REPORT FOR THE HEARING
in Case C-28/91 *

I — Legislative background

1. In order to protect production within the Community, Council Regulation (EEC) No 1431/82 of 18 May 1982 laying down special measures for peas and field beans (OJ 1982 L 162, p. 28) established a system of aid for those products harvested in the Community and used in the manufacture of animal feed and human foodstuffs.

2. In order to facilitate the application of that scheme, the aid is not paid directly to producers. Pursuant to Article 3(3) and (4) of the regulation,

'3. Aid shall be granted only to operators using the said products in human foodstuffs or animal feed who:

— satisfy the conditions necessary to qualify for aid,

— guarantee that the producer has received not less than the minimum price.

The minimum price shall be fixed ...

4. Aid shall be paid by the Member State on whose territory processing into animal feed or human foodstuffs takes place.'

3. An Article 2a was added to Regulation No 1431/82 by Council Regulation (EEC) No 1485/85 of 23 May 1985 amending Regulation (EEC) No 1431/82 (OJ 1985 L 151, p. 7). That article provided for prices to be increased monthly, by an equal amount each month, for a period to be determined as from the beginning of the third month of the marketing year, and stipulated that the monthly increases would be fixed annually by the Council.

4. The basic rules for the special measures described above are set out in Council Regulation (EEC) No 2036/82 of 19 July 1982 adopting general rules concerning special measures for peas and field beans (OJ 1982 L 219, p. 1), as amended by Council Regulations (EEC) Nos 1734/84 of 18 June 1984 (OJ 1984 L 164, p. 3) and 1832/85 of 27 June 1985 (OJ 1985 L 173, p. 3); Commission Regulation (EEC) No 3540/85 of 5 December 1985 laying down detailed rules for the application of the special measures for peas, field beans and sweet lupins (OJ 1985 L 342, p. 1) was introduced subsequently.

5. Under those regulations, the granting of aid takes place in the following stages.

* Language of the case: German.

6. Pursuant to Article 4(1) of Regulation No 2036/82 as amended by Regulation No 1734/84, in cases where the products are sold by the producer, the first buyer, who is defined in Article 3(1) of the same Regulation, 'shall lodge a declaration of delivery with the agency appointed by the Member State in which the product is harvested.'

7. In that declaration, which includes the information specified in Article 3(3) of Regulation No 3540/85, the first buyer certifies, in accordance with Article 3(2) of Regulation No 2036/82 as amended by Regulation No 1832/85:

'— the quantity of products delivered by the producer and the date of delivery,

— the price conditions shown on the contract; these shall stipulate in particular, in cases where delivery is to take place during the period of monthly increments, a price not less than the minimum price valid at the start of the marketing year, plus an amount equal to the total of monthly increments applying in the month of delivery'.

8. Subsequently, pursuant to Article 4(2) of Regulation No 2036/82 as amended by Regulation No 1832/85,

'the agency appointed by the Member State, after verifying the content of the declaration, shall issue the first buyer with a certificate confirming that the producer has obtained at least the minimum price for the quantity he has delivered, adjusted as appropriate by the monthly increments referred to in Article 2a of Regulation (EEC) No 1431/82'.

Articles 5 and 6 of Regulation No 3540/85 specify details of the checks to be carried out by the agency appointed by the Member State.

9. Pursuant to Article 5 of Regulation No 2036/82,

'the aid shall be granted to any natural or legal person who uses the products provided that:

— he lodges an application and the certificate referred to in Article 4(2) with the agency appointed by the Member State on whose territory the product has been used,

— the quantity specified in the certificate has actually been used, after being placed under supervision, in the undertaking in which use took place'.

10. Article 6(5) of Regulation No 3540/85 provides for the following measures to be taken if the procedure is not followed in accordance with the rules:

'Should Member States discover that they have issued certificates of purchase at the minimum price for more than the actual

quantities involved, they shall recover the certificates for the excess quantities, or, if the certificates have been passed on, they shall require the first buyer to pay an amount equal to the highest aid applicable on the date the certificate was issued, multiplied by the excess quantity.'

