OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 29 June 1988

My Lords,

Mr Jensen, a farmer with a dairy herd in the western region of Denmark, applied for a non-marketing premium pursuant to Council Regulation (EEC) No 1078/77 (Official Journal 1977, L 131, p. 1) introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds. He entered into a contract with the EC Directorate of the Danish Ministry of Agriculture, by which he undertook not to market milk for a period of five years in return for a non-marketing premium calculated on the basis of his existing milk production. By the terms of that contract, which bore an endorsement of approval dated 3 May 1979, but which he apparently signed on 12 September 1979, Mr Jensen undertook, *inter alia*:

(i) not to sell, give away or otherwise dispose of milk or milk products from the holding for a period of five years,

(ii) not to allow others to use the holding or any part thereof for dairy farming . . . ,

(iii) not to entrust the holding or any part thereof to a third party by way of sale, lease, termination of lease or by any other means unless the EC Directorate had previously been informed in writing of the name and address of the transferee,

(iv) to refund the premium paid together with interest thereon at a rate corresponding to 2% above the discount rate established from time to time by the National Bank in the event of his non-compliance with the undertakings given by him or if a transferee of the holding to which the undertakings related did not take them over.

Mr Jensen was accordingly granted a non-marketing premium of DKR 289 120.12, of which he received half (DKR 144 560.06) as an initial instalment on 23 November 1979. The balance of the premium was to be payable in two equal instalments, each of 25% of the total, before the end of the third and fifth years of the undertaking. The stock on the holding, consisting of some 45 to 50 cows, was subsequently sold for slaughter and the use of the holding changed to the rearing of bull calves.

Upon the application of a creditor his farm was put up for sale by court order on 15

April 1981 — that is approximately 19 months after the undertaking was given. At the time of the sale it seems that Mr Jensen disclosed the existence of the non-marketing undertaking. The farm was taken over by the Dansk Landbrugs Realkredietfond (the Danish Agricultural Credit Fund: 'the Fund'), which resold it, on 23 August 1981 to a Mr Michael Christian Lyneborg.

The EC Directorate of the Danish Ministry of Agriculture asked Mr Lyneborg whether he wished to take over the non-marketing undertakings previously entered into by Mr Jensen. On receiving no reply from Mr Lyneborg, the Directorate asked Mr Jensen, by letter dated 25 November 1981, to refund the DKR 144 560.06 already paid by way of premium. On his refusal to do so, the Danish Ministry of Agriculture brought proceedings before the Vestre Landsret (the Western Regional Court) for the recovery of that sum with interest thereon.

The Western Regional Court gave judgment for the Danish Ministry of Agriculture and Mr Jensen appealed to the Højesteret (the Supreme Court). On appeal, the Danish Ministry of Agriculture maintained that it should be refunded the premium paid so far in full, together with interest. Mr Jensen submitted that he was not in breach of his contract, because his transfer of the holding was not a voluntary transfer, and that his appeal should therefore be allowed in full. In the alternative, he submitted that he should only be held liable to repay that portion of the premium received which corresponded to the period of time during which his undertaking was not complied with, namely DKR 28 912.01. The Højesteret stayed proceedings and referred the following questions to the Court:

'(1) Do the term "takes over" in Article 6 (1) of Council Regulation No 1078/77, the term "transfer" in Article 8 (4) of Commission Regulation No 1307/77 and the term "transfer" in Article 9 (4) of Commission Regulation No 1391/78 also cover a situation in which an agricultural holding undergoes a change of ownership as the result of an auction by court order?

(2) Is the situation in which an agricultural holding undergoes a change of ownership as a result of an auction by court order covered by the provisions on *force majeure* contained in Article 12 of Commission Regulation No 1391/78, as amended by Article 1 of Commission Regulation No 1799/79?

