OPINION OF ADVOCATE GENERAL LÉGER

delivered on 27 June 2002 [1]

1. This reference from the Verwaltungsgericht (Administrative Court) Hannover (Germany) for a preliminary ruling asks the Court to assess the validity of Regulation (EC) No 2799/1999 [2] and its annexes by reference to Article 11(1) of Regulation (EC) No 1255/1999 [3] and Article 34(2), second subparagraph, EC, and to general principles of law including, in particular, the principle of the protection of legitimate expectations.

Legal context

2. Under Article 34(2) EC:

'The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 33, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports.

The common organisation shall be limited to pursuit of the objectives set out in Article 33 and shall exclude any discrimination between producers or consumers within the Community.

...'

3. Regulations Nos 1255/1999 and 2799/1999 also form part of the legal context.

Regulation No 1255/1999

4. Regulation No 1255/1999 is the basic regulation. It relates to the common organisation of the market in the sector of milk

1 — Original language: French.

2 — Commission Regulation (EC) No 2799/1999 of 17 December 1999 laying down detailed rules for applying Regulation (EC) No 1255/1999 as regards the grant of aid for skimmed milk and skimmed-milk powder intended for animal feed and the sale of such skimmed-milk powder (OJ 1999 L 340, p. 3).

3 — Council Regulation (EC) No 1255/1999 of 17 May 1999 on the common organisation of the market in milk and milk products (OJ 1999 L 160, p. 48).

and milk products. One of its objectives is to provide for a system of aids and incentives for the consumption of milk and milk products in the Community. [4]

5. Article 11 of Regulation No 1255/1999 provides as follows:

'1. Aid shall be granted for skimmed milk and skimmed-milk powder intended for use as feedingstuffs, if these products reach certain standards.

For the purposes of this article, buttermilk and buttermilk powder shall be regarded as skimmed milk and skimmed-milk powder.

2. Aid amounts shall be fixed taking into account the following factors:

— the intervention price for skimmed-milk powder,

— development of the supply situation as regards skimmed milk and skimmed-milk powder and developments in the use thereof as feed,

— trends in calf prices,

— trends in the market prices for competing proteins as compared with those for skimmed-milk powder.'

6. Article 15 of the same regulation provides as follows:

'The following shall be adopted in accordance with the procedure laid down in Article 42: [5]

(a) the detailed rules for the application of this chapter and, in particular, the conditions under which the aids set out therein may be granted,

4 — Fourth recital.

5 — Article 42 describes the procedure to be followed and the respective roles of the Commission and the committee responsible for delivering an opinion to ensure the application of Regulation No 1255/1999.

(b) the amounts of the aids referred to in this chapter,

...

(d) the other decisions and measures that may be adopted by the Commission under this chapter.'

Regulation No 2799/1999

7. Regulation No 2799/1999 deals more specifically with the system of aid for skimmed milk and skimmed-milk powder intended for processing and use as animal feed.

8. This regulation lays down detailed rules for applying Regulation No 1255/1999 with regard to the grant of aid for skimmed milk and skimmed-milk powder intended for animal feed. [6]

9. The third recital in the preamble to Regulation No 2799/1999 sets out the following objectives:

'it is necessary to ensure that the skimmed milk and skimmed-milk powder for which aid is granted are in fact used as feed. To that end, aid should be granted only for skimmed milk and skimmed-milk powder processed into compound feedingstuffs or denatured in accordance with certain requirements. It is also necessary to prevent aid being paid more than once for the same product'.

10. In the 11th recital, the Commission states its opinion that the aid measure for skimmed milk provided for by Regulation (EEC) No 1105/68 [7] should be abolished for the following reasons. First, the Commission considers that the grant of aid for skimmed milk gives rise to many problems, particularly in relation to checks on beneficiaries. Second, the aid scheme has now only a marginal impact on the balance of the market in milk products because of the sharp fall in the production of skimmed milk. Finally, the market in skimmed milk will continue to be supported by the aid

6 — Article 1(a) of Regulation No 2799/1999 states that the regulation lays down detailed rules for applying Regulation No 1255/1999 as regards 'the grant of aid for skimmed milk, skimmed-milk powder, buttermilk and buttermilk powder intended for use as animal feed under Article 11 of that regulation'.

