OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 22 November 1989 *

My Lords,

1. This reference for a preliminary ruling raises questions concerning the validity and interpretation of provisions of Community legislation on the grant of special aid for the use of skimmed milk as animal feed. The reference has been made in the context of a dispute relating to a claim for reimbursement of the special aid.

The Community legislation

2. Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) provides in Article 10 for the grant of aid for skimmed milk manufactured in the Community for use as animal feed. Under Article 10(2), the Council is to adopt general rules governing the aid and in particular the conditions under which the aid may be granted. Under Article 10(3), the Commission is to lay down detailed rules for the application of that article. Council Regulation (EEC) No 986/68 of 15 July 1968 lays down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260). Initially, the level of aid for skimmed milk for use as feed under Regulation No 986/68 was such that the skimmed milk was used only for the feeding of calves. However, in 1977, faced with increased intervention buying as a result of growing surpluses of milk and milk products, the Council decided to introduce an incentive to encourage the use of skimmed milk in order to feed animals other than calves. Accordingly, Council Regulation (EEC) No 876/77 of 26 April 1977 (Official Journal 1977, L 106, p. 24) amended Regulation No 986/68 by introducing a special, i.e. higher, aid for skimmed milk used for feeding animals other than young calves.

3. Controls were necessary in order to ensure that skimmed milk qualifying for special aid was used for the purpose intended and not, for instance, used to feed calves. To that end, Commission Regulation (EEC) No 2793/77 of 15 December 1977 on detailed rules for granting special aid for skimmed milk for use as feed for animals other than young calves (Official Journal 1977, L 321, p. 30) provides in Article 3(1)(a) that the special aid shall be granted to a dairy only in respect of skimmed milk covered by an undertaking on the part of the farmer which satisfies the conditions of Article 4 of the regulation. According to Article 4(1)(b) second indent, in the case of a specialized farm (i.e., a farm on which in principle only animals

* Original language: English.

other than young calves are kept), the farmer's undertaking includes the commitment:

'... to forward to the dairy, before the beginning of each quarter, a statement of the size of his herd ...'

4. With a view to making the management of the special aid system simpler, Commission Regulation (EEC) No 1438/79 of 11 July 1979 (Official Journal 1979, L 175, p. 23) amended the second indent of Article 4(1)(b) of Regulation No 2793/77 by providing that, with effect from 1 January 1980, the farmer was to undertake to forward to the dairy, at the option of the Member State concerned, either a statement of the herd before the beginning of each calendar quarter, as previously, or, before the beginning of each calendar year, a statement of the average herd to be kept on the farm during each quarter of the year in question (Article 1(3)). Commission Regulation (EEC) No 188/83 of 26 January 1983 (Official Journal 1983, L 25, p. 14), which entered into force on 30 January 1983, further amended Article 4 of Regulation No 2793/77 by adding a new paragraph 3 providing that:

'Where a statement made to a dairy of the size of a herd or the maximum number of calves is not forwarded on time but not more than 10 days late, the amount of aid shall be reduced by 10% for the period concerned.'

5. Under Article 5(3) of Regulation No 2793/77, an application for payment of special aid submitted by the dairy to the competent authority shall be accompanied by a declaration that the dairy:

'...

(b) will, as appropriate, forgo or repay the special aid wholly or in part to the competent authority if it is found that the farmer has not abided by one of the undertakings referred to in Article 4;

...'

Article 5(4) provides that:

'The undertaking referred to in Article 4 shall remain valid for the whole period during which skimmed milk qualifying for special aid is supplied to the farmer concerned.'

6. The Community legislation concerning special aid has already been considered by the Court in several judgments: see Joined Cases 187 and 190/83 *Nordbutter* v *Germany* [1984] ECR 2553, Case 9/85 *Nordbutter* v *Germany* [1986] ECR 2831, and the judgment of 16 November 1989 in Case C-333/87 *Germany* v *Commission* [1989] ECR 3773.