II — Facts and procedure before the national court

11. It appears from the order for reference that in 1986 Helmut Haneberg GmbH & Co. KG (hereinafter 'Haneberg') bought a quantity of peas and that on 22 October and 3 November 1986 the Bundesanstalt für landwirtschaftliche Marktordnung (the Federal Office for the Organization of Agricultural Markets, hereinafter 'the BALM') issued the company with certificates of purchase at the minimum price in respect of 40 329 kg and 27 441 kg of peas respectively and paid the stipulated aid after the peas had been processed.

12. An inspection carried out by the BALM at the business premises of Haneberg in November 1987 revealed that only the basic minimum price of DM 68.29 per 100 kg had been paid for the quantities in question, but not the monthly increment of DM 0.43 per 100 kg.

13. Citing Article 6(5) of Regulation No 3540/85, the BALM by decision of 18 April 1988 required Haneberg either to produce the certificate of purchase at the minimum price or to pay a sum of DM 25 570.37.

14. Haneberg appealed against that decision to the Verwaltungsgericht (Administrative Court) Frankfurt am Main. Being of the opinion that the outcome of the case turned on the interpretation of Article 6(5) of Regulation No 3540/85, the Verwaltungsgericht decided, by order of 2 January 1991, to stay the proceedings and to put the following question to the Court of Justice for a preliminary ruling:

'1. Must Article 6(5) of Commission Regulation (EEC) No 3540/85 of 5 December 1985 (OJ 1985 L 342, p. 3) be interpreted as meaning that the certificate of purchase at the minimum price may be recovered even if the minimum price was not paid?

2. If so, may the certificate of purchase at the minimum price be recovered under Article 6(5) in respect of the whole quantity certified or does only the quantity remaining, after the price actually paid per 100 kg of goods delivered has been taken into account as the minimum price, count as the excess quantity?'

15. In the statement of reasons on which its order was based, the Verwaltungsgericht asks whether Article 6(5) of Regulation No 3540/85 is an appropriate legal basis for the contested decision of the BALM.

16. According to the Verwaltungsgericht, a strict interpretation of the wording of that

article suggests that the provision allows the recovery of certificates or a requirement for payment of a compensatory amount only in the case of a difference in quantities, in other words if the quantities delivered were less than those stated on the certificates.

17. However, in the opinion of the Verwaltungsgericht, the structure of that provision and an interpretation in accordance with its spirit and purpose seem instead to indicate that it should be applied to all cases in which the certificate of purchase at the minimum price has been wrongly issued, which may arise not only from a difference in quantity but also from the fact that the minimum price has not been paid. Were it otherwise, the authorities would have no possibility of taking action where, to the prejudice of the producer, the minimum price has not been paid.

18. In the opinion of the Verwaltungsgericht, if Article 6(5) can be considered as the appropriate legal basis, the question then arises as to the interpretation of the phrase '... they shall recover the certificates for the excess quantities'. If the minimum price has not been paid, the minimum price certificate may be regarded as having been wrongly issued in respect of the entire quantity, so that there are no 'actual quantities involved' within the meaning of the said regulation. Such an interpretation would, in the opinion of the Verwaltungsgericht, constitute a strict and hence effective penalty to ensure observance of the requirement to pay.

19. However, the Verwaltungsgericht considers that the excess quantity could be ascertained by calculating the quantity which might be regarded, on the basis of the sum paid, as having been purchased at the minimum price and that only the remaining quantity, which is very small in this case, should be considered as the excess quantity. This manner of proceeding would, in the opinion of the Verwaltungsgericht, take particular account of the principle of proportionality.

III — Procedure before the Court

20. The order for reference was received at the Court Registry on 28 January 1991.

21. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by Haneberg, represented by Barbara Festge, of the Hamburg Bar, and by the Commission of the European Communities, represented by Ulrich Wölker, of its Legal Service, acting as Agent.

22. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry and, pursuant to Article 95(1) and (2) of the Rules of Procedure, to assign the case to the Fourth Chamber. However, the Court asked the Commission to answer certain questions and the request was met within the time allowed.

IV — Written observations submitted to the Court

First question

23. *Haneberg* emphasizes by way of introduction that:

(a) The increment at the time in question amounted to DM 0.43 per 100 kg, in other words 0.64% of the fixed minimum price, which was DM 68.29. The non-payment of that increment was due to an excusable error on the part of Haneberg's accountant.

