OPINION OF ADVOCATE GENERAL JACOBS
delivered on 14 April 1994 *

My Lords,

1. This case is a reference from the Finanzgericht Baden-Württemberg; it raises the question whether special aid granted to German producers, in order to offset a partial dismantling of the system of monetary compensatory amounts, should also be available to a French producer selling its produce on the German market.

2. The Finanzgericht has referred the following questions:

'(1) Is it compatible with Article 3(1) of Title II of Council Regulation (EEC) No 855/84 of 31 March 1984 (OJ 1984 L 90, p. 1) for the Federal Republic of Germany to grant special aid to an agricultural producer which does not have its seat in Germany but in another country of the EEC but which imports its products from the country of production into Germany and sells them to German purchasers on the market for agricultural products in Germany?

(2) If Question 1 should be answered in the negative:

Does Article 3 of Title II of Regulation No 855/84 directly exclude the grant of special aid provided in German turnover tax law, possibly in contravention of Article 3(1), for agricultural producers not having their seat in Germany?'

In what follows I will first set out the relevant Community legislation, and then turn to consider what answers should be given to the questions referred.

* Original language: English.

The Community legislation

3. Monetary compensatory amounts (MCAs) are employed in order to avoid distortions of trade resulting from disparities between actual exchange rates and the artificial or 'representative' rates used for the purposes of the common agricultural policy; the latter are used, in particular, to convert agricultural prices set in terms of the ECU into national currencies. [1] The representative rates are sometimes referred to as the 'green' rates, and the corresponding values as 'green' currencies. Where, for a particular currency, the green rate is below the market rate of exchange, the corresponding MCAs are positive, that is to say they take the form of a levy on imports and a subsidy on exports. Conversely, where the green rate is above the market rate, the corresponding MCAs are negative, taking the form of a subsidy on imports and a levy on exports.

4. Council Regulation (EEC) No 855/84 [2] (hereafter 'the Regulation') introduced measures to eliminate the need for positive MCAs by adjusting the representative rates of exchange. Those adjustments included, in particular, an increase in the representative rate for the German mark, i. e. a revaluation of the green mark. Given that many agricultural prices are set in terms of the ECU and are, as we have seen, converted into national currencies at the representative rates, such a revaluation led to a reduction of farm incomes in Germany. As the 13th recital to the Regulation observes:

'... adaptation of the representative rates in the Federal Republic of Germany and the Netherlands entails a reduction in prices expressed in national currencies and consequently lower farm incomes; ... by way of compensation, the possibility of granting national aids to the financing of which the Community will contribute on a temporary and degressive basis should be provided for.'

Article 3 of the Regulation accordingly provides that:

'1. Any special aid granted to German agricultural producers under the conditions referred to below shall be deemed to be compatible with the common market.

2. The Federal Republic of Germany shall be authorized to grant separately the special aid by payment mentioned in the invoicing

1 — MCAs were first introduced by Council Regulation (EEC) No 974/71 (OJ, English Special Edition, 1971(I), p. 257).

2 — Council Regulation (EEC) No 855/84 of 31 March 1984 on the calculation and the dismantlement of the monetary compensatory amounts applying to certain agricultural products (OJ 1984 L 90, p. 1).

and/or the VAT declaration using the VAT as an instrument.

The aid may not exceed 3% of the ex-VAT price paid by the purchaser for the agricultural product.'

It is clear that, in the above provision, 'German agricultural producers' should be understood as meaning 'agricultural producers in Germany', since it was those farmers who were affected by the revaluation of the green mark. Thus Germany was authorized to grant aid to such producers in the form of a reduction in the producer's liability to value added tax (VAT), up to a maximum of 3% of the price of the product. That limit was increased to 5%, for the period 1 July 1984 to 31 December 1988, by Council Decision 84/361/EEC. [3] The preamble to the decision explains that the 3% limit laid down by the Regulation had proved insufficient in view of the particular difficulties encountered by German agriculture. However, nothing in the present case turns upon the difference between the 3% allowed by the original regulation and the 5% permitted by the subsequent decision.

