OPINION OF ADVOCATE GENERAL LÉGER

delivered on 11 July 2002 [1]

1. The Oberverwaltungsgericht des Landes Sachsen-Anhalt (Higher Administrative Court of the Land Sachsen-Anhalt) (Germany), requests the Court to interpret Article 9(2) of 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. [2]

2. The national court is asking, in essence, whether the penalties established in that provision may be imposed only where the farmer has made false declarations when submitting his application for aid. In the main proceedings, Agrargenossenschaft Pretzsch eG, a German cooperative, applied for 'area' aid [3] in accordance with the requirements in force but did not report to the Amt für Landwirtschaft und Flurneuordnung Anhalt, the competent German authority, changes which occurred after the application had been made. However, those changes were such as to deprive the applicant of the aid applied for.

I — Relevant Community law

Regulation (EEC) No 1765/92

3. Regulation (EEC) No 1765/92 [4] establishes a support system for producers of certain arable crops in which the set-aside of land plays a central role. The set-aside of land has two distinct functions. It confers entitlement, as for a crop, to a compensatory payment [5] and its existence is a precondition for the farmer's entitlement to aid for arable crops. [6]

4. Article 2 of Regulation No 1765/92 lays down general rules for the grant of compensatory payments.

5. Article 2(1) provides that Community producers of arable crops may apply for a

1 — Original language: French.

2 — OJ 1992 L 391, p. 36.

3 — This is Community aid granted in proportion to the area cultivated. Payment of the aid is subject to the fulfilment of certain requirements, amongst which is the duty to declare the area of the agricultural land under cultivation.

4 — Council Regulation of 30 June 1992 (OJ 1992 L 181, p. 12).

5 — The 15th recital and the second subparagraph of Article 2(2) of Regulation No 1765/92. 'Compensatory payment' means the aid paid to producers pursuant to the regulation.

6 — Article 7(1) of Regulation No 1765/92.

compensatory payment under the conditions set out in Articles 2 to 13 of the regulation.

6. The second subparagraph of Article 2(2) provides that '[t]he 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...'.

7. Articles 4 to 6 of Regulation No 1765/92 establish the methods for calculating the compensatory payments, which differ according to the type of arable crop concerned.

8. Article 7 of Regulation No 1765/92 lays down the provisions applicable to set-aside.

9. Article 7(4) provides that the land set aside may be used for the provision of materials for the manufacture within the Community of products not primarily intended for human or animal consumption, provided that effective control systems are applied.

10. Regulation No 1765/92 was repealed and replaced by Regulation (EC) No 1251/1999. [7] This new aid scheme does not introduce major amendments to the scheme created in 1992. Set-aside is still a precondition for the grant of aid for arable crops and, itself, confers entitlement to a compensatory payment for the farmer. However, in view of the market situation, the set-aside requirement has been reduced. [8]

Regulation (EC) No 762/94

11. Regulation (EC) No 762/94 [9] lays down detailed rules for the application of Regulation No 1765/92 with regard to set-aside.

12. The first paragraph of Article 2 of Regulation No 762/94 provides:

'Without prejudice to Article 7(4) of Regulation... No 1765/92, "set-aside" means

7 — Council Regulation of 17 May 1999 establishing a support system for producers of certain arable crops (OJ 1999 L 160, p. 1). This new system is applicable from the 2000/2001 marketing year onwards (Article 15(2)). It does not therefore affect the present case.

8 — The set-aside requirement will be 10% of the farm's land for the period 2000-2006. However, this percentage may be re-examined to take account of production and market developments (the 22nd recital in the preamble to Regulation No 1251/1999).

9 — Commission Regulation of 6 April 1994 (OJ 1994 L 90, p. 8).

the leaving fallow of an area which has been cultivated in the previous year with a view to a harvest.'

13. Article 3(2) of Regulation No 762/94 provides that the areas set aside must be cared for so as to maintain good cropping conditions. They may not be used for agricultural production of any sort other than that referred to in Article 7(4) of Regulation No 1765/92, nor put to any lucrative use incompatible with the growing of an arable crop.

