OPINION OF ADVOCATE GENERAL ALBER

delivered on 10 February 2000 *

I — Introduction

1. The present reference for a preliminary ruling essentially concerns the following issues: first, it is necessary to examine whether protected information on the crops sown in preceding years by the former tenant of a farm ought to have been passed on to the new tenant of the farm by the Ministry of Agriculture, this being information which the new tenant required in order to be able to make a proper application for compensatory payments in respect of set-aside land. Second, the question arises as to whether the competent authority could impose penalties on the applicant by reason of a false declaration in the aid application if the declaration was false because the applicant had not received any information from the authorities. A further question is whether those penalties could in turn be based on data in respect of which disclosure had been refused.

II — Legal framework

1. *Community law*

(a) Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops [1]

2. This regulation established a new support system designed to ensure better market balance. The recitals in the preamble to the regulation state as follows in regard to market balance:

'... the best way to achieve this objective is to approximate the Community prices of certain arable crops to the prices of the world market and to compensate the loss of income caused by the reduction of the institutional prices by a compensatory payment for producers who sow such products;... therefore the area eligible should be restricted to the area down to

* Original language: German.

1 — OJ 1992 L 181, p. 12.

arable crops or publicly funded set aside in the past;...'.

3. The arable crops in question are, pursuant to Article 1, those listed in Annex I to the regulation.

4. Article 2 provides:

'...

2. The compensatory payment shall be fixed on a per hectare basis and regionally differentiated.

The compensatory payment is granted for the area which is down to arable crops or subject to set-aside in accordance with Article 7 of this Regulation and which does not exceed a regional base area. This is established as the average number of hectares within it...

3. Instead of a system of regional base areas, a Member State may apply an individual base area system...

5. The compensatory payment shall be granted under:

(a) a "general scheme", open to all producers, or

(b) a "simplified scheme", open to small producers.

Producers applying for the compensatory payment under the general scheme shall be subject to an obligation to set aside part of the land of their holding from production and shall receive a compensation for this obligation.

...'

5. Article 7 provides:

'1. The set-aside requirement for each producer applying for compensatory payments under the general scheme is fixed:

...

— in the case of an individual base area, as a percentage reduction of his relevant base area.

...

The land set aside shall be subject to rotation...'.

At the material time, the set-aside percentage amounted to 10 % of the area concerned.

(b) Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes [2]

6. According to the recitals in the preamble to this regulation, prior to its adoption 'the various aid schemes have been administered and controlled by the Member States under separate rules for each scheme, as a result of their heterogeneous structure;... however, in realigning the existing market measures as part of the reform of the common agricultural policy, the Community is opting, to a large extent, in both the crop and livestock sectors, for direct aid to producers;... in order to adapt the administration and control mechanisms to the new situation and improve their effectiveness and usefulness, it is necessary to set up a new integrated administration and control system...'. The recitals in the preamble further provide that this new system should both prevent and penalise irregularities. The integrated administration and control system provides in particular that the Member States should establish computerised databases and store the data from aid applications.

2 — OJ 1992 L 355, p. 1.

The articles material to the present case provide as follows:

7. Article 2

'The integrated system shall comprise the following elements:

(a) a computerised database;

(b) an alphanumeric identification system for agricultural parcels;

...

(d) aid applications;

(e) an integrated control system.'

8. Article 3

'1. The computerised database shall record, for each agricultural holding, the data obtained from the aid applications. This database shall in particular allow direct and immediate consultation, through the competent authority of the Member State, of the data relating at least to the previous three consecutive calendar and/or marketing years.

...'

9. Article 9 provides as follows with regard to data protection:

'The Member States shall take the measures necessary to ensure protection of the data collected.' [3]

(c) Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes [4]

10. As the recitals in the preamble to this regulation make clear, these rules of appli-

3 — The national provisions germane to the present case follow from the Data Protection Act 1984.

