1725/79 requires in effect that the finished product should contain at least 60% partly skimmed milk powder, and not 60% non-fat milk elements. If it had been the Commission's intention, by Regulation No 101/85, to alter the compositional requirements in order to prevent substitution of cheaper, non-milk proteins or sugars, then it could easily have effected this by an appropriate amendment to Article 4 (1).

Conclusion

39. I am therefore of the opinion that the question of the College van Beroep voor het Bedrijfsleven should be answered as follows:

'Articles 1 (5) and 4 (1) (a) of Regulation (EEC) No 1725/79, read together, must be construed as meaning that the actual quantities of skimmed-milk powder per 100 kg of the finished product should be multiplied by a coefficient of 0.9 and that prior to that multiplication those quantities should be between 60 and 70 kg.'