14. Under Article 3(4) of Regulation No 762/94:

'To be considered under the scheme provided for in Regulation... No 1765/92, the areas set aside must:

— have been farmed by the applicant during the previous two years, save in special cases, duly justified according to objective criteria laid down by the Member State concerned, such as circumstances relating to the type of tenure, installation, or expansion of the holding by succession,

— remain set aside for a period commencing on 15 January at the latest and ending on 31 August at the earliest. However, Member States shall set the conditions under which producers may be authorised to sow seed, from 15 July, for harvesting in the following year and the conditions to be met in order for grazing to be authorised from 15 July in Member States where transhumance is traditionally practised....'

Regulation (EEC) No 3508/92

15. In order to simplify the management of the various aid schemes, [10] particularly that covered by Regulation No 1765/92, Regulation (EEC) No 3508/92 [11] establishes an integrated administration and control system for certain Community aid schemes.

16. Under Article 1(1)(a) of Regulation No 3508/92, the integrated administration

10 — These are schemes to provide financial support for arable crops, beef and veal, sheepmeat and goatmeat, as well as specific measures for farming in mountain, hill and certain less-favoured areas (the third recital in the preamble to and Article 1 of Regulation No 3508/92).

11 — Council Regulation of 27 November 1992 (OJ 1992 L 355, p. 1).

and control system applies, in the crop sector, to the support system for producers of certain arable crops established by Regulation No 1765/92.

17. Under the first subparagraph of Article 6(1) of Regulation No 3508/92, in order to be eligible under one or more Community schemes governed by the regulation, each farmer is to submit, for each year, an 'area' aid application indicating the agricultural parcels, including areas under forage crops, and agricultural parcels covered by a set-aside measure for arable land and those laid fallow.

Regulation No 3887/92

18. Regulation No 3887/92 lays down detailed rules for applying the integrated administration and control system for the various aid schemes listed in Article 1 of Regulation No 3508/92.

19. The first subparagraph of Article 4(1) of Regulation No 3887/92 specifies the information which must be given in 'area' aid applications. This includes particulars permitting identification of all the agricultural parcels on the holding, namely their area, location and use and the aid scheme concerned.

20. The second subparagraph of Article 4(1) of the regulation states that by 'use' is meant the type of crop or ground cover or the absence of a crop.

21. Article 4(2) of Regulation No 3887/92 provides:

'(a) After the time-limit for its submission the "area" aid application may be amended only:

— in cases of obvious error recognised by the competent authority,

— where agricultural parcels are concerned, in particular cases that are properly documented (e.g. death, marriage, purchase or sale, conclusion of a tenancy contract)....'

22. Under Article 6(1) of Regulation No 3887/92, administrative and on-the-spot checks are to be made in such a way as to ensure effective verification of compliance with the terms under which aids and premiums are granted.

23. Article 9 of the regulation contains a series of closely connected provisions for calculating the eligible area when there is disparity between the area declared in an area 'aid' application and the area actually determined [12] on inspection by the competent national authorities. That article seeks to prevent and penalise irregularities and fraud effectively. [13]

24. Article 9 of Regulation No 3887/92 has been amended several times, in particular by Regulations (EC) Nos 229/95 [14] and 1648/95. [15] These amendments apply to aid applications made for 1996 onwards. However, under Article 2(2) of Regulation (EC, Euratom) No 2988/95, [16] they also apply retroactively to infringements committed under Regulation No 3887/92. Article 2(2) of Regulation No 2988/95 provides that '[i]n the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively'.

25. In its judgment in *National Farmers' Union and Others*, [17] the Court held that the amendments made by Regulations Nos 229/95 and 1648/95 had to a certain extent reduced the administrative penalties introduced by Regulation No 3887/92. According to the Court, it is clear from Article 9 of Regulation No 3887/92, as amended by Regulations Nos 229/95 and 1648/95, read in conjunction with Article 2(2) of Regulation No 2988/95, that the less severe penalties laid down by Regulations Nos 229/95 and 1648/95 must be applied retroactively. [18]

26. Article 9 of Regulation No 3887/92, as amended by Regulations Nos 229/95 and 1648/95, provides:

'1. If the area actually determined is found to be greater than that declared in the

12 — 'Determined area' means the area for which all of the conditions laid down in the rules have been met (Article 9(2), final subparagraph, of Regulation No 3887/92).