4 — OJ 1992 L 391, p. 36.

cation were also adopted in order to prevent and/or penalise irregularities and instances of fraud. To that end, Article 9 sets out penalties proportionate to the seriousness of the irregularities.

Article 9 provides:

'...

2. If the area actually determined is found to be less than that declared in an "area" aid application, the area actually determined... shall be reduced:

— by twice the difference found if this is more than 2%... but not more than 10% of the determined area;

— by 30% if the difference found is more than 10% but not more than 20% of the determined area.

If the difference is more than 20% of the determined area no area-linked aid shall be granted.

However, in the case of a false declaration made intentionally or as a result of serious negligence:

— the farmer in question shall be excluded from the aid scheme concerned for the calendar year in question, and

— in the case of a false declaration intentionally made, from any aid scheme... for the following calendar year...

These reductions shall not be applied if the farmer can show that his determination of the area was accurately based on information recognised by the competent authority.

...'

2. *The national administrative procedure*

11. The Divisional Court (hereinafter 'the national court') states the following with regard to the course of the national applications procedure:

'In the UK, applications for AAPs must be made on an IACS form [5] which consists of two parts: a Base Form and a Field Data Printout. The Field Data Printout lists each of the applicant's fields separately; for each field the farmer must state what crop is growing on it or whether it is set aside. Each year the Respondent sends to all applicants for AAPs who remain in occupation of the same land a computerised printout on which the data given by them in the previous year's application is printed. The farmer need therefore make only the necessary changes in completing his IACS application.

Each UK base form in use by the Respondent requires the applicant to declare that the information contained therein is accurate and that "it may be passed by the relevant Agricultural Department(s) in confidence to duly authorised agents for the purposes of verifying its accuracy, evaluating the Scheme(s) covered by this application, or to assist in the wider areas of work within the relevant Agricultural Departments".

Because of this requirement on the UK base form, in the first year when a farmer farms a particular parcel of land, he receives a blank Field Data Printout and is expected to obtain the information which would have been included on the Field Data Printout from sources other than MAFF. [6] In the event that a farmer is able to satisfy the Respondent that there are exceptional circumstances and that the farmer has exhausted all conventional means of obtaining the information which is normally printed on the Field Data Printout, the Respondent may disclose some of the information on the Field Data Printout to the farmer.'

III — The facts

12. The applicants in the national proceedings, Mr and Mrs Fisher (hereinafter 'the applicants'), farm three agricultural holdings. Until 1995, two of these holdings, belonging to The Flint Co. Ltd (hereinafter 'Flint'), were tenanted to a Mr Nicholson. In 1994 bankruptcy proceedings were commenced against Mr Nicholson and notice was given of termination of the tenancy agreement. Flint did not recover the farms until the end of October 1995.

5 — Integrated administration and control system form.

6 — The Ministry of Agriculture, Fisheries and Food, hereinafter referred to as 'the respondent'.

13. In the summer of 1995, and thus before the farms were handed back, Mr Fisher was asked by Flint's agents to inspect the crops on the two farms in order to determine what was harvestable. Mr Fisher carried out this inspection in the company of a crop consultant.

14. After Flint had recovered the farms at the end of October 1995, the applicants began to work them. They wished to set aside particular fields and apply for aid in respect of the fields thus set aside.

15. However, neither Mr Nicholson nor anybody acting on his behalf provided the applicants with information concerning the previous cropping history of the farms. The applicants accordingly requested the respondent at the beginning of November 1995 to provide this information, since they were unable to obtain it from any other source. In particular, the applicants requested details as to which fields on the two farms were eligible for set-aside payments and the field data printouts from previous years. By letter of 7 November 1995 the competent authority declined to provide any of the information requested, citing the Data Protection Act 1984. It further stated that 'If under exceptional circumstances you are unable to obtain the necessary information from the sources suggested we will be able to consider releasing basic information relating to the land'.