7 — Regulation (EEC) No 1105/68 of the Commission of 27 July 1968 on detailed rules for granting aid for skimmed milk for use as feed (OJ, English Special Edition 1968 (II), p. 379).

granted when skimmed milk is incorporated into compound feedingstuffs.

11. Chapter IV, entitled 'Transitional and final provisions', of Regulation No 2799/1999 contains Article 36, which provides expressly for the repeal of Regulation No 1105/68.

12. Article 38 of Regulation No 2799/1999 stated that the regulation was to enter into force on 1 January 2000 and that 'it shall apply only to skimmed milk and skimmed-milk powder processed into compound feedingstuffs or denatured skimmed-milk powder from that date'.

Facts and main proceedings

13. On 8 January 2000 Molkerei Wagenfeld Karl Niemann GmbH & Co. KG,[8] a private dairy, applied to the Bezirksgregierung Hannover (Hanover Regional Government) for aid for skimmed milk used for feeding animals.

The application related to January 2000 and concered, for the period in question, 6 695 kg of skimmed milk. The total aid claimed was DEM 759.47.

14. By a decision of 13 January 2000, the defendant refused Niemann's application on the ground that Regulation No 2799/1999 had retained aid only for skimmed-milk powder and had abolished it for skimmed milk.[9]

15. On 21 January 2000 Niemann lodged an administrative appeal against the decision. Niemann challenged the validity of Regulation No 2799/1999, which had been in force since 1 January 2000, on the following grounds:

— Regulation No 2799/1999 was contrary to the prohibition of discrimination laid down by Article 34(2) EC because it made a distinction between skimmed milk and skimmed-milk powder, although they were the same product;

— the Commission had no power to abolish subsidies for skimmed milk

8 — Hereinafter 'Niemann'.

9 — Meaning liquid skimmed milk.

because Regulation No 1255/1999 provided for aid for both skimmed-milk powder and skimmed milk;

— the sudden abolition of subsidies was contrary to the principle of the protection of legitimate expectations. As Regulation No 2799/1999 was published only 31 December 1999, producers had no time to adjust to it.

16. By decision of 22 February 2000, the appeal against the decision of 13 January 2000 was dismissed by the Bezirksregierung Hannover, which stated that it was bound to apply Regulation No 2799/1999.

17. On 13 March 2000, Niemann brought an action before the Verwaltungsgericht Hannover, seeking a ruling on the validity of Regulation No 2799/1999 by reference to the principle of non-discrimination, Article 11(1) of Regulation No 1255/1999 and the principle of the protection of legitimate expectations.

The question referred for a preliminary ruling

18. Consequently the national court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Regulation (EC) No 2799/1999 in conjunction with its annexes contravene:

(a) Article 11(1) of Regulation (EC) No 1255/1999,

(b) the second subparagraph of Article 34(2) EC, and

(c) the general legal principles of the European Community and the principle of the protection of legitimate expectations, inasmuch as the aforesaid regulation precludes aid from being granted for skimmed milk and buttermilk for liquid feed unless that milk is first processed into compound feedingstuffs or into skimmed-milk powder, and makes no provision for a transitional period; or is it on those grounds void (in part)?'

Assessment

19. The national court's question asks, first, whether the Commission exceeded the inherent limits on its power of implementation when giving effect to Regulation No 1255/1999 by deciding to abolish aid for skimmed milk and liquid buttermilk intended for feeding animals, secondly, whether that abolition of such aid infringes the principle of non-discrmination and, thirdly, whether that abolition is contrary to the general principles of law and the principle of the protection of legitimate expectations.