The background to the case

7. In 1979 and 1980, Butterabsatz Osnabrück Emsland ('Butterabsatz'), which operates a dairy at Beesten (Lower Saxony),

applied for the grant of special aid to the Bundesamt für Ernährung und Forstwirtschaft (Federal Board for Food and Forestry — 'the Bundesamt'), which is 'the competent authority' in the Federal Republic of Germany for the purposes of the relevant Community legislation, and received aid totalling some DM 6.5 million for the period from September 1979 to September 1980. However, in July 1980 the Bundesamt carried out an inspection at the premises of Butterabsatz in relation to the period September 1979 to May 1980 inclusive, and found that five pig-breeders to whom the dairy had supplied skimmed milk had not forwarded the necessary statements as to herd size, in writing and using the prescribed forms, before the beginning of each calendar quarter. Specifically, as appears from the case file, the inspection revealed that one of the farmers had not submitted any statements in respect of the relevant period; three had not submitted statements in respect of the first two quarters of 1980, and one had not submitted a statement in respect of the second quarter of 1980. None of the five farmers had forwarded the statement in respect of the third quarter of 1980 which was due before 1 July 1980. It appears from the order for reference and the case file that in the course of the inspection, which lasted from 3 to 30 July 1980, the dairy drew up and forwarded the missing statements as to herd size on the basis of information supplied by the farmers by telephone. A further inspection carried out in June 1981 and relating to the period June 1980 to May 1981 found that the necessary statements in respect of the fourth quarter of 1980 and the first quarter of 1981 had been duly forwarded to the dairy. The inspections did not reveal any breach of the fundamental requirements of the aid scheme, namely the requirement that the skimmed milk be used to feed animals other than young calves.

8. By notices dated 25 June and 9 November 1981 the Bundesamt demanded the repayment by Butterabsatz of some DM 141 000 representing the whole of the special aid granted in respect of sales to the five farmers in question during the periods in respect of which quarterly statements had not been forwarded.

9. Butterabsatz brought an action challenging the greater part of the demands for repayment (some DM 135 000) and at first instance the Verwaltungsgericht (Administrative Court) of Frankfurt am Main, by judgment of 19 May 1983, upheld the application on the ground that while the Community legislation required the farmer to undertake to supply the dairy with a statement as to herd size, it did not expressly make compliance with that undertaking a condition of the payment of aid to the dairy. It appears from the case file that the Verwaltungsgerichtshof (Higher Administrative Court) Hesse, by judgment of 9 June 1986, upheld the Bundesamt's appeal as regards the first demand for repayment, which related to aid granted in the period from October to December 1979. However, it dismissed the appeal as regards the second demand, relating to the period from January to September 1980, on the ground that, since at that time the Federal Republic had not made a valid choice between quarterly and yearly statements as provided for in Regulation No 1438/79, a legal vacuum had arisen, and farmers were relieved of the obligation to supply quarterly statements from 1 January 1980. In that context, the Verwaltungsgerichtshof had regard to a Circular 6/1979, dated 5 November 1979, which was drawn up and sent by the Bundesamt to the dairies participating in the aid scheme. That circular described the effects of Regulation No 1438/79 and *inter alia* informed the dairies that for the time being there was no intention of making use

of the possibility, provided by that regulation, of extending the time-limit for the forwarding of statements of herd size. The Verwaltungsgerichtshof ruled that while the circular was clearly intended to represent an exercise of the option, it did not amount to a valid exercise because the Bundesamt was not competent to make the choice; moreover, the circular was not in the appropriate legal form and had not been communicated to the persons most directly concerned, i.e. the pig farmers.

10. Faced with an appeal and cross-appeal on points of law, the Bundesverwaltungsgericht (Federal Administrative Court) referred to this Court the following questions:

'(1) Is Article 5(3)(b) of Commission Regulation (EEC) No 2793/77 of 15 December 1977 invalid in so far as it provides that it is a condition for the grant of special aid that a dairy applying for special aid shall submit a declaration that it will repay the special aid if a farmer has not abided by one of the undertakings under Article 4, on the grounds that the Commission was not empowered by Article 10(3) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 to adopt a substantive provision such as that?

(2) Is Article 5(3)(b) of the aforesaid Regulation (EEC) No 2793/77 invalid in so far as it provides that a dairy applying for special aid must submit a declaration that it will repay the special aid if a farmer has, *inter alia*, failed to abide by the undertaking given pursuant to the second indent of Article 4(1)(b) to supply before the beginning of each quarter a statement of the size of his herd, on the grounds that it infringes the principle of proportionality inasmuch as the dairy must undertake to repay in its entirety the special aid in respect of the farmer and calendar quarter in question even when the farmer has only slightly exceeded the prescribed period for the statement (by a few days) and it is established that he has duly used the subsidized skimmed milk as animal feed?

(3) Is Article 1(3) of Commission Regulation (EEC) No 1438/79 of 11 July 1979 to be interpreted as meaning

(a) that the obligations imposed on a farmer until 31 December 1979 by the second indent of Article 4(1)(b) of Regulation (EEC) No 2793/77 to supply a statement of the size of his herd every quarter lapsed on 1 January 1980, or

(b) that those obligations on the farmer's part continue to exist beyond 31 December 1979 and until such time as the Member State in question has made its choice between quarterly and yearly statements as to herd size?