16. By letter of 21 November 1995, the competent authority accepted that the applicants had exhausted all conventional means of obtaining the information requested and supplied them with basic details of the land on the two farms and information on which land had been set aside in previous years. No information, however, was provided as to which crops had been grown in the various fields according to the previous year's field data printouts.

17. By the time that the applicants had received this information, they had already begun to sow part of the land. The remaining area was to be sown the following spring.

18. On 3 May 1996 the applicants submitted to the competent authority their application form for compensatory set-aside payments. They were informed on 26 November 1996 that during the processing of their claim it had been established that two parcels of land which the applicants had set aside were ineligible for set-aside payments on the basis of their previous cropping history. Those payments therefore had to be disallowed.

19. As a result of this, penalties were imposed on the applicants pursuant to

Article 9 of Regulation No 3887/92 on the ground that they had set aside land which was not eligible for aid.

20. The applicants appealed against the decision to impose penalties. Their appeal was rejected. Judicial-review proceedings were then brought before the national court for an order of *certiorari* to quash the competent authority's decision in regard to penalties and for damages. The applicants argued in these proceedings that the error made in setting aside non-eligible land resulted exclusively from the competent authority's refusal to supply them with details of the previous cropping history of the land set aside. Further, they submitted that the authority should not have used against them information which it had refused to disclose to them.

21. In reply, the respondent argued that it could not have provided details of the crops cultivated since to do so would have constituted a breach of duty towards Mr Nicholson and the receiver. He was, however, obliged to use this information in order to verify whether the land which the applicants had set aside was in fact eligible for aid.

22. The respondent further submitted in the main proceedings — and the national court had also so found — that the applicants could have ensured that the land which they set aside was eligible for aid if they had used the information at their disposal from their own inspection of the land in the summer of 1995 and the information which they had received from the competent authority in November 1995. The national court, however, also formed the view that, had they received the additional information sought before the sowing in spring 1996, the applicants would have set aside only eligible land. The fact that they had not done so was, the national court found, directly attributable to their not having been given the additional information which they had sought.

23. To enable it to ascertain how far the competent authority was under an obligation to pass on the requested information to the applicants and to determine whether that authority was entitled to impose penalties despite its refusal to do so, the national court has submitted three questions to the Court for a preliminary ruling.

IV — Questions submitted for preliminary ruling

(1)(i) Do Articles 3(1) and 9 of Regulation (EEC) No 3508/92, coupled with the general principles of Community law, permit information held on a computerised database set up under Article 2, relating to

data supplied by or on behalf of a former claimant for payments under AAPs, to be disclosed to third parties?

(ii) If the answer to Question 1(i) is 'yes', is the disclosure which the competent authority is lawfully required to provide limited, as regards the persons to whom disclosure can be made:

(a) to persons authorised by the former claimant on the UK Base Form; and/or

(b) to persons who require the information in connection with their application for agricultural aid in respect of the same land as the former claimant even where the former claimant refuses to disclose the information;

and as regards the information to be disclosed:

(c) to that information which does not constitute commercially confidential information; and/or

(d) to that information which it is necessary to disclose to ensure that the person requesting the information can, by taking reasonable steps, avoid incurring penalties in connection with his own application for agricultural aid?

(2) If the answer to Question 1(i) is 'yes', and the competent authorities have unlawfully failed to disclose information requested in circumstances where, had the person received the information, he would have set aside only eligible land, is the imposition of penalties under Article 9 of Regulation (EEC) No 3887/92 for this reason alone rendered unlawful?

(3) Whether or not the failure by the competent authorities to disclose the information referred to in Question 1(i) above was lawful or unlawful, are they entitled to use against a person information which, despite requests for same, they had refused to supply to that person?

V — Submissions of the parties

24. With regard to Question 1, the applicants argue that Article 3 of Regulation No 3508/92 must be 'interpreted' as imposing an 'obligation' on Member States to ensure that the information stored on the computerised database may be consulted on application to the competent authority. This interpretation is consistent with the essential purpose of the regulation, with the prevention of fraud, with the objectives of the common agricultural policy, and with the general principles of Community law such as transparency, non-discrimination, and protection of legitimate expectations and of the rights of the defence.