(3) Must Articles 6 (1) and 11 (1) of Council Regulation No 1078/77 and Article 9 (1) of Commission Regulation No 1391/78, according to which the Member States shall take all necessary steps to recover any sums already paid in respect of the premium, be interpreted as meaning that a demand may be made only for the recovery of a sum which is proportionate to the period during which the undertakings under the premiums system were not complied with?'

In Denmark, the conditions for the receipt of the milk non-marketing premium

introduced by Regulation No 1078/77 are apparently set out in Notice No 366 of 30 June 1977 of the Ministry of Agriculture, as amended by Notice of 5 July 1978, and are reflected in the terms of the contract already referred to.

Under Regulation No 1078/77, the conditions which must be fulfilled for the grant of a non-marketing premium include not allowing the holding or any part thereof to be used by others for dairy farming (Article 2 (2) (b)). Article 6 (1) provides that, 'Any person who takes over an agricultural holding may undertake in writing to continue to carry out the undertakings given by his predecessor. In such case, the sums already paid (by way of premium) shall remain the property of the latter... Otherwise, the sums already paid shall be refunded by the predecessor'. Finally, Article 11 (1) requires Member States to take the measures necessary for the recovery of premiums which have already been paid in cases where the undertakings provided for have not been fulfilled.

Commission Regulation (EEC) No 1307/77 (Official Journal 1977, L 150, p. 24) lays down detailed rules for the application of the premium system. Article 8 (1) provides that, where the recipient of a premium fails to prove to the satisfaction of the competent authority that he has complied with the obligations laid down in Article 2... of Regulation No 1078/77, the Member State concerned 'shall take all necessary steps to recover all sums already paid in respect of that premium'. Under Article 8 (4) of the English text, 'where the recipient of a premium intends to transfer his holding, or part thereof, to another person, he shall first notify the competent authority and indicate to what extent, if any, the transferee is to take over his obligations under the premium scheme... If necessary the competent authority shall recover all sums already paid to the transferor'.

The 7th recital to Regulation No 1307/77 (with a footnote reference to Case 4/68 *Schwarzwaldmilch GmbH* v *Einfuhr- und Vorratsstelle für Fette* [1968] ECR 377, at p. 386, and Case 11/70 *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, at pp. 1137 and 1138, paragraph 23) provides that whereas premiums already paid must be recovered if the obligations under the premium system are not met, yet in certain cases, and in particular if the recipient is temporarily or permanently not in a position to fulfil these obligations by reason of circumstances beyond his control and which he cannot remedy save at disproportionate cost to himself, it appears justified to release him temporarily or permanently from those obligations.

Article 10 (1) of the regulation provides that, 'In case of *force majeure*, the Member States may provide that the premiums already paid shall not be recoverable even if the obligations under the scheme have not been fulfilled and, if necessary, the non-marketing... period may be suspended for a specific period and extended accordingly'. Articles 10 (2) and 10 (3)

each contain three particular situations which may respectively be accepted as justifying provision for non-recovery of the premium and provision for suspension of the relevant period. Finally, Article 10 (4) requires Member States to inform the Commission of all cases of *force majeure* accepted as such by them.

Commission Regulation (EEC) No 1391/78 (Official Journal 1978, L 167, p. 45) modified Regulation No 1307/77. The relevant provisions, for present purposes, are the same as in the earlier regulation save that in Articles 9 (1) and 9 (4) the term 'producer' replaces 'recipient of a premium' in the earlier regulation and that in Article 12 (1) of Regulation No 1391/78 the phrase 'in cases of *force majeure* occurring after the application has been approved' is substituted for 'in case of *force majeure*' contained in Article 10 (1) of the earlier regulation.

