OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 13 December 1991 *

Mr President,
Members of the Court,

1. The firm Otto Pressler, the applicant in the main proceedings, had 23 028 litres of table wine distilled for it in the wine-growing year 1986/87 on the basis of a distillation declaration approved on 9 June 1987 by the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry, hereinafter referred to as 'the Bundesamt'). On 27 July 1987 the applicant submitted a written request for aid together with a customs certificate stating the distillation had been carried out in conformity with the approved distillation declaration.

During a subsequent inspection the Bundesamt noted that the declaration of stock of grape must had not been submitted before 7 September but only on 11 September 1986 and therefore refused to grant the aid requested.

It is common ground between the parties that the applicant fulfilled all the obligations under Article 41(8) of Council Regulation (EEC) No 822/87 of 16 March 1987 [1] on the common organization of the market in wine, in conjunction with Commission Regulation (EEC) No 603/87 of 27 February 1987, [2] and that he would therefore be entitled to aid in the sum of DM 22 871.24 under Article 9 of Regulation No 603/87.

This right is lost, however, by virtue of Article 10a of Commission Regulation (EEC) No 2102/84 of 13 July 1984 on harvest, production and stock declarations relating to wine-sector products, [3] as amended by Commission Regulation (EEC) No 2459/84 of 20 August 1984, [4] since that article provides that persons required to submit the stock declarations provided for in Article 4 of the regulation are not to qualify for the benefit from the measures provided for by, *inter alia*, Article 15 of Regulation (EEC) No 337/79 [5] if they do not submit such declarations by the dates specified in Article 5(3), that is to say, by 7 September.

The objection raised by Otto Pressler against the refusal of aid was rejected by the Bundesamt on 4 January 1988. Pressler then brought an action before the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main) for the annulment of the decision of refusal. That court stayed the proceedings in order to refer to the Court of Justice a question on

* Original language: Italian.

1 — OJ 1987 L 84, p. 1.

2 — OJ 1987 L 58, p. 53.

3 — OJ 1984 L 194, p. 1.

4 — OJ 1984 L 231, p. 5.

5 — OJ 1989 L 54, p. 1. The rules laid down in Article 15 of Regulation No 337/79 were replaced by those laid down in Article 41 of Regulation (EEC) No 822/87, on the basis of which the applicant requests aid.

the validity of Article 10a of Regulation No 2102/84 in the light of the principle of proportionality.

2. The Commission dismissed the doubts raised by the national court, pointing out that Article 10a of Regulation 2102/84 may not be regarded as a provision that prescribes a penalty. It recalls that the Court, in its judgment in Case C-217/88,[6] held that a similar provision, namely Article 6(1) of Regulation No 337/79, which excludes producers from various voluntary measures if they fail to comply with the obligation to deliver the table wine for compulsory distillation, did not constitute a sanction but merely set out a condition for eligibility for certain intervention measures provided for by the regulation.

Although the Commission agrees that the provision in question resembles a penalty inasmuch as it attaches an unfavourable legal consequence to the breach of an obligation, it points out that according to the case-law of the Court there can truly and properly be said to be a penalty, to which a strict criterion of proportionality can be applied, only if the measure adversely affects an already existing right or at least a legitimate expectation.

3. I must admit that I find it difficult to draw a precise distinction between provisions which lay down conditions or obligations the breach of which may entail unfavourable legal consequences for the person concerned and provisions which prescribe the refusal of a benefit in regard to which he has a legitimate expectation, the latter provisions being said to constitute penalties in the strict sense of the term?[7]

I do not consider, however, that a solution to this problem is essential for the purposes of the present case, since it does not seem to me that in the case-law of the Court the two situations mentioned above are approached differently. The Court has in fact carried out its own rigorous review, in the light of the principle of proportionality, not only with respect to provisions which provide for the loss of a right or for prejudice to a legitimate expectation of the person concerned, but also in relation to those duties failure to comply with which precludes the obtaining of a benefit.