The Commission's power of implementation when giving effect to Regulation No 1255/1999

20. In its written observations, Niemann submits that the Commission's power of implementation must be exercised in the framework of certain limits laid down by Community case-law. It considers that the Commission's powers must be assessed by reference to the main objectives of the organisation of agricultural markets, as laid down by the Council in Regulation No 1255/1999. According to Niemann, the Council created a market organisation in the sector of milk and milk products with the aim of supporting markets for both liquid milk and milk powder. By abolishing aid for skimmed milk and liquid buttermilk in Regulation No 2799/1999, the Commission modified the scope of that market organisation and thereby contravened Regulation No 1255/1999.

21. The Commission contends that the regulation empowers it to subsidise milk intended for animal feed, provided that it is in the form of milk powder or is part of a mixture or compound feedingstuff. The Commission considers that the Council has power to lay down the essential rules in the matter of agricultural policy, but that it, the Commission, is responsible for determining the detailed rules of application. The power delegated to the Commission must therefore be interpreted broadly.

22. In the present case, the question is whether the requirement, as a condition for the grant of aid, that skimmed milk intended for feeding animals be processed beforehand into compound feedingstuffs or into skimmed-milk powder in order to qualify under the aid system contravenes Regulation No 1255/1999.

23. In response to all the parties' submissions, it must be observed that the Court considers that, in order to assess

the extent of the Commission's implementing powers regarding the common agricultural policy, reference must be made to the context of the EC Treaty, in which Article 211 EC [10] must be placed, and from which it follows that the concept of implementation must be given a wide interpretation. Since only the Commission is in a position to keep track of agricultural market trends and to act quickly when necessary, the Council may confer on it wide powers of discretion in that sphere and when it does so, the limits of those powers must be determined in the light of the essential general aims of the market organisation. [11]

24. In this connection, it must be observed that the Court distinguishes between essential rules, which are the Council's preserve, and those which, being merely of an implementing nature, may be delegated to the Commission. Only provisions intended to give concrete shape to the fundamental guidelines of Community policy must be classified as essential rules. [12]

25. In the light of this case-law, I consider that the Commission did not exceed the inherent limits on the exercise of its power of implementation when giving effect to Regulation No 1255/1999.

26. The reason is, as the Commission correctly notes, that Article 11(1) of that regulation provides that aid is to be granted for skimmed milk and skimmed-milk powder intended for use as feedingstuffs only *subject to certain conditions*. [13]

27. Moreover, as the Commission explained at the public hearing the Council empowered it to prescribe the *conditions* to which the grant of aid for skimmed milk and skimmed-milk powder is subject.

28. For this purpose the Commission added two provisions to Regulation No 2799/1999. First, Article 8 provides that, to qualify for aid, skimmed milk and skimmed-milk powder must be used in an undertaking approved in accordance with Article 9 of the regulation and that it must not have benefited from aid or a reduction

10 — According to this article, in order to ensure the proper functioning of the common market the Commission is, on the one hand, to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied and, on the other, to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

11 — Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *Commission* [1987] ECR 1155, paragraph 14; Joined Cases 133/85 to 136/85 *Rau and Others* [1987] ECR 2289, paragraph 31; and Case C-359/89 *SAFA* [1991] ECR I-1677, paragraph 16.

12 — Joined Cases 6/88 and 7/88 *Spain and France* v *Commission* [1989] ECR 3639, paragraph 15; Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraphs 36 and 37; and Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461, paragraph 21.

13 — See paragraphs 9 to 11 of the Commission's written observations (French version).

in price under other Community measures. Secondly, Article 9 of Regulation No 2799/1999 provides that such approval applies only to undertakings producing mixtures, compound feedingstuffs or denatured skimmed-milk powder.

29. This analysis of Articles 8 and 9 of Regulation No 2799/1999 shows that the Commission intended to modify the conditions for granting aid to skimmed milk by making them more restrictive.

30. Similarly, the regulation seems to indicate that only skimmed milk previously processed into compound feedingstuffs or into skimmed-milk powder qualifies for the aid provided for by Regulation No 1255/1999.

31. The Commission justifies the changes in the conditions for the grant of aid for skimmed milk by the argument that the formulation of the *concrete conditions* to which the system of aid is subject is the Commission's exclusive preserve and a matter for assessment in its absolute discretion. It considers that Regulation No 1255/1999 therefore gives it a broad scope for interpretation in so far as Article 11 is vague and gives no details of the conditions required for the grant of aid. The Commission adds that the wording of the article does not indicate that the Council absolutely insisted that the subsidies for skimmed milk used directly in feedingstuffs should be continued.