Finally, Article 1 (1) of Commission Regulation (EEC) No 1799/79 (Official Journal 1979, L 206, p. 12) replaced Article 1 of Regulation No 1391/78 by a new text. As amended, Article 12 (1) states that:

'Where, by reason of a case of *force majeure* occurring after the day on which the application for a premium has been approved, the beneficiary . . . is unable, or would be able only at the cost of excessive sacrifices, to fulfil an obligation arising out of the system of premiums, the Member State concerned shall determine the measures which it shall deem necessary with regard to the circumstances invoked. Such measures may, according to the case, entail postponing the beginning of the non-marketing . . . period . . . *or* the suspension of the obligations for a specific length of time during that period *and* the non-recovery of the premiums already paid, which would have to be refunded in accordance with Article 9 (1)' (my emphasis).

By Article 12 (2): 'Without prejudice to specific circumstances to be taken into consideration in individual cases' the six situations specified in the earlier regulation may be deemed to justify either of the measures referred to in paragraph 1 of the article. Article 12 (3) maintains the requirement that the Member States should inform the Commission of all cases of *force majeure* accepted as such by them.

The first question referred to the Court asks whether 'takes over' in the Council Regulation (Article 6 (1) of Regulation No 1078/77) and 'transfer' in the two Commission regulations (Article 8 (4) of Regulation No 1307/77 and Article 9 (4) of Regulation No 1391/78) include a change of ownership of an agricultural holding as a result of an auction by court order. Neither of these terms is defined in the regulations.

Article 6 (1) of Regulation No 1078/77 seems in all language texts to be quite general and to raise the objective question whether an agricultural holding has in fact

been taken over. Thus the English text refers to 'Any person who takes over an agricultural holding', which appears in French as 'Tout successeur à une exploitation agricole' and in German as 'Jeder Betriebsnachfolger'. The Danish text reads, 'Enhver, der overtager en landbrugsbedrift'. The defendant in the main action and the Commission in its observations argue that the term used ('overtager') carries a wide meaning, which would accord with the other language versions mentioned.

The position under the two Commission regulations is less immediately clear. The English text requires the recipient of a premium (or producer) to give notice if he 'intends to transfer his holding'. It is argued that this supposes an act of volition on the part of the transferor, so that a transfer following a court order is excluded.

The Danish text has in Regulation No 1307/77 language which I am told indicates that the transfer must be voluntary ('Hvis den begunstigede helt eller delvis overdrager sin bedrift til andre . . . '); in Regulation No 1391/78 the language used is more neutral ('Hvis producenten helt eller delvis afstår sin bedrift til en ander . . . ').

The French text requires that 'si le producteur cède son exploitation . . . à des tiers il communique ce fait à l'avance' and the other language texts appear to be similar. It is argued again that this involves a voluntary act on the part of the transferor and that a transferor can only give notice in advance if the transfer is made by him voluntarily rather than by way of a compulsory sale. For my part I do not accept this — if there is a transfer, a cession, whether voluntary or otherwise, notice must be given. If a court order for sale by auction is made, the producer must give notice that a transfer will take place pursuant to a court order. If this were not so it seems to me that the Commission regulation purports to cut down the effect of the Council regulation, which it cannot do. I would read the English version as meaning 'If the producer is about to transfer'. Unless read this way it seems to me that the English version conflicts with the others. It must be read so as to conform with them.

As the Court held in Case 109/84 (*Menges* v *Land Nordrhein-Westfalen* [1985] ECR 1289), 'The aim of reducing milk surpluses or at least of preventing their increase requires the obligations imposed on the recipients of the premiums to be interpreted in the sense which is the most conducive to its achievement' (paragraph 15 of the judgment, p. 1298; see also Case 77/79 *Damas* v *Fonds d'orientation et de régularisation des marchés agricoles (FORMA)* [1980] ECR 247, pp. 258 to 260, paragraphs 6 and 7 — a case concerning an earlier system of premiums, very similar to the present scheme). Unless read in this way, it seems to me that the regulation could be used for transfers 'engineered' by means of an application for a court order so as to evade the duty to give notice and to repay the

premiums. Accordingly I am of the view that the correct interpretation is that any form of transfer including transfer by way of forced sale is covered by the regulation.