In *RU-MI* [8] and *Société Laitière de Gacé*,[9] the Court examined the question, which moreover it answered in the affirmative, whether the Community provisions prescribing the withholding of aid for failure to comply with the *conditions for processing* certain products were in conformity with the principle of proportionality.

6 — Judgment in *Commission* v *Federal Republic of Germany* [1990] ECR I-2879, paragraph 18.

7 — That the dividing line between the two is not particularly clear is evident from the fact that in *Commission* v *Federal Republic of Germany*, cited above, Advocate General Jacobs described the measures in question as penalties and that Commission Regulation No 2459/84, which inserted Article 10a into Regulation 2102/84, mentions in the third recital in the preamble, the need to provide for penalties to apply in the event of failure to submit a declaration or where a declaration is incorrect or incomplete.

8 — Judgement in Case 272/81 [1982] ECR 4167.

9 — Judgment in Case 273/81 [1982] ECR 4193.

A like examination was undertaken by the Court in *Denkavit Nederland* [10] with respect to provisions which required compliance with special forms of administrative supervision before aid could be paid.

In the later case of *Denkavit France*, [11] in which the setting of a peremptory time-limit for the submission of applications for the payment of monetary compensatory amounts was disputed, the Court, while accepting that the barring of claims on the ground that the requisite documents have been submitted out of time is not a penalty but, as a general rule, the normal consequence of the expiry of any prescribed period the observance of which is mandatory, nevertheless considered whether such a provision was necessary and corresponded to the importance of the aim pursued.

More recently, in *Hopermann I* [12] and *Hopermann II*, [13] the Court reviewed the validity of provisions under which failure to observe a time-limit for lodging the application for aid or for completing certain operations before so doing resulted in loss of entitlement, and held that such provisions were in conformity with the principle of proportionality, but only inasmuch as observance of the prescribed time-limits was found to be *essential for the proper functioning* of the scheme of aids.

4. It seems to me to emerge with sufficient clarity from this case-law that, in general, provisions entailing disadvantageous legal consequences for the person concerned must conform to the principle of proportionality.

In that context the fact, to which the Commission too refers, that the contested provision does no more than exclude the person concerned from the benefit of a measure to which effect had not yet been given at the time of the failure to comply with the obligation does not appear to be of decisive significance. It does not seem to me that the injurious nature of a provision disappears or is in some way attenuated by denying to a person the possibility of making use of future advantages which are as yet only loosely defined but whose possible adoption is expressly provided for.

We must now consider whether the provision forming the subject of the preliminary question conforms to the principle of proportionality, according to which a provision must not exceed what is appropriate and necessary to attain the objective sought and, more particularly, the means which it uses to achieve the objective be in keeping with the importance of the objective itself and necessary for its attainment. [14]

5. A brief description of the system of intervention in the wine sector will help to make more comprehensible the scope of the contested provision.

10 — Judgment in Case 15/83 [1984] ECR 2171.

11 — Judgment in Case 266/84 ECR [1986] 149.

12 — Judgment in Case C-357/88 [1990] ECR I-1669.

13 — Judgment in Case C-358/88 [1990] ECR I-1687.

14 — See most recently the judgment in *Italtrade*, Case C-199/90 [1991] ECR I-5545, paragraph 12; the judgment in *Philipp Brothers*, Case C-155/89 [1990] ECR I-3265, paragraph 34; the judgment in *Lingenfelser*, Case C-118/89 [1990] ECR I-2637, paragraph 12.

The essential point of reference for the intervention measures is the forward estimate, which must be established before 10 December each year and which includes an indication of the stocks of wine and grape must (Article 31 of Regulation No 822/87). These data are then used to decide the aid to be granted for storage (Article 32 of Regulation 822/87), which forms the basis for the granting of aid for the re-storage of wines (Article 34 of Regulation No 822/87) and aid for distillation as provided for in Article 42 of Regulation 822/87.