(4) Is the first sentence of Article 5(4) of Regulation (EEC) No 2793/77 to be interpreted as meaning

(a) that the term "undertaking referred to in Article 4" means the obligations imposed on farmers by Article 4 as revised from time to time, or

(b) that the commitments contained in farmers' undertakings given prior to 1 January 1980, and in particular the commitment to supply quarterly statements as to herd size, should remain valid even when the underlying obligations on the part of the farms, set out in Article 4, are altered or lapse as a result of subsequent amendments to Article 4 — in this case, by Article 1(3) of Regulation (EEC) No 1438/79?'

The first question

11. The first question is concerned with the validity of the rule in Article 5(3)(b) of Regulation No 2793/77 that an application for special aid must be accompanied by a declaration that the dairy will forgo or repay the aid if it is found that the farmer has not abided by one of the undertakings referred to in Article 4 of that regulation, and asks whether the Commission, in imposing such a requirement, exceeded the powers granted to it by Article 10(3) of Regulation No 804/68 to adopt detailed rules for the application of the aid system.

12. As regards the Commission's powers to adopt Article 5(3)(b), Butterabsatz argues that it is for the Council to lay down the conditions for the grant of the special aid and that by in effect imposing a new, supplementary condition for the grant of the aid the Commission has exceeded its powers to adopt implementing measures. At the hearing, counsel for Butterabsatz also pointed out that Council Regulation (EEC) No 2128/84, which came into force on 29 July 1984, (Official Journal 1984, L 196, p. 6) had amended Regulation No 986/68 by providing (in Article 3(2) second subparagraph of the amended regulation) that: 'if necessary, additional conditions for the payment of the aid may be laid down in accordance with the procedure provided for in Article 30 of Regulation No 804/68' (i.e. in accordance with the management committee procedure). In the view of Butterabsatz, the implication is that a power to lay down additional conditions did not exist previously.

13. In my opinion, these arguments cannot be accepted. As the Bundesamt and the Commission point out, according to the established case-law of the Court, the concept of implementation within the meaning of Article 155 of the Treaty must be given a wide interpretation (see, in particular, Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279). In exercising its powers of implementation in the context of an agricultural market the Commission is authorized to adopt all the measures which are necessary or appropriate for the implementation of the basic Council legislation, provided that those measures do not conflict with that Council legislation or with implementing legislation adopted by the Council (see Case 121/83 *Zuckerfabrik Franken* v *Hauptzollamt Würzburg* [1984] ECR 2039, and the judgment of 14 February 1989 in Case 13/88 *Knoeckel* v *Hauptzollamt Landau* [1989] ECR 337).

In a recent example of this line of case-law the Court ruled that a requirement in a Commission regulation that the beneficiaries of a production aid should keep stock accounts as a condition of receipt of the aid formed part of a system of control and proof which was necessary to ensure the proper functioning of the aid system in question (judgment of 18 October 1988 in Case 121/87 *Bayernwald Früchteverwertung GmbH* v *Federal Republic of Germany* [1988] ECR 6273, paragraphs 21 and 22).

14. In the present case, it is clear that the requirement that the dairy submit the declaration forms part of a series of controls intended to prevent the abuse of the system of special aid and that the requirement can therefore properly be regarded as necessary or appropriate to the proper functioning of that system. Equally, there is no suggestion that that requirement conflicts with the relevant Council legislation.

15. Nor, in my view, does the conferment on the Commission, by Regulation No 2128/84, of an express power to adopt 'additional conditions' alter this position. Regulation No 2128/84, which applied only until the end of the 1985/86 milk marketing year, introduced a differentiated system of aid for skimmed-milk powder used in the manufacture of compound feedingstuffs in place of the single aid which had existed previously. To take account of this expansion of the aid scheme, it replaced Articles 2, 2a and 3 of Regulation No 986/68. The recitals of Regulation No 2128/84 do not explain the purpose of the power to adopt additional conditions, but since the regulation is entirely concerned with the new, differentiated system of aid for skimmed-milk powder, it appears probable that the object of the power was to enable the Commission to adopt conditions of a substantive nature specifically in relation to that differentiated system of aid. If the Council had thought it necessary to confer on the Commission an express power to make compliance with control measures a condition of receipt of aid under Regulation No 986/68, it would presumably not have waited until 1984 to do so. Moreover, if it had thought that such an express delegation of power was necessary, it would have retained the express power conferred by Article 3(2) of Regulation No 986/68 when Regulation No 2128/84 lapsed at the end of the 1985/86 marketing year and Articles 2, 2a and 3 of Regulation No 986/68 reverted to their previous wording.