25. No limits on the obligation to disclose data can be derived from Article 9 (data protection) of Regulation No 3508/92; in the absence of express provision, such limits could be imposed only on the basis of a fully reasoned weighing of interests. In this connection, proportionality must also be ensured, with the result that only the means necessary to protect competing interests may be applied. However, since there were no such grounds in the present case, the initial refusal to disclose the data was not justified.

26. If, however, the competent authority — so the applicants argue in regard to Question 2 — failed to disclose the data requested, contrary to Regulation No 3508/92 and thus 'unlawfully', it was not entitled for that reason to impose penalties under Regulation No 3887/92. Further or alternatively, they submit, a clear and unambiguous legal basis for the penalties is lacking. Finally, the competent authority abused its powers and/or failed to respect the applicants' legitimate expectations and/or imposed a disproportionate penalty. In any event, an authority cannot rely on its own previous 'unlawful' conduct as a basis for penalties. In view of the fact that the applicants had unsuccessfully requested disclosure of specific data, the same penalty could not be imposed on them as would be imposed in the case of negligence and an innocent error.

27. With regard to Question 3, the applicants take the view that the refusal to disclose the data is contrary to the purpose of Regulation No 3887/92 and/or the general principles of law, in particular transparency, the rights of the defence and legitimate expectation, and is therefore 'unlawful'. The competent authority could not justify the penalties imposed by reference to information which had not been made available to the applicants, even though it had in fact been requested. Had the data sought been made available to the applicants, the false declaration on the application form would have been avoided.

28. In the view of the United Kingdom Government, Article 3 (computerised database) of Regulation No 3508/92 must be read in conjunction with Article 9 thereof (data protection). Since Article 9 requires compliance with data protection, Article 3 cannot confer free access to data. As the data are stored for administration and monitoring purposes, they may be consulted only by the authorities responsible for the administration of the integrated system. This interpretation of Article 3 is borne out by the sixth recital in the preamble to Regulation No 3508/92, which states that computerised databases are to be set up in order to allow *cross checks in particular to be made.*[7] The intention of Article 3 is to enable the authorities to administer the integrated system properly, not to provide information for agricultural producers. Data protection under Article 9 also relates to the confidentiality of data, protected under Article 8 of the ECHR (protection of the right to privacy). The information supplied by applicants is generally of a commercially sensitive nature, supplied in confidence to the authorities. The disclosure of confidential data is therefore restricted by Article 9.

29. The scope of data protection is not indicated by Article 9, which does not contain any provisions on the matter, but derives from the applicable national law, which must follow the context and purpose of the integrated system.

30. The United Kingdom Government accordingly proceeds on the basis that the data collected must, as a general rule, remain confidential since applicants must also be assured that those data will be kept only for administrative purposes and will, as a general rule, not be released to third parties. Exceptions to this may be made only with the consent of the person concerned or if an overriding public interest requires disclosure. Neither is the case in the present instance. In the absence of any authorisation of disclosure by Mr Nicholson, the competent authority was not in a position to accede in full to the applicants' request. However, in order to prevent penalties being imposed on the applicants, a justifiable minimum of information on field sizes was disclosed. A balancing of the interests involved — protection of basic rights and freedoms, on the one hand, and the need to obtain the data in order to apply for compensatory payments, on the other — resulted in the disclosure of only these basic data.

31. Question 2 referred by the national court consequently serves no purpose: should it none the less require an answer, regard should be had to the fact that under Article 9(2) of Regulation No 3887/92 penalties must also be imposed even where the applicant is not at fault. Since the integrated system is designed to prevent perpetration of fraud, every inaccurate

7 — Emphasis added by the United Kingdom Government in its written observations.

declaration on an application form must be penalised.