On the basis of the forward estimate and the production and harvest declarations which Member States are required to submit before 15 February it is then decided, before 28 February, whether it is necessary to proceed to compulsory distillation (Article 39), and this decision in turn determines the automatic opening of 'support' distillation provided for in Article 41 of the regulation, in respect of which the applicant in the main proceedings had requested payment of the aid.

As indicated above, observance of the 10 December time-limit, the date by which the Commission must draw up the forward estimate, constitutes an important point of reference for ensuring the proper functioning of the system. To this end Regulation (EEC) 2102/84, on the one hand, requires the traders concerned to declare to the competent national authorities by 7 September the stocks of concentrated grape must and wine held by them on 31 August (Article 5(3)) and, on the other hand, provides that the Member States are to communicate those particulars to the Commission before 30 November (Article 8(3)).

The choice of the date of 7 September, to the non-observance of which the contested provision in the present case attaches the consequence of disqualification from the benefit of a number of measures provided for by Community legislation, was determined, as the Commission explained, by the twofold need to obtain reliable information at a date as close as possible to 31 August, the end of the marketing year, and to allow the national authorities sufficient time to gather, process and transmit the declarations.

6. From the legislative background outlined above it appears that there does indeed exist a link between voluntary participation in a measure within the context of the common organization of the market in wine and the submission of the stock declarations, inasmuch as the declarations enable the Commission to judge the market situation and adopt the necessary measures. It also appears evident that it is necessary to set time-limits for the submission of the declarations in order to ensure the orderly application of the intervention measures.

Nevertheless, if it is borne in mind that the time-limit of 7 September has already been set very near to the close of the marketing year and that this also allows the national authorities over 80 days to collect, process and forward the data to the Commission, it does not seem to me that the aim of ensuring that the Commission receives timely and reliable information could in any way be impaired by slightly exceeding the time-limit for the submission of the stock declarations.

It should also be noted that the excessive rigour of Article 10a(1) of Regulation (EEC) No 2102/84 does not sit well with the provisions of the following paragraph, according to which persons who are required to submit harvest, production or stock declarations and who submit declarations found to be incomplete or incorrect by the competent authorities of the Member States may benefit from the measures provided for in Regulation (EEC) No 337/89 (replaced by Regulation (EEC) No 822/87) only if the missing or incorrect particulars are not essential to the proper application of the measures in question.

It should be pointed out, finally, that, although the most recent case-law shows the traditional distinction between principal and secondary obligations to have been surpassed, inasmuch as, in regard to the former, it is considered whether the means employed are appropriate to attain the objective pursued and whether or not they go beyond what is necessary to do so,[15] in the present case the obligation to submit stock declarations in good time represents a secondary obligation in relation to the principal obligation to distil, to which the granting of aid is subject.

To sum up, from the information available to the Court, it does not seem to me to be the case that failure, even to a slight degree, to observe the prescribed time-limit is liable to entail consequences for the functioning of the system such as to require the complete exclusion of the person concerned from certain intervention measures. I therefore consider that the principle of proportionality has been breached.

7. In the light of the foregoing considerations, I therefore suggest that the Court should reply to the question referred to it by the Verwaltungsgericht Frankfurt am Main as follows:

Article 10a of Commission Regulation (EEC) No 2102/84 of 13 July 1984 on harvest, production and stock declarations relating to wine-sector products, as amended by Article 1 of Commission Regulation (EEC) No 2459/84 of 20 August 1984, is invalid inasmuch as it provides for the exclusion from the benefit of the measures provided for in Article 15 of Council Regulation No 337/89 (replaced by Article 41 of Regulation 822/87) for any failure to observe the time-limit prescribed for the submission of stock declarations.

15 — Judgment in *Lingenfelser*, supra; judgment in Case 47/86 *Roquette* [1987] ECR 2889; judgment in Case 21/85 *Maas* [1986] ECR 3537.