5. As we have seen, the aid authorized by the Regulation was to be granted in the form of VAT relief. However, the Sixth Directive on VAT [4] lays down a uniform basis of assessment for value added tax, as well as an exhaustive list of the deductions which can be made in determining a taxable person's liability. In order to permit the aid to be granted, therefore, it was necessary to provide derogations from the provisions of the Sixth Directive. The Council accordingly adopted a Twentieth Directive on VAT. [5] Articles 1 and 2 of the Twentieth Directive authorize Germany, by way of derogation from the Sixth Directive, to use VAT in order to grant the special aid permitted in Regulation No 855/84 and Decision 84/361. By Article 3, Germany is required to take the necessary steps to ensure that Articles 1 and 2 do not affect the calculation of 'own resources' for the purposes of the Community budget. [6] By Article 7, the directive applies from 1 July 1984 to 31 December 1991 at the latest.

3 — Council Decision 84/361/EEC of 30 June 1984 concerning an aid granted to farmers in the Federal Republic of Germany (OJ 1984 L 185, p. 41).

4 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

5 — Twentieth Council Directive 85/361/EEC of 16 July 1985 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: derogations in connection with the special aids granted to certain farmers to compensate for the dismantlement of monetary compensatory amounts applying to certain agricultural products (OJ 1985 L 192, p. 18).

6 — See Council Decision 85/257/EEC, Euratom of 7 May 1985 on the Communities' system of own resources (OJ 1985 L 128, p. 15), now replaced by Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources (OJ 1988 L 185, p. 24).

Consideration of the questions referred

6. The plaintiff in the main proceedings (hereafter 'Rustica') is a French company which carries on, in France, the business of plant-breeding and seed-growing. In the relevant period, it exported seeds for cereals and oil seeds from France to Germany and sold them on the German market. Rustica was liable for VAT in Germany in respect of those sales. In making its VAT returns for the years 1986 and 1987 Rustica claimed an abatement of 5% under Paragraph 24a of the Umsatzsteuergesetz, which gives effect in German law to the authorization granted by Article 3 of Regulation No 855/84 and Article 1 of Decision 84/361. [7] Those abatements were refused by the defendant Tax Office, and Rustica brought proceedings against that decision before the Finanzgericht Baden-Württemberg.

The first question

7. By its first question, the Finanzgericht asks whether the aid authorized by the Regulation can be granted to a producer in another Member State which exports its produce to Germany and sells it on the German market.

8. As we have seen, the aid authorized by the Regulation is granted in order to compensate producers in Germany for a loss in income consequent upon the revaluation of the green mark. Rustica argues that the principle of non-discrimination requires that the aid must also be made available to producers in other Member States who sell their produce on the German market. It suggests that such producers will have been affected by the dismantling of MCAs in exactly the same way as German farmers, and that they should therefore be entitled to the same VAT relief to compensate for their loss in income.

9. Rustica also relies upon Article 95 of the Treaty, first paragraph, which provides that:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.'

Rustica submits that Paragraph 24a of the Umsatzsteuergesetz must be interpreted in accordance with that provision, and that the aid granted under Paragraph 24a must accordingly be available to the producers of other Member States as well as to German producers. For otherwise the products supplied by the former producers would, indi-

7 — Paragraph 24a was inserted into the Umsatzsteuergesetz by the Erste Gesetz zur Änderung des Umsatzsteuergesetzes, of 29 June 1984 (BGBl. I, 796): see Sölch/Ringleb/List *Umsatzsteuergesetz* (Munich 1993), Paragraph 24a, Note 2.

rectly, bear a greater burden of VAT than that borne by equivalent German products.

10. In my view, those submissions cannot be accepted. First, it is clear from the wording of Article 3 of the Regulation that producers in other Member States are not intended to be covered. That is also clear, moreover, from its purpose. For we have seen that the aid authorized by the Regulation is intended to compensate for the revaluation of the green mark. But, as the Commission points out, the income of producers exporting their produce from another Member State will not have been affected by that revaluation. Where the price of the product in question is fixed by intervention arrangements, any reduction of the price (expressed in German marks) resulting from a revaluation of the green mark will be compensated by a corresponding reduction in the MCA levied on import. Where, on the other hand, the price is not fixed by intervention arrangements, a revaluation of the green mark can have no effect on the value received for the goods. Of course, in the latter case the value received by the producer (expressed in the currency of its own Member State) may be affected by changes in the market exchange rate; but it is clear that it cannot be affected by changes in the green rate of exchange.