32. The answer to Question 3 must therefore also be that the penalties may be based on data of which the applicant has no knowledge. The competent authority has no discretion when examining whether penalties should be imposed and must penalise false declarations accordingly.

33. The Commission takes the view that Community law did not in this case preclude disclosure of the information to the applicants. In this it proceeds on the basis that the applicants would have set aside only eligible land had the competent authority made the requested information available. There are three arguments in favour of disclosure of the information to the applicants.

34. First, the competent authority would have disclosed the information to the applicants by way of its statement of reasons for the imposition of the penalties, this being a procedural requirement. It is thus unclear why this could not already have been done at an earlier stage.

35. Second, Article 3 of Regulation No 3508/92 does not preclude disclosure. According to the wording of that article, these data may be consulted directly and immediately *through*[8] the competent authority. This means that access to the data by persons other than the authority itself or its officials is intended. Article 9 sets out only a general requirement of data protection and does not go into specific details. Disclosure is excluded only in the case where the interests of the person concerned in preventing disclosure outweigh those in favour thereof.

36. Third, the balancing of interests in the present case leads to the result that the data could have been disclosed. Regulation No 3508/92, however, does not provide any guidance on how to carry out such balancing. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[9] — which is, however, not applicable to the present case — is more detailed in this regard. Under Article 7 of this directive, data may be disclosed to a third party if this serves the pursuit of legitimate interests and those interests are

8 — Emphasis added by the Commission in its written observations.

9 — OJ 1995 L 281, p. 31.

not overridden by the interests or rights of the person concerned. [10]

37. The applicants were dependent on the information in order to be able to apply for compensatory payments under Regulation No 1765/92 and to avoid the imposition of penalties. The information at issue in the national proceedings would no longer have affected the legal position of Mr Nicholson, and thus greater weight could no longer be attached to his interests. Disclosure of the information could, however, have assisted the applicants in exercising their rights without adversely affecting Mr Nicholson. Mandatory disclosure of information is more frequently provided for in other areas, such as insurance law, securities law and employment law. These examples involve information which affects the obligations and liabilities of individuals. The present case also concerns issues of liability (penalties) and obligations (to set aside eligible land). In any event, the information could have been disclosed to the applicants in alphanumeric [11] form pursuant to Article 4 of Regulation No 3508/92, which would have excluded any misuse by third parties, since such parties could not have linked the information thus supplied to the previous tenant (Mr Nicholson).

38. Concerning Questions 2 and 3 submitted by the national court, the Commission argues that no penalties can be imposed on the basis of information of which the applicants had no knowledge, their application for disclosure notwithstanding. Otherwise, there would be a breach of the applicants' rights of defence inasmuch as they would have no access to the information forming the basis of the penalties. Even if the question here is what information ought to be disclosed in order to avoid imposition of penalties, the applicants' rights to be heard and to defend their interests must be taken into account. From the point of view of procedural economy, too, earlier disclosure of the information to the applicants would have made sense so as to avoid the costly administrative procedure in regard to the penalties. Since there is here a causal connection between the refusal by the competent authority to disclose the information and the imposition of the penalties, this should not work to the applicants' detriment. By refusing to disclose the information, however, the competent authority acted improperly, with the result that it cannot rely on that information as a ground for the imposition of penalties.

10 — Article 7 of Directive 95/46 provides:
'Member States shall provide that personal data may be processed only if:
(a) the data subject has unambiguously given his consent; or
...
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject...'.

11 — The term 'alphanumeric' means encoded in decimal figures and letters.
Article 4, cited by the Commission, provides:
'The alphanumeric identification system for agricultural parcels shall be established on the basis of land registry maps and documents, other cartographic references or of aerial photographs or satellite pictures or other equivalent supporting references or on the basis of more than one of these elements.'