As to the second question — whether a forced sale by court order constitutes *force majeure* — it may be that the relief contained in Article 12, as amended by Regulation No 1799/79, permitting the non-recovery of premiums, is only to be allowed when either postponement of the beginning of the non-marketing period *or* suspension of the obligations for a specific length of time during that period is authorized.

Be that as it may, I do not consider that a forced sale by court order is within any of the specific situations listed in Article 12. 'Compulsory purchase' deals with the situation where national authorities take over the agricultural holding under, e. g. statutory powers and cannot in my view be extended to cover a sale by court order on the application of creditors. In this regard it is to be observed that no Member State has notified the Commission that it considers a forced sale to come within the *force majeure* provision.

Does such a sale come within the general reference to *force majeure* in Article 12 (1) as a situation as the result of which the beneficiary cannot otherwise than at the cost of excessive sacrifices fulfil his obligations? The Court has stated that *force majeure* 'must be understood in the sense of unusual and unforeseeable circumstances, beyond the trader's control, the consequences of which could not have been avoided even if all due care had been exercised' (Case 266/84 *Denkavit (France) SARL* v *Fonds d'orientation et de régularisation des marchés agricoles (FORMA)* [1986] ECR 149, at p. 170, paragraph 27). In particular, in Case 77/79 *Damas* the Court stated that 'the only circumstances which may justify non-compliance with the obligations undertaken by the recipient of the premium, as far as concerns the withholding of milk and milk products from the market, are those which are beyond his control, where the conditions for a case of *force majeure* ... are present' (p. 259, paragraph 7).

A forced sale by court order does not *per se* fall within that description. Such a sale may result from financial problems due to inefficiency or mismanagement or due to a variety of other reasons. The answer to the second question, as it is framed, in my view must be in the negative. However, the financial difficulties which led to the court order may, in a particular case, be caused directly by an event which is itself within the definition of *force majeure*. In such a case Member States may in my view apply Article 12 of the regulation to permit the relevant postponement, suspension or non-recovery of premiums paid. Whether the present could be such a situation does not emerge from the reference.

I turn finally to the third question asked by the Højesteret which is, in essence, whether all the premium paid to Mr Jensen is recoverable, or whether the principle of

proportionality intervenes so as to reduce the sum which he is liable to repay to a sum proportionate to the period during which the undertaking was not complied with.

Article 6 (1) of Regulation No 1078/77 clearly indicates that the amounts paid by way of premium must be repaid in full if the conditions of grant are not respected for the full five-year period. There is nothing in the text of Article 9 of Regulation No 1391/78 which provides for a partial non-repayment related to the period during which the undertakings have been observed.

The fact that, in a later regulation (Commission Regulation (EEC) No 1300/84, Official Journal 1984, L 125, p. 3) it was thought necessary to provide expressly for a reduction in the amount of premium to be repaid during the first six months of the non-commercialization or conversion period in certain circumstances militates in favour of the view that proportional reimbursement of the premium already paid is not normally to be possible.

Nor does the fact that, under Article 4 (1) of Regulation No 1078/77, the non-marketing premium is paid in three tranches in my view provide any support for the argument that only part of the premium received should be repaid if the undertaking is not complied with. As recital 5 and the text of Article 4 (1) itself make clear, the purpose of the system of payment by instalments is to facilitate checks on compliance with the obligations arising out of such undertakings and does not create any reduced liability to repay the premium received in the event of breach of the undertaking.

Is the provision, which on the face of it provides for total recovery, itself disproportionate — does it correspond to the importance of the aim sought to be achieved and is it necessary to achieve that aim (Case 266/84 *Denkavit* [1986] p. 168, at paragraph 17)?