13 — Ninth recital.

14 — Commission Regulation of 3 February 1995 amending Regulation No 3887/92 and Regulation No 762/94 (OJ 1995 L 27, p. 3).

15 — Commission Regulation of 6 July 1995 amending Regulation No 3887/92 (OJ 1995 L 156, p. 27).

16 — Council Regulation of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

17 — Case C-354/95 [1997] ECR I-4559.

18 — *Ibidem*, paragraphs 40 and 41.

"area" aid application, the area declared shall be used for calculation of the aid.

2. If the area actually determined is found to be less than that declared in an "area" aid application, the area actually determined on inspection shall be used for calculation of the aid. However, except in cases of *force majeure*, the area actually determined on inspection shall be reduced by twice the difference found if this is more than 3% or two hectares 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 referred to in Article 1(1) of Regulation... No 3508/92 for the following calendar year, in respect of an area equal to that for which his aid application was rejected.

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.

Where a farmer has not met all the obligations incumbent on him in regard to parcels fallowed for non-food production purposes these shall, on the occasion of inspection for the purposes of application of this article, be considered not to have been found.

For the purposes of this article, "determined area" means the area for which all of the conditions laid down in the rules have been met.

3. Forage areas, set-aside areas and each arable crop area for which a different aid

rate is applicable shall be treated exclusively and separately for the purposes of applying paragraphs 1 and 2.

4(a) The areas established in accordance with the provisions of paragraphs 1 to 3 for the purpose of calculating the aid shall be used... for the calculation of the compensatory allowance.

The calculation of the maximum eligible area for the compensatory payments to arable crop producers shall be made on the basis of the area of set-aside land actually determined and on a pro rata basis for each crop concerned.

...'

27. Under the first subparagraph of Article 14(1) of Regulation No 3887/92, in cases of wrong payment the farmer is to be required to reimburse the amount in question plus interest for the period between payment by the competent authority and the reimbursement of the overpayment by the beneficiary.

II — Facts and procedure

A — *Facts in the main proceedings*

28. On 3 May 1996, the applicant applied for a compensatory payment pursuant to Regulation No 1765/92 in respect of the setting-aside of a parcel of 191.71 hectares. It submitted the application to the defendant, which is the competent German authority for managing the integrated administration and control system for the aid scheme. In its aid application form, the applicant stated that it undertook to inform the competent national authority immediately of all facts which conflicted with the grant or continuation of the aid, any departure from the application data and any change in use entitlement for the duration of the obligations undertaken by it, and also of any non-compliance with the conditions under which the aid was granted, even if non-compliance resulted from *force majeure*.

29. On 11 December 1996, the defendant informed the applicant that it was excluded from the payment of subsidy in respect of the whole of the set-aside land, both for the application year and the following year, pursuant to the second indent of the third subparagraph of Article 9(2) of Regulation No 3887/92, as amended, on the ground that, according to the on-the-spot findings, the applicant had used 14.90 hectares of the set-aside area as pasture without informing the defendant. The defendant

considered that the applicant knew that the area declared as set-aside could no longer be used as pasture after the declaration had been made and had deliberately omitted to inform it of the changed use.

30. It is apparent from the order for reference that, during the proceedings, the applicant demonstrated that, since March/April 1995, building works on two cowsheds and the construction of a liquid manure container had been planned. The works on the cowshed, in which the cows which were subsequently driven on to the set-aside land had stood, were commenced at the end of May 1996. The animals were then kept in the neighbouring farmyard. However, since the construction of a liquid manure container on the boundary of the farmyard was brought forward by four weeks, it was necessary to drive the cows temporarily onto the nearby set-aside area. According to the building plans it was indeed envisaged that the farmyard would be used temporarily, but not that the set-aside area would be used as cow-pasture.