VI — Analysis

1. *Question 1*

39. In Question 1 — which falls to be examined in conjunction with its subquestions — the national court is essentially seeking to ascertain whether crop growers are, in the particular circumstances of the main proceedings, entitled to disclosure of information stored on a computerised database in accordance with Article 3 of Regulation No 3508/92. The particular circumstances consist, *inter alia*, in the fact that the applicants for aid in the main proceedings — who are also the applicants in the present proceedings — wished to farm the fields in question for the first time. Article 9 (data protection) of Regulation No 3508/92 may preclude disclosure of information concerning the previous use made of those fields.

40. It is not entirely clear from Articles 3(1) and 9 of Regulation No 3508/92 whether the information requested by the applicants ought to have been disclosed. I consider that the Commission is correct in its view that the wording of Article 3(1) — according to which the database must make it possible to consult the data *through* the competent authority — shows that those who consult the data may also be persons other than those working within the authority. That, however, does not mean that external third parties may be such persons. As is clear from the sixth recital in the preamble, [12] the data are not only evaluated at the time of verification of the aid applications but are also used for purposes of checking which go beyond their administrative use. Checks can certainly be carried out by a department other than that which processes the application. To that extent the United Kingdom Government is correct in its argument, although, conversely, this consideration also does not lead to any general prohibition of disclosure to third parties.

41. Nor is it possible to infer from Article 9, which states that information is subject to data protection, whether the competent authority can disclose information. There is some ground for arguing that it can do so, since there would be no need for data protection if there were a general prohibition of information disclosure. The reference to *necessary* measures may also indicate that disclosure of information cannot generally be excluded. At any rate, the wording of the two articles is not sufficiently clear to enable a reply to be given to the questions submitted.

42. The Court has consistently held that, in the event of unclear and ambiguous elements, it is necessary to proceed in accordance with the context and objective of the

12 — The sixth recital in the preamble to Regulation No 3508/92 provides:
'... the administration of the data collected and its use for the verification of aid applications make it necessary to set up high-performance computerised data bases allowing cross-checks in particular to be made'.

legislation in question. [13] According to the recitals in its preamble, the purpose of Regulation No 3508/92 is to achieve more effective administration and control. Efficiency also includes a more rapid and simplified administrative procedure without major expense for the authorities, without queries and without subsequent corrections. These simplifications must also benefit the applicant, as follows from the fifth recital in the preamble to Regulation No 3887/92, even though this relates to a separate matter. [14] It is only if the details provided by the farmer, in accordance with Article 6 of Regulation No 3508/92, are complete and accurate from the outset — and to that end he may in certain circumstances require relevant information from the authority — that one can talk of an efficient procedure.

43. As is further evident from the recitals in the preamble, the purpose of Regulation No 3508/92 is not only to penalise irregularities but also to prevent them. From this in particular it can be presumed that the authority is required, even before the application is submitted, to cooperate actively in ensuring that the details are accurate, if need be through a corresponding disclosure of information. This may in certain circumstances amount to a duty to disclose information if the applicant unconditionally requires the data for his aid application and in order to avoid penalties, and if no third-party rights — in particular rights covered by data protection — constitute an obstacle in that regard, this being a matter to be resolved in each individual case by balancing the relevant interests.

44. The general principles governing data protection also confirm this assessment. In accordance with the general principle of transparency of State administration, transparency may be restricted only if special grounds of justification are shown to exist. This requires a detailed balancing of interests, since data protection in its abstract form does not extend sufficiently far. In view of the fact that Article 9 does not itself contain any further details concerning the form and scope of data protection, it is in principle a matter for the Member States themselves to adopt the appropriate measures. They may not, however, go beyond what is necessary to attain the objective. [15] This is also confirmed by the data-protection directive, Directive 95/46. [16] Although it had not yet entered into force at the time of the events in the main proceedings, its provisions may none the less be adduced for further consideration, since the data-protection directive — as stated in recitals (10) and (11) — does not introduce any new legal principles but rather gives substance to existing legal views.

45. However, in order for it to be possible to disclose information covered by data protection even without the express authorisation of the person concerned, a number of prior conditions must be satisfied.