Case 66/82 *Fromançais SA* v *Fonds d'orientation et de régularisation des marchés agricoles (FORMA)* [1983] ECR 395, at pp. 404 to 406, paragraphs 8 to 14 and 18, Case 147/81 *Merkur Fleisch-Import GmbH* v *Hauptzollamt Hamburg-Ericus* [1982] ECR 1389, at p. 1397, paragraphs 11 and 12, Case 272/81 *Société RU-MI* v *Fonds d'orientation et de régularisation des marchés agricoles (FORMA)* [1982] ECR 4167, at p. 4180, paragraph 14, and Case 273/81 *Société Laitière de Gacé* v *Fonds d'orientation et de régularisation des marchés agricoles (FORMA)* [1982] ECR 4193 establish that, once the purpose to be achieved forms part of the general objectives or is of fundamental importance to the proper functioning of the common agricultural policy, provisions which provide for identical consequences either for the total or partial failure of the beneficiary to carry out the operation which he undertook to carry out (or indeed for carrying out that operation outside prescribed time-limits) may be regarded as in conformity with the principle of proportionality.

It is therefore necessary to look at the aims and objective of the legislation governing the system of non-marketing and conversion

premiums introduced by Regulation No 1078/77. It is clear from recitals 1 to 6 to that regulation that the pressing need was to reduce milk surpluses by encouraging certain groups of farmers to cease milk production or the marketing of milk products for a definite and specified period in return for the payment of a premium: five years in the case of a non-marketing premium, four years in the case of a conversion premium. It is clear that, if it were possible for a producer to forfeit merely that part of the premium already received which applied to the period during which the undertakings were not respected, there would be no, or virtually no, incentive for a farmer to stay out of the market for milk and milk products for the period to which he had earlier committed himself. The premium system can, as I see it, only achieve the desired economic effect if the penalty for breach of the undertaking is a substantial one, namely the forfeiture of the entire premium already received. It seems to me that here, as in Case 77/79 *Damas*, non-commercialization during the entire five-year period is the essential and fundamental criterion governing the grant of a premium.

Whether, as may seem in some circumstances justified, it would be right or possible for a Member State or a national court on a forced sale by court order to require that the premium advanced be repaid out of the proceeds of sale rather than directly by the former producer is a matter for consideration under national law but does not seem to me to fall within the present reference.

In my view, it is therefore not possible to conclude that a proportion only of the premium should be repaid.

Accordingly, in my opinion the questions referred by the national court fall to be answered along the following lines:

'(1) The term "takes over" in Article 6 (1) of Council Regulation No 1078/77, the term "transfer" in Article 8 (4) of Commission Regulation No 1307/77 and the term "transfer" in Article 9 (4) of Commission Regulation No 1391/78 cover a situation in which an agricultural holding undergoes a change of ownership as a result of an auction by court order.

(2) The situation in which an agricultural holding undergoes a change of ownership as a result of an auction by court order is not *per se* within the provisions on *force majeure* contained in Article 12 of Commission Regulation No 1391/78, as amended by Article 1 of Commission Regulation No 1799/79. However, when considering such a change of ownership, a Member

State and a national court are entitled to examine the chain of events leading up to the auction by court order, so as to establish whether any of those events themselves constitute a case of *force majeure* leading directly to the auction by court order. If so, the provisions relating to the non-recovery of the premium may be applied.

(3) Articles 6 (1) and 11 (1) of Council Regulation No 1078/77 and Article 9 (1) of Commission Regulation No 1391/78, according to which the Member States shall take all necessary steps to recover any sums already paid in respect of the premium, are not to be interpreted as meaning that a demand may be made only for the recovery of a sum which is proportionate to the period during which the undertakings under the premiums system were not complied with. In such circumstances, the whole of the premium already paid is recoverable.'

The costs of the Danish Ministry of Agriculture, as a party to the main proceedings, fall to be dealt with by the national court. Mr Jensen did not submit observations to this Court and was not represented at the hearing. To the extent that he has nevertheless incurred costs, those costs, too, are a matter for the national court. The costs of the Commission, which has also submitted observations, are not recoverable.