31. In its action before the Verwaltungsgericht (Administrative Court) Dessau (Germany), the applicant submitted that the putting of cows to pasture on the set-aside area does not constitute agricultural production such as to cast fresh doubt on the grant of aid. The penalty laid down in the second indent of the third subparagraph of Article 9(2) of Regulation No 3887/92, as amended, relates only to intentionally false declarations about the size of the set-aside area at the time of the application. That provision does not apply to the present situation, which concerns the reduction of the area set aside, after the submission of the application, and therefore the failure to inform the competent authority of that subsequent change.

32. By judgment of 14 July 1999, the applicant's action was dismissed. The Verwaltungsgericht Dessau held that the applicant had made false declarations about the area set aside. It was clearly in accordance with the wording of the second indent of the third subparagraph of Article 9(2) of Regulation No 3887/92, as amended, and also required by the spirit and purpose of that provision, to regard information stated in the application for aid as false, not only when it did not correspond with the actual circumstances at the time of the application but also when that information subsequently became incorrect, that is, where the applicant for aid did not correct it after a change in the original circumstances. Persisting with an aid application in spite of a subsequent change in circumstances capable of affecting the grant of aid in itself constitutes a false declaration within the meaning of the penalty scheme. According to the Verwaltungsgericht Dessau, the applicant was also guilty of the necessary element of intent for the penalty to be

imposed. It realised at the end of June 1996 at the latest that the set-aside area was being used in circumstances which compromised eligibility for aid, so that it promptly drove the cows from that boundary. Nevertheless, with knowledge of its reporting duty, it gave the defendant no notice of the reduction in the set-aside area.

33. The applicant, which was given leave to appeal against that judgment before the referring court, claims payment without reduction of the aid for set-aside. The defendant seeks confirmation of the decision at first instance. The national court states that, if the applicant's explanations are accepted, it did not, at the time the aid application was submitted, make any false declarations, either intentionally or as a result of serious negligence, about the area set aside. In those circumstances the applicant would be partially successful if, as it argues, the penalty laid down in the second indent of the third subparagraph of Article 9(2) of Regulation No 3887/92, as amended, presupposed that a use of set-aside areas contrary to the aid scheme was premeditated at the time the application was submitted or that the applicant — acting in a seriously negligent way — ought to have known that such a use would occur after the application was submitted.

34. According to the national court, the interpretation of Article 9(2) of Regulation No 3887/92, as amended, does not, however, lead to a result which is so clear as to leave no room for any reasonable doubt. The court therefore decided to stay proceedings and to refer two questions to the Court of Justice for a preliminary ruling.

B — *The questions referred for a preliminary ruling*

35. '1. On a proper interpretation of the third subparagraph of Article 9(2) of Regulation [No 3887/92], does "false declaration" refer to a culpable "positive act" in the context of an application for aid, so that failure to report to the granting authority changes which are relevant to the application but do not occur until afterwards is not penalised?

2. Do the so-called "simple" cases of difference in the second sentence of the first subparagraph of Article 9(2) of the regulation [No 3887/92] presuppose the making of a "false declaration" in the application itself, or is it simply a

question of comparing the information given in the application with the result of the on-the-spot inspection?'

III — Assessment

36. By its first question, the national court seeks clarification of the term 'false declaration' within the meaning of the third subparagraph of Article 9(2) of Regulation No 3887/92, as amended. It therefore asks the Court to determine whether the term necessarily presupposes that:

— the applicant for 'area' aid has committed a culpable 'positive act', so that a culpable failure or omission could not incur the penalties laid down in that provision. A culpable 'failure' or 'omission' means not reporting to the competent authority a change in the situation previously declared which has had an effect on the grant or continuance of the aid;

— the false declaration was made when the application for 'area' aid was submitted, so that a culpable positive act or a culpable omission committed after the application was submitted could not incur penalties.

37. By its second question, the national court asks the Court to state whether the penalty laid down in the first sentence of the first subparagraph of Article 9(2) of Regulation No 3887/92, as amended, also presupposes that the applicant for 'area' aid made a false declaration at the time the aid application was submitted. If not, it requests the Court to state whether merely the finding of a difference between the declared area and the area determined on inspection is enough to give rise to application of the penalties laid down in the second sentence of the first subparagraph of Article 9(2) of Regulation No 3887/92, as amended.