13 — Judgments in Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23, and in Case C-6/98 *ARD* v *PRO Sieben Media* [1999] ECR I-7599, paragraph 27 and further references therein.

14 — The fifth recital begins thus: '... so as to simplify the work as much as possible for farmers...'.

15 — Judgment in *Adidas* (cited above in footnote 13).

16 — Cited in point 36 and in footnotes 9 and 10.

46. For the present case this means that the person requesting information must be someone who directly requires the data in order to satisfy a requirement under Regulation No 3508/92. It goes without saying that third parties such as private creditors, tax authorities or environmental agencies, who may be interested in accessing the data for reasons other than those deriving from the regulation, do not satisfy that condition. In contrast, a farmer as defined in Article 1(4) of Regulation No 3508/92, who requires the information for the declaration which he must submit under Article 6 of that regulation, does have such an entitlement to that information.

47. Next, it must be established that the person requesting the information cannot obtain the data in any other way. In the present case, this is a matter which is no longer in dispute. The respondent and the national court are correct in saying that, when they inspected the farms in the summer of 1995 — in connection with the details which were in fact later provided by the authority — the applicants could have determined what had been planted by the previous tenant. It is irrelevant why they failed to make relevant notes at that time. Possibly — the landowner, after all, did not regain possession of the two farms until late October 1995 — they were themselves unable to harvest the fields as they had originally intended. The fact that they did not make the requisite determinations earlier, that is to say, in the summer of 1995, cannot be held against them. In contrast, however, the fact that it was visually possible to ascertain what the previous tenant had planted indicates that the requested data could not have been so much in need of protection as to be incapable of disclosure.

48. As a further condition, the interests of the person requesting the information must outweigh the interests of the person who owns the protected data. This condition is also satisfied in the present case, since the information was of considerable economic and financial importance to the applicants. The receipt of aid and the avoidance of penalties were both dependent on that information. The applicants also suffered additional loss by virtue of the fact that land had mistakenly been set aside which would in all likelihood have otherwise been planted. In contrast, it is not clear what interests the previous tenant could still have had in non-disclosure of the data. Counsel for the applicants indicated during the oral procedure that the requested information had been given to the applicants in the statement of reasons justifying the penalties. It is, however, not clear why this information, if it was disclosed (or had to be disclosed) subsequently, could not have been provided at an earlier point in time.

49. It must also be established that there is no danger that disclosure will adversely affect the owner of the data. Nothing on the file suggests this to be the case. Alphanumeric disclosure — in codified form — of the information requested might also have been envisaged for the purpose of avoiding any adverse effect.

50. It is, however, the function of the national court to determine whether the

foregoing conditions have been satisfied, regard being had to the principles governing protection of the rights and freedoms of persons in respect of the processing of personal data.

51. In view of the particular features of this case and the significance and objective of the integrated system, Articles 3 and 9 of Regulation No 3508/92 allow the competent authorities, after balancing the relevant interests in the light of data protection, to provide a new applicant, at his request, with the requisite data relating to crops previously planted if these are required to enable a proper application to be made for compensatory payments in connection with the setting-aside of land.

2. *Question 2*

52. In Question 2, the national court is essentially asking whether there was no right to impose penalties under Article 9 of Regulation No 3887/92 in this case precisely because the competent authority had itself failed to disclose the information requested to persons who had otherwise acted properly and correctly.

53. According to the Court's case-law, the penalties set out in Article 9 of Regulation No 3887/92 may be imposed even where it cannot be established that the applicant who provides false details acted intentionally or with gross negligence. In its judgment in the *National Farmers' Union* case,[17] the Court had to examine whether the penalties provided for under Article 9 could also be imposed in a case where *bona fide* errors had been made. The Court's answer was in the affirmative, and it ruled in this connection that the penalties were not contrary to the principle of legal certainty, the prohibition of discrimination, or the principle of proportionality. This inference the Court drew essentially from the meaning and objective of Regulation No 3887/92, which, in the context of measures to prevent fraud, penalises every false declaration in an aid application.