32. I would point out that the Court has observed that the Community institutions enjoy wide discretion in the area of the common agricultural policy corresponding to the responsibilities given to them by the EC Treaty. [14] In cases involving such a discretion, the Community Court must restrict itself to considering whether the exercise of that discretion is vitiated by a manifest error or constitutes a misuse of power or whether the Community institutions clearly exceeded the bounds of their discretion. [15]

33. However, it does not appear that there was a manifest error or misuse of power by the Commission or that it clearly exceeded the bounds of its discretion in applying Regulation No 1255/1999.

14 — Case C-375/96 *Zaninotto* [1998] ECR I-6629, paragraph 64; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 80; Case C-328/00 *Weber* [2002] ECR I-1461, paragraph 32; and Case C-63/00 *Schilling and Nehring* [2002] ECR I-4483, paragraph 39.

15 — Case 143/77 *Koninklijke Scholten-Honig* v *Council and Commission* [1979] ECR 3583, paragraph 10; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 8; Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 50; and Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 74.

34. Regulation No 1255/1999 expressly provides that the amount of aid is to be calculated taking account of a number of economic factors relating to the milk market. These are to include, under the second indent of Article 11(2), 'development of the supply situation as regards skimmed milk and skimmed-milk powder and developments in the use thereof as feed'. However, the Commission considers that the use of skimmed milk in the liquid state for animal feed has dwindled in market terms. [16] There is no justification for continuing assistance to the skimmed milk market.

35. The skimmed milk market has changed significantly in recent years. The Commission observes, and the applicant and the Member States do not deny, that 'the arrangements... for granting aid... have proved difficult to implement and checks on beneficiaries are problematic. Moreover, the quantities of skimmed milk benefiting from this measure have fallen sharply in recent years, so that the scheme now has only a marginal impact on the balance on the market in milk products. In addition, the market in skimmed milk will continue to be supported by the aid granted when skimmed milk is incorporated into compound feedingstuffs'. [17]

16 — See p. 6 of the order for reference (French version).

17 — Regulation No 2799/1999, 11th recital.

36. In those circumstances, it does not seem unreasonable for the Commission to have made the grant of aid conditional upon skimmed milk for animal feed being processed beforehand into compound feedingstuffs or milk powder.

37. For my part, therefore, I consider that the Commission did not exceed the inherent limits on the exercise of its power of implementation. I consider that the exclusion of skimmed milk which is not processed into compound feedingstuffs or milk powder from the system of aid laid down by Regulation No 1255/1999 does not amount to modifying the scope of the Regulation.

38. Consequently I propose that the Court give the answer that examination of the first part of the national court's question does not show that Regulation No 2799/1999 is invalid.

Infringement of the principle of non-discrimination

39. With regard to the principle of non-discrimination, Niemann contends that it was infringed simply by reason of treating

skimmed-milk powder differently from liquid skimmed milk. [18] It considers that there is no fundamental difference between skimmed milk and skimmed-milk powder used for feeding animals because skimmed-milk powder is nothing other than skimmed milk in dried form. [19] According to Niemann, the Commission has infringed the principle of non-discrimination.

40. The Court has consistently held that the prohibition of discrimination is merely a specific expression of the general principle of equal treatment, which requires that comparable situations not be treated differently and different situations not be treated alike unless such different treatment is objectively justified. [20]

41. In the present case, skimmed milk and skimmed-milk powder are certainly two comparable products.

42. However, there are two objective differences which seem to justify treating them differently. First, skimmed milk is more perishable than milk powder. Consequently, skimmed milk cannot be preserved in the same way as milk powder. Secondly, skimmed milk is not subject to the same checks as milk powder. As the Commission correctly observes, because liquid skimmed milk is perishable it must be checked at relatively close intervals in dairies and by the veal farmers who use that type of milk. [21] As a result, the cost of these checks is much higher than that of checks on milk powder.