38. The applicant submits that Article 9(2) of Regulation No 3887/92, as amended, should be construed as meaning that no penalty may be imposed unless an error was committed when the application was submitted, so that changes in circumstances affecting the grant or continuance of the aid applied for are of no consequence.

39. I agree with all the parties which have submitted observations, that that interpretation is not only incompatible with the wording and purpose of Article 9 of Regulation No 3887/92, as amended, but that it also infringes the principle of proportionality and is liable to encourage fraud and render ineffective the control and administration system established by the aid schemes.

40. The objective of Article 9(2) of Regulation No 3887/92, as amended, is to prevent and penalise irregularities and fraud by introducing a system of penalties graded according to the gravity of the irregularity committed. The penalty may go as far as total exclusion from an aid scheme for the year in question and the year thereafter. [19]

41. For that purpose, the system established by that provision provides:

— 'area' aid is to be granted in full only if:

— the area declared is the same as the area determined; [20]

— all of the conditions laid down in the rules by the aid scheme in question have been met, [21] and

— a mere finding of a difference between the area declared and the area determined is to bring about an adjustment, or even a penalty, except in cases of *force majeure*. [22]

42. If the area declared is greater than the area determined, Article 9(2) of Regulation No 3887/92, as amended, provides for four kinds of penalties graded according to the gravity of the irregularity committed.

43. Under the first and second subparagraphs of Article 9(2), a non-culpable act (such as an error made in good faith) will incur two kinds of penalty consisting in a reduction in the aid granted. The reduction will be made according to the extent of the error in determining the area in respect of which there is an entitlement to aid. If the error in determining that area is slight, a simple adjustment will be made to the amount of the aid. [23] On the other hand, the reduction may be larger if the difference found is more than 3% or two hectares but not more than 20% of the determined area. [24] If the difference is more than 20%

19 — Ninth recital.

20 — Any difference between those two areas leads to a reduction in aid (Article 9(1) and (2) of Regulation No 3887/92, as amended).

21 — Article 9(2), final subparagraph, of Regulation No 3887/92, as amended.

22 — Article 9(2), first subparagraph, second sentence, and fourth subparagraph, of Regulation No 3887/92, as amended.

23 — Article 9(2), first subparagraph, first sentence, of Regulation No 3887/92, as amended.

24 — The area actually determined (that is, the eligible area) is then reduced by twice the difference found (Article 9(2), first subparagraph, of Regulation No 3887/92, as amended.

of the determined area, the penalty may go as far as withholding the aid. [25]

44. Culpable conduct — such as a false declaration made intentionally or serious negligence — on the part of the applicant for 'area' aid incurs heavier penalties. In that case, the farmer in question is to be excluded from the aid scheme concerned for the calendar year in question. [26] In the case of a false declaration intentionally made, he is also to be excluded from any aid scheme for the following calendar year, in respect of an area equal to that for which his aid application was rejected. [27]

45. It is apparent from those provisions that a mere finding of a difference between the area declared and the area actually determined following inspections by the competent authorities leads to an adjustment. Furthermore, the time at which the irregularity was committed is unimportant, if at the inspection stage a difference is found between the area declared and the area determined.

46. It is also clear from those provisions that a system of graded penalties has been established, which takes account of an objective factor, the extent of the difference between the two areas, and a subjective factor, the gravity of the irregularity committed [28] (the culpable or non-culpable conduct of the farmer who caused the situation and also his serious negligence). The fundamental element in determining the penalties applicable is therefore the conduct of the person who caused this reprehensible situation. In that regard, it is irrelevant whether the misrepresentation giving rise to the irregularity is active or passive (like an omission or negligence).

47. Lastly, it is in any event for the national court alone to determine the degree of gravity of the irregularity committed. [29]

48. In the present case, the applicant temporarily put cows on part of the set-aside area without notifying the competent authorities. By so doing, it used the land declared as set-aside for purposes other than those authorised by the applicable provisions. Article 7(4) of Regulation No 1765/92 provides that the land set aside may be used only for the provision of materials for the manufacture of products not primarily intended for human or animal consumption. That therefore excludes the pasturing of cows on the land.