54. The facts of the present case, however, differ from those in *National Farmers' Union* inasmuch as the applicants here had requested from the competent authority data which they could not otherwise obtain, in order that they could make a proper application for compensatory payments. Only subsequently did they give false details. The respondent argued that he was obliged to impose the penalties in the absence of any discretion in the matter. I cannot accept this view that imposition was mandatory. It follows from the fourth subparagraph of Article 9(2) of Regulation No 3887/92 — cited above in point 10 — that reductions are not to be applied 'if the farmer can show that his determination of the area was accurately based on information recognised by the competent authority'. The authority will thus in all likelihood be estopped by its own conduct if the aid

17 — Case C-354/95 *The Queen* v *Minister for Agriculture, Fisheries and Food, ex parte National Farmers' Union and Others* [1997] ECR I-4559.

application was false because of the information which it had supplied. Penalties — the reductions mentioned in Article 9(2) — may not be imposed if the application was based on false information supplied by the authority. The issue of fault on the part of the authority is in this regard irrelevant. On an *a contrario* argument, these conclusions must also hold good in the case where the information in the application was false because the applicant had not received any data whatever from the authority. In this — likewise by way of analogy — it will also be immaterial whether the authority was or was not authorised to disclose the data.

55. In view of the fact that this case also involves the application of Community law, so far as the provisions of Regulations No 3508/92 and No 3887/92 are concerned, there must be compliance with the general principles of law regarding legal certainty, legality of administrative action, protection of the rights of the defence, and proportionality. It follows that an authority may not, as a matter of principle, invoke previous unlawful conduct for the purpose of imposing penalties. It would be incomprehensible if the authority could impose penalties if it was previously aware, because of the request made to it, that the applicant had no data and was unable otherwise to obtain such data at the time when the application was made, with the result that it could be assumed that the information contained in the application for aid would in all likelihood be false. In such a case of inaction, the authority must — since it could and, as argued above, ought to have prevented the submission of false information — be treated in the same way as in the case where it has supplied the false information itself, by analogy with the fourth subparagraph of Article 9(2) of Regulation No 3887/92.

3. *Question 3*

56. In Question 3, the national court seeks to ascertain whether, in the imposition of penalties, information could be used against the person concerned, disclosure of which to that person had been refused despite a request to that effect. In view of the reply to the first two questions, it is unnecessary to answer this question. The use of the undisclosed data for the purpose of imposing a penalty would also not be possible. If the information was disclosed as part of the statement of reasons underlying the penalties and thereby made public, this would be equivalent to subsequent disclosure and would thus — as indicated above — stand in contrast to the authority's own previous conduct. The outcome would be the same if the information originally refused had not been included in the statement of reasons. The latter would then have been incomplete and it would be necessary to agree with the Commission that in this case the imposition of a penalty would also not have been lawful, in particular because it would have infringed the rights of the defence.

VII — Costs

57. The costs incurred by the United Kingdom Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

VIII — Conclusion

58. On the basis of the foregoing, I propose that the questions referred by the national court should be answered as follows:

(1) Articles 3 and 9 of Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes must be construed as allowing the competent authorities of a Member State, in a case such as the present, to make available to the new holder of a farm, at his request, protected data relating to the crops planted by his predecessor, if

— this is necessary to enable him to make a proper application for compensatory payments in respect of the setting-aside of land;

— the data cannot otherwise be obtained;

— greater weight attaches to the interests of the new holder than to those of his predecessor; and

— it is unlikely that the previous farmer will be adversely affected by disclosure of the data.

(2) If the competent authorities do not disclose those data to an applicant for compensatory payments under Regulation (EEC) No 1765/92 or if they conclude, after examining the conditions, that they are not allowed to do so, no penalties within the meaning of Article 9(2) of Regulation (EEC) No 3887/92 may be imposed on the applicant if he makes a false declaration because of the non-disclosure of those data.