43. The Commission explains the difference in treatment on the ground that the skimmed-milk market has constantly diminished in recent years and the continuance of aid entails a high cost which is difficult to justify.

44. It seems that there is a tendency for skimmed milk to become less and less attractive. If the sector for that type of milk is to continue to receive aid when its share of the market is in constant decline,

18 — See p. 4 of the order for reference (French version).

19 — See p. 12 of Niemann's written observations (French version).

20 — Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 23; Joined Cases C-181/88, C-182/88 and C-218/88 *Deschamps and Others* [1989] ECR 4381, paragraph 18; Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 26; Case C-56/94 *SCAC* [1995] ECR I-1769, paragraph 27; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; *National Farmers' Union and Others*, cited above, paragraph 61; Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 81; and Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39.

21 — See paragraph 12 of the Commission's written observations (French version).

the aid system must be reviewed and adapted to the needs of that market.

45. I therefore consider that skimmed milk and skimmed-milk powder have objective differences which justify the Commission's application of different systems of aid to them.

46. In those circumstances I conclude that Regulation No 2799/1999 is valid with reference to Article 34(2) EC.

Infringement of the principle of the protection of legitimate expectations

47. In the order for reference the national court refers to the general principles of Community law and the principle of the protection of legitimate expectations in particular. I find that, in the actual grounds of the order for reference, there are reasoned arguments concerning only the validity of Regulation No 2799/1999 in the light of the principle of the protection of legitimate expectations. I shall therefore discuss the question of the validity of Regulation No 2799/1999 only in relation to that principle.

48. Niemann considers that that principle required the Commission to have provided for an adequate transitional period before the regulation, which provides for the abolition of aid for skimmed milk, entered into force.

49. I do not agree.

50. The Court has consistently held that the principle of the protection of legitimate expectations may be invoked as against Community rules only to the extent that the Community itself has previously created a situation which could give rise to a legitimate expectation. [22]

22 — Case C-177/90 *Kühn* [1992] ECR I-35, paragraphs 13 and 14; Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 19; Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 67; and Case C-179/00 *Weidacher* [2002] ECR I-501, paragraph 31.

51. In the sphere of the common organisation of the markets, whose purpose involves constant adjustments to meet changes in the economic situation, economic agents cannot legitimately expect that they will not be subject to restrictions arising out of future rules of market or structural policy.

52. In the present case there are two factors which must be borne in mind.

53. The first concerns Special Report No 1/99 of the Court of Auditors. [23] In an annex to this document the Commission states clearly that it intends to change the existing rules concerning aid for the skimmed milk sector. First, the Commission observes that in the framework of Agenda 2000 it presented a proposal for the amendment of Regulation No 1255/1999. [24] Secondly, the Commission very clearly calls into question the continuance of aid for skimmed milk because of the marginal importance of the product for the balance of the protein milk market (3% of the total subsidised volume of skimmed milk on the internal market). [25]

54. The second factor for consideration is the correspondence between the Commission and the relevant farmers' federations. It appears from the file that in August 1999 the Commission informed the German Farmers' Federation and the National Federation of Veal Farmers of its intention to abolish aid for liquid skimmed milk to be used for animal feed.

55. Consequently, the plea concerning breach of the principle of the protection of legitimate expectations must also be dismissed.

56. In view of the foregoing, the reply to the third part of the question must be that examination of it has revealed nothing which is capable of affecting the validity of Regulation No 2799/1999.

23 — Report concerning the aid for the use of skimmed milk and skimmed-milk powder as animal feed, accompanied by the Commission's replies (OJ 1999 C 147, p. 1).

24 — Ibid., paragraph 14.

25 — Ibid., paragraph 16.

Conclusion

57. Consequently, I propose that the Court reply as follows:

Examination of the question referred has revealed nothing capable of affecting the validity of Commission Regulation (EC) No 2799/1999 of 17 December 1999 laying down detailed rules for applying Regulation (EC) No 1255/1999 as regards the grant of aid for skimmed milk and skimmed-milk powder intended for animal feed and the sale of such skimmed-milk powder.