25 — Article 9(2), second subparagraph, of Regulation No 3887/92, as amended.

26 — *Ibidem*, third subparagraph, first indent.

27 — *Ibidem*, third subparagraph, second indent.

28 — See, in that regard, the judgment in *National Farmers' Union and Others*, cited above (paragraph 54).

29 — By analogy, see Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraph 26.

49. The applicant has therefore not fulfilled the conditions laid down in the set-aside rules since, contrary to the provisions contained in the second indent of Article 3(4) of Regulation No 762/94, it did not leave set aside the land declared set aside. Consequently, under the sixth subparagraph of Article 9(2) of Regulation No 3887/92, as amended, the aid applied for cannot be granted in full.

50. It is for the referring court to determine the gravity of the irregularity in the light of the conduct of the farmer who committed it.

51. In addition to the fact that it is incompatible with the purpose and wording of Article 9 of Regulation No 3887/92, as amended, the interpretation suggested by the applicant would also lead to the paradoxical situation that a farmer who makes a mistake in all good faith in his declaration of the set-aside areas will be penalised by a reduction in the area eligible for aid, or even by the withholding of all the aid applied for. [30] On the other hand, the finding of a difference between the areas declared to be set aside and those determined on inspection cannot have any detrimental consequences for a farmer who proves that he did not commit any error in the 'area' aid application, even if it transpires that he infringed his obligation to leave set aside the land declared set aside.

52. Finally, that interpretation is liable to encourage fraud and render ineffective the control and administration system for the 'area' aid scheme. In order to escape the penalties which should have been imposed on him as the result of the finding of a difference between the declared areas and the inspected areas, an aid applicant would need only to make a correct declaration, adduce evidence of the circumstances as they exist at the time the aid application is submitted, and then change those circumstances without notifying the authorities.

53. It follows from the foregoing arguments that Article 9(2) of Regulation No 3887/92, as amended, must be interpreted as meaning that the penalties it lays down apply if a difference is found between the areas stated in the aid application and those determined following inspection by the competent authorities. In that regard, the cause of the difference is irrelevant, as is the time at which the irregularity, whether committed in good or bad faith, as a result of serious negligence or intentionally, was committed. Moreover, the distinction drawn between 'fault by action' and 'fault by omission' is irrelevant for the purposes of applying the penalties laid down in Article 9(2) of the regulation. Finally, as regards the categorisation of the irregularity in relation to the scale of penalties provided for in Article 9(2) of the regulation, it is for the national court to

30 — If the difference is more than 20% of the determined area (Article 9(2), second subparagraph, of Regulation No 3887/92, as amended.

determine whether the irregularity was committed in good faith, or whether it was deliberately intended by the applicant for 'area' aid or the result of his serious negligence, and to impose the penalties provided for in Article 9.

Conclusion

54. For the reasons set out above, I propose that the Court give the following reply to the questions raised by the Oberverwaltungsgericht des Landes Sachsen-Anhalt:

Article 9(2) of 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, as amended by Commission Regulations (EC) Nos 229/95 of 3 February 1995 and 1648/95 of 6 July 1995, must be interpreted as meaning that:

— the penalties it lays down apply if a difference is found between the areas stated in the aid application and those determined following inspection by the competent authorities; in that regard, the cause of the difference is irrelevant, as is the time at which the irregularity, whether committed in good or bad faith, as a result of serious negligence or intentionally, is committed, so that an irregularity committed after the aid application is submitted cannot avoid the penalties thus laid down;

— in the application of Article 9(2), the distinction between the terms 'fault by action' and 'fault by omission' is irrelevant;

— the categorisation of the error in relation to the scale of irregularities provided for in Article 9(2) of Regulation No 3887/92, as amended, falls within the exclusive jurisdiction of the national court, so that it is for that court to determine whether the irregularity was committed in good faith, or whether it was deliberately intended by the applicant for 'area' aid or was the result of his serious negligence.