The second question

16. The second question is also concerned with the validity of Article 5(3)(b) of Regulation No 2793/77 and asks whether that provision is compatible with the principle of proportionality in so far as it could result in the dairy being required to repay the whole of the aid in respect of the farmer and calendar quarter in question even if the farmer is only a few days late in submitting the quarterly statement of herd size and even if he has duly used the skimmed milk for the purpose intended by the legislation.

17. Two preliminary points need to be made in regard to this question. The first is that the whole issue of proportionality can only be seen as relevant in relation to the statements of herd size for the third quarter of 1980 which were outstanding when the Bundesamt commenced its inspection of the

dairy's premises on 3 July 1980: the missing statements in respect of earlier calendar quarters had clearly at that point in time been overdue for months rather than just 'a few days'. Secondly, the precise extent of the delay in relation to the submission of the statements for the third quarter of 1980 is not apparent from the case file and was not clarified at the hearing. In this respect the essential finding of fact is lacking.

18. The precise extent of the delay is also crucial to the possibility of the retroactive application of Regulation No 188/83, which amends Regulation No 2793/77 by providing for a 10% reduction in the amount of the aid where the statement is forwarded not more than 10 days late. According to Article 2 of Regulation No 188/83, the possibility of a reduced entitlement to aid can be invoked, at the request of the applicants, in respect of 'applications for aid already submitted under Regulation No 2793/77'. In the Commission's view, it should be possible for the aid applications at issue in the present case to benefit from that provision, since, in view of the dispute as to recovery, they had not resulted in a final decision at the time of the entry into force of Regulation No 188/83. The Court has not been asked to rule on this question, and it will be for the national court to determine whether Butterabsatz can rely on Regulation No 188/83 in this case: in any event, as already indicated, the possibility of invoking a reduced entitlement to aid by virtue of that regulation is relevant in relation only to the statements for the third quarter of 1980, and then only if those statements are found by the national court to have been forwarded within 10 days of the due date, i.e. 1 July 1980.

19. This Court is thus asked to rule on the somewhat hypothetical question whether, on the assumption that the statements for the third quarter of 1980 were forwarded only 'a few days' late, and that the dispute, in so far as it relates to those statements, cannot be resolved by the retroactive application of Regulation No 188/83, the loss of the whole aid in relation to the period covered by those statements was compatible with the principle of proportionality.

20. Before answering that question, it is in my view necessary to define more precisely the notion of 'a few days" delay as referred to by the national court. In my opinion, that notion, for the purposes of this case, must be understood to mean a delay of up to 10 days. It is of course correct that the 10-day period of grace was not introduced until the adoption of Regulation No 188/83. However, when called upon to decide upon the compatibility of that very 10-day rule with the principle of proportionality, the Court in Case 9/85 *Nordbutter* v *Germany*, already cited, found that the loss of the full amount of the special aid was not incompatible with the principle of proportionality where, in the context of mixed farms, the relevant declarations required by the same legislation were made more than 10 days late. In my view, the implication must be that, even in relation to events which took place before the adoption of Regulation No 188/83, the maximum extent of the permissible delay must be taken to be 10 days.

21. I turn then to the proportionality of the provisions, contained in the original version of Regulation No 2793/77, to the effect

that the whole of the aid was to be forfeited where statements of herd size were not submitted by the due date. According to the established case-law of the Court, in order to determine whether a provision of Community legislation infringes the principle of proportionality, it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation establishes a distinction between a primary obligation, compliance with which is necessary to attain the objective sought, and a secondary obligation, essentially of an administrative nature, that legislation cannot, without breaching the principle of proportionality, penalize failure to comply with the secondary obligation as severely as failure to comply with the primary obligation (see, for example Case 240/78 *Atalanta* v *Produktschap voor Vee en Vlees* [1979] ECR 2137, and Case 181/84 *E. D. F. Man (Sugar) Ltd* v *Intervention Board for Agricultural Produce* [1985] ECR 2889).

22. In terms of the overall scheme of the relevant Community legislation in this case, the farmer's obligation, in Article 4(1)(b) of Regulation No 2793/77, to submit advance quarterly statements as to herd size must be seen as an obligation of a secondary, administrative nature designed to ensure the proper functioning of the scheme and in particular to avoid abuse; yet in the original version of the regulation, even a minor breach of that obligation attracted, by virtue of Article 5(3)(b), the same sanction as the breach by the farmer of the other, more fundamental obligations contained in Article 4, such as, in the case of specialized farms, the obligations not to keep young calves and to use the skimmed milk as feed for animals other than calves. I am therefore of the opinion that Article 5(3)(b) of Regulation No 2793/77, before the amendment, with effect from 30 January 1983, of Article 4 of Regulation No 2793/77 by Regulation No 188/83, was invalid to the extent that it resulted in the forfeiture by the dairy of the whole sum of the aid in respect of the farmer and calendar quarter in question, in a case where the farmer only slightly exceeded the deadline for submission of the statement (by a period not exceeding 10 days) and where there was no doubt that the primary obligations of the scheme had been complied with.