(b) Once the error had been brought to Haneberg's notice by the contested decision of the BALM, Haneberg paid the missing increment to the producer.

(c) Although Haneberg had omitted to pay the producer only 0.64% of the sum due, the entire amount of the aid which had been passed on to the producer in the form of the minimum price was recovered.

24. In Haneberg's opinion, the wording of Article 6(5) of Regulation No 3540/85 provides for the penalties mentioned therein to be imposed only if an excess quantity is shown in the certificate of purchase at the minimum price and not for failure to adhere to the minimum price. It considers that the reply to the first question must be in the negative.

25. In Haneberg's opinion, that strictly literal interpretation is corroborated by the following considerations.

26. The recovery of the certificate of purchase at the minimum price or, as in the present case, the demand for repayment of *the entire amount of the aid* would be a severe penalty out of proportion to the small amount which owing to an oversight was not paid. Furthermore, it is harsher than the penalty laid down in Article 6(5) of Regulation No 3540/85 in the case of differences in quantities. In any case, irrespective of the far more severe penalty imposed by the BALM, application of the said provision by analogy would not be permissible either, as Regulation No 3540/85 lays down penalties applicable to a specific case of non-compliance with the aid scheme without making any provision for restraining other infringements.

27. The fact that Article 6(5) applies only to irregularities with regard to the *quantity* indicated on the certificate of purchase at the minimum price also emerges, in Haneberg's opinion, from Commission Regulation (EEC) No 1561/90 of 7 June 1990 amending Regulation (EEC) No 3540/85 laying down detailed rules for the application of the special measures for peas, field beans and sweet lupins (OJ 1990 L 148, p. 9), whereby Article 4a was inserted into Regulation No 3540/85 following the amendment of Regulation No 2036/82 by Regulation No 1789/89. According to Haneberg, the new Article 4a introduces a penalty for non-payment or partial payment of the minimum price whereby the buyer pays the producer, and not the agency, an amount equal to twice the difference between the minimum price and the price actually paid in respect of the

quantity agreed and received. The fact that after abolishing the declaration of delivery the legislature considered it necessary to adopt Article 4a demonstrates that Article 6(5) applied and still applies only to an irregularity in respect of the quantity.

28. A rule such as that now laid down by Article 4a was not necessary at the time in question. The producer received a copy of the delivery declaration, which he also signed, and the contract mentioned in Article 4(1) of Regulation No 2036/82. From these he could therefore calculate without any doubt the amount he should receive from the first buyer. Hence he could and should have checked himself that the minimum price, plus any appropriate increments, had been adhered to.

29. Haneberg proposes the following reply to the first question:

'Article 6(5) of Commission Regulation (EEC) No 3540/85 of 5 December 1985 (OJ 1985 L 342, p. 1) must not be interpreted as meaning that a certificate of purchase at the minimum price may also be recovered if the minimum price has not been paid.'

30. The *Commission* observes that from the facts set out in the reference for a preliminary ruling it is not possible to establish whether the purchase contract or the delivery declaration stated the insufficient purchase price, whether the necessary checks were carried out before the certificate of purchase at the minimum price was issued or whether the certificate was produced before the aid was granted.

31. The *Commission*, like Haneberg, considers that the answer to the first question should be in the negative. That observation is also based on the wording of Article 6(5) of Regulation No 3540/85.

32. The Commission also considers, in contrast to the view of the Verwaltungsgericht, that the abovementioned provision cannot be applied by analogy, since it is perfectly possible to take action in cases in which the minimum price has not been paid.

33. In the Commission's opinion, the gradual legal effect provided for in the provision at issue in the main proceedings is appropriate in the event of differences as far as quantity is concerned: the first buyer must either return the certificate of purchase at the minimum price (so that it may be rectified and so that the correct aid may subsequently be paid) or pay an amount corresponding to the aid granted for the excess quantity. In that way the appropriate result would ultimately be achieved: the aid would be granted only for the quantity for which the essential objective had actually been achieved, that is to say for which the producer received the minimum price (including any increments).