23. In my view the disproportionate character of the original provision is implicitly confirmed by the introduction of a provision for partial forfeiture in Regulation No 188/83, and by the judgment in Case 9/85 *Nordbutter* v *Germany*, cited above, where the Court found that the Community rules as modified 'take into account the considerable disadvantage represented by the loss of the entire aid where the time-limits prescribed have been exceeded only slightly' (at paragraph 17 of the judgment).

24. For the sake of completeness, I would add that if some or all of the statements of herd size for the third quarter of 1980 are found by the national court to have been submitted within 10 days of the due date, and if a retroactive application of Regulation No 188/83 is not found to be possible, then the dairy will be entitled to the full amount of the aid in respect of the statements in question.

The third and fourth questions

25. The third and fourth questions are concerned with the legal consequences of the introduction by Regulation No 1438/79 of a choice between requiring farmers to supply statements on a quarterly basis, as before, or on an annual basis. The third question in effect asks whether, where the Member State failed to exercise the option by 1 January 1980, the farmer's obligation to supply quarterly statements of herd size lapsed, or whether that obligation continued in force until such time as the Member State made its choice. Question 4 is essentially concerned with the impact of Regulation No 1438/79 on a pre-existing obligation on the part of the farmer to supply quarterly statements: does the farmer's obligation remain the same or must it be viewed as automatically modified in the light of changes to the obligations set out in Article 4 of Regulation No 2793/77?

26. Both questions appear to assume that the relevant Member State, the Federal Republic of Germany, did not exercise its option between quarterly and annual statements before 1 January 1980. In this context, it will be recalled that the Verwaltungsgerichtshof in its judgment of 9 June 1986 in the course of the national proceedings took the view that the Bundesamt circular of 5 November 1979, stating that it intended to retain the system of quarterly controls of herd size, did not amount to a valid exercise of the choice granted by Regulation No 1438/79. This Court has not been asked to rule on that question, and it is therefore for the national court to decide on the status and effect of the circular. However, the issue appears in any event somewhat irrelevant since, even if no valid choice was made as of 1 January 1980, there is nothing in the terms of the regulation to suggest that a legal vacuum arose as regards the farmer's obligation to submit statements of herd size. As the Commission points out, to suggest that the farmer's obligations lapsed would amount to removing an important aspect of the controls on the proper functioning of the aid scheme. The answer to the third question must therefore be that the obligation to submit quarterly statements continued unless and until the Member State chose to go over to a different system.

27. In the light of the above, an answer to question 4 appears unnecessary. If the circular amounted to a valid exercise of the Member State's choice, then there was no change in the legal situation of the German farmers affected by the aid scheme. However, even if the circular was not valid, there was, as already stated, no question of a legal vacuum arising as a consequence of the coming into force of Regulation No 1438/79, so that the farmer's undertaking to supply quarterly statements continued as before.

28. Accordingly I would give the following answers to the questions referred by the Bundesverwaltungsgericht:

'(1) Article 5(3)(b) of Commission Regulation No 2793/77, in the version of the regulation in force before 30 January 1983, must be regarded as invalid on the ground that it infringed the principle of proportionality in so far as it provided that a dairy applying for special aid had to repay the whole of the special aid in respect of the farmer and calendar quarter in question if a farmer had failed to abide by the undertaking given pursuant to the second indent of Article 4(1)(b) to supply before the beginning of each quarter a statement of the size of his herd, even if the farmer had only slightly exceeded the prescribed period for the statement (by 10 days or less) and it had been established that the farmer had otherwise complied with the obligations of the special aid scheme.

(2) Consideration of the questions raised has not disclosed any other factor of such a kind as to affect the validity of Article 5(3)(b) of Commission Regulation No 2793/77.

(3) Article 1(3) of Commission Regulation No 1438/79 of 11 July 1979 must be interpreted as meaning that the obligation imposed on a farmer by the second indent of Article 4(1)(b) of Regulation No 2793/77 to supply a statement of the size of his herd every quarter continues to exist beyond 31 December 1979 and until such time as the Member State in question has made its choice between quarterly and yearly statements as to herd size.'