34. According to the Commission, the interests involved are different if the price paid is less than the minimum price (plus any monthly increment). In that case the entire certificate of purchase at the minimum price

has been wrongly issued. As a consequence, repayment should be demanded.

35. According to the Commission, and in contrast to the view adopted by the court of reference, the recovery of aid thus incorrectly granted is not a penalty (to be imposed in accordance with the criterion of proportionality) but rather — in accordance with the judgment of the Court in Joined Cases 205 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633 — a duty of the Member States stemming from Article 8(1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ 1970 L 94, p. 13).

36. The Commission considers that the reply to the first question should be that Article 6(5) of Regulation No 3540/85 is not applicable in this case and suggests that the reply might be supplemented by citing paragraphs 2 and 3 of the operative part of the abovementioned judgment.

37. The Commission proposes the following reply to the first question:

'Article 6(5) of Regulation No 3540/85 is not applicable where it is only the obligation to pay the minimum price which has not been met.'

Second question

38. *Haneberg*'s view is that, by asking the second question, the court of reference seeks a reply in case Article 6(5) of Regulation No 3540/85 should be applicable by analogy.

39. Haneberg observes that the BALM demanded repayment of the entire amount of aid which had been paid to Haneberg. By contrast, in Haneberg's opinion Article 6(5) of Regulation No 3540/85 imposes a penalty only in relation to the quantity not delivered. Similarly, in Haneberg's view, the new Article 4a inserted by Regulation No 1561/90 also provides for a limited penalty, consisting in the payment of an amount equal to twice the difference between the minimum price and the price actually paid.

40. According to Haneberg, the legislature therefore considered that in order to attain the objective it was only appropriate and necessary that there be a penalty in proportion to the scale of the infringement concerning the special measures for peas, field beans and sweet lupins. Too severe a penalty in breach of those principles, as in this case, would be contrary to the principle of proportionality.

41. Haneberg considers, moreover, that such a sanction would also be contrary to the principle of equal treatment, since a person who by mistake has not paid the minimum price in full under the arrangements applica-

ble cannot be treated less favourably than one who does not take delivery of part of the quantity for which he has received aid.

42. According to Haneberg, the price actually paid for the quantities indicated in the delivery declaration and the certificate of purchase at the minimum price should be multiplied by the quantity delivered. The sum thus obtained should then be divided by the minimum price fixed by the regulation, including the increment. That would give the quantity for which the minimum price, including the increment, was paid. The difference between the quantity so calculated for which payment was made at the minimum price, including the increment, and the quantity actually delivered would then constitute the 'excess quantity' within the meaning of Article 6(5) of Regulation No 3540/85. That difference should in turn be multiplied by the amount of the highest aid applicable and the sum thus obtained should be paid by the applicant.

43. Haneberg proposes the following reply to the second question:

'Article 6(5) of Regulation No 3540/85 should be interpreted, in the context of application by analogy mentioned above, as meaning that account should be taken only of the excess quantity after the price actually paid per 100 kg of delivered produce has been taken into account as the minimum price.'

44. The *Commission* replies to the second question in the alternative. It observes that if the basis of the system of aid for legumes has not been complied with, that is to say if the minimum price for the total quantity has not been paid to the producer, repayment of the total amount of the aid should be demanded. Recalling that the recovery of aid incorrectly granted is not a penalty subject to the principle of proportionality, the Commission considers that a proportional solution (calculation of the quantity 'covered' by the full minimum price), as in the alternative envisaged by the national court, would not be compatible with that system. Finally, the Commission emphasizes that both solutions involve a degree of 'interpretative acrobatics' and therefore demonstrate again that Article 6(5) of Regulation No 3540/85, which was conceived to deal with differences of quantity, is not appropriate in cases involving differences in the level of prices.

V — Reply to the questions put by the Court

45. The Commission was asked to reply to the following questions:

'1. On page 7 of its observations, the Commission refers to the "gradual effect" of Article 6(5), in application of which the first buyer must surrender the certificate of purchase to the national agency so that the certificate may be corrected and the correct aid may subsequently be paid.

What is the "gradual effect" of Article 6(5) and how is that effect achieved?

2. How is Article 6(5) applied in practice?

(a) By replacing the recovered certificate by a fresh certificate showing the quantity actually due?

or

(b) As set out in Article 8(2) of Regulation No 3540/85?

3. The Commission acknowledges that if there is a difference between the quantity mentioned on the certificate and that actually due, the "gradual" legal consequence foreseen by Article 6(5) of Regulation No 3540/85 is appropriate. By contrast, according to the Commission, if the difference relates to the minimum price paid to the producer, the legal consequence of Article 6(5) is not appropriate.

What is the criterion justifying a more severe consequence in the second case?'

46. With regard to the first and second questions, the Commission's answer is that the expression 'gradual legal effect' is used only to summarize what is described on page 7 of its written observations as the consequence of the actual application of Article 6(5) of Regulation No 3540/85. It emphasizes that in practice the sequence of events is as follows: the first buyer returns the certificate of purchase at the minimum price, which is then corrected or replaced by a fresh certificate, or, if the aid has already been paid and the first buyer can no longer return the certificate for correction, the first buyer must pay or reimburse to the authority the amount corresponding to the aid granted on the quantity not delivered. In either case, the aid is ultimately granted only for the quantity actually delivered, and it is in that respect that the effect is 'gradual'.

47. In the Commission's opinion, application of Article 8(2) of Regulation No 3540/85 would achieve the same result as far as correction is concerned. However, if the certificate can no longer be produced, and hence cannot be corrected, the payment obligation stems solely from Article 6(5) of the regulation. That latter provision should, according to the Commission, be considered a *lex specialis* in relation to Article 8(2) should the quantity mentioned be inaccurate.

48. The Commission states that in its opinion Article 8(2), in the same way as Article 6(5), relates to inaccurate information in the sense that the certificate does not reflect the true position; if the quantity stated is incorrect, in reality the quantity delivered differs from the quantity mentioned on the certificate. The situation is different in the event of failure to adhere to the minimum price: in view of the fact that the certificate

of purchase at the minimum price (a form contained in Annex II to Regulation No 3540/85) does not state the price in figures, one cannot doubt the 'accuracy' of the stated price, within the meaning of Article 8(2). According to the Commission, it follows from the foregoing that neither Article 8(2) nor Article 6(5) of Regulation No 3540/85 applies to this case, where it is the minimum price which has not been adhered to.

49. As to the third question, the Commission observes that the system of aid for legumes is based on adherence to the minimum price (including monthly increments); otherwise, it would be impossible to achieve the objective of the 'special measures', which consists in ensuring a fair return for producers (see the fifth recital to Regulation No 1431/82 and the third recital to Regulation No 1561/90). It is true that the aid is paid to the first processor, but it must indirectly benefit the producer. In order for this to be the case, aid is granted only upon production of the certificate of purchase at the minimum price showing that the producer has obtained at least the minimum price (with the increment where appropriate).

50. According to the Commission, if Article 6(5) of Regulation No 3540/85 were to be applied by analogy to cases in which the difference related to the price — an incorrect interpretation, in the Commission's opinion — and hence if it were inferred from that provision that the legal effect must be 'gradual' as in cases where the difference relates to the quantity, that would to a large extent remove the protection afforded to the producer, who moreover is generally in a position of economic weakness in relation to the buyer and processor. If the certified and delivered quantity were simply reduced notionally to the quantity 'covered' by the full minimum price, that would only have the consequence, according to the Commission, of reducing the aid in proportion or making the buyer pay the difference to the producer. It follows that there would be a great temptation — without presuming such an intention in this case — to attempt to reduce the minimum price in any event, as it is far from certain that the difference would always be discovered.

51. In the Commission's opinion, a 'gradual' effect such as that produced by Article 6(5) of Regulation No 3540/85 would therefore not be sufficient to achieve the objective sought. Consequently, according to the Commission, it is not conceivable to apply that provision by analogy. In the Commission's view, the only possibility is therefore the one set out in detail in its written observations, namely to consider that the entire aid has been wrongly paid, which would give rise to recovery in accordance with the rules of national law. The Commission again emphasizes that that would not be by way of a penalty and that it would in any case not amount to an obligation to repay the entire sum.

C. N. Kakouris
Judge-Rapporteur