11. It is no doubt for that reason that Article 3(1) of the Regulation refers to 'special aid granted to *German* agricultural producers', and why the preamble to Decision 84/361 refers to the 'particular difficulties encountered by *German* agriculture' (and its title to 'an aid granted to farmers in the *Federal Republic of Germany*'). [8] As I have emphasized, the difficulties in question arose from a revaluation of the green mark. There is no reason to depart from a literal construction of those provisions, and interpret them as applying to a French producer which sells its produce in Germany. To grant such a producer compensation for the revaluation of the green mark would be to grant compensation for a non-existent loss.

12. That is particularly easy to see in the case of the products presently at issue. For, as the Commission observes, the common organization of the market for seeds generally takes the form of a system of production aids rather than of intervention prices. [9] Thus, even in the case of German producers, the income obtained from the sale of seeds in Germany will not have immediately been affected by the revaluation of the green mark, although that revaluation will have affected the amounts of production aids (expressed in German marks) which are paid

8 — See, similarly, the subsequent Council Decision 88/402/EEC of 30 June 1988 on an aid granted to farmers in the Federal Republic of Germany (OJ 1988 L 195, p. 70), and Council Decision 92/392/EEC of 30 June 1992 on temporary national compensation for farmers in Germany (OJ 1992 L 215, p. 100).

9 — See Council Regulation (EEC) No 2358/71 of 26 October 1971 on the common organization of the market in seeds (OJ, English Special Edition 1971(III), p. 894), last amended by Council Regulation (EEC) No 1239/89 of 3 May 1989 (OJ 1989 L 128, p. 35). However, Article 6 of Regulation No 2358/71 provides for the fixing of annual reference prices in the case of hybrid maize for sowing.

to German farmers. On the other hand, the value of the production aids paid to French farmers will depend only upon the rate of the green franc.

13. Nor, in my view, is Rustica assisted by Article 95 of the Treaty. Since the meaning of the Regulation is clear, both from its terms and in the light of its purpose, any argument based on Article 95 would go to the validity rather than the interpretation of the Regulation. As we have seen, the Regulation must be interpreted as authorizing only aid granted to producers in Germany. It is to be noted, however, that the validity of the Regulation has not been put in issue in these proceedings; and it is clear, in any event, that Rustica would not be assisted in its present claim by a finding of invalidity. For if the Regulation were to be declared invalid, the result would not be to authorize the grant of aid, in the form of VAT relief, to producers in other Member States, but only to remove authorization for the grant of such aid to producers in Germany.

14. I conclude therefore that the first question referred by the Finanzgericht is to be answered in the negative. It is accordingly necessary to answer the second question.

The second question

15. By its second question the Finanzgericht asks in substance whether Article 3 of the Regulation precludes the grant of aid, in the form of VAT relief, to producers not falling within the scope of that provision.

16. It is clear that Article 3 of the Regulation does not in itself prohibit the grant of aid, but has the effect only of authorizing the grant of aid satisfying the conditions laid down. Authorization is required from two points of view.

17. In the first place, aid granted by a Member State favouring certain undertakings or the production of certain goods may be incompatible with the common market, and accordingly contrary to Article 92 of the Treaty. It is true that Article 42 of the Treaty states that the provisions of the chapter of the Treaty relating to rules on competition, which include the rules relating to State aids, [10] shall apply to agricultural products only to the extent determined by the Council within the framework of Article 43(2) and (3). However, rules providing for a common organization of the market frequently provide for the application of the State aid provisions of the Treaty. Thus, Article 8 of Regulation No 2358/71 [11] applies Articles 92

10 — Now in Part Three, Title V, Chapter 1, Section 3, of the Treaty.

11 — Cited above, note 9.

to 94 of the Treaty to the products falling under the common organization of the market in seeds, except as otherwise provided in that regulation. Depending upon the circumstances, therefore, the grant of aid falling outside the scope of Regulation No 855/84 (or, as the case may be, Decision 84/361) may be prohibited by Article 92 of the Treaty. Moreover, a Member State proposing to grant such aid must in any event comply with the notification requirements laid down by Article 93(3). Aid falling within the scope of the Regulation, on the other hand, is of course deemed to be compatible with the common market.

18. In the second place, as we have already seen, [12] the grant of aid in the specific form of VAT relief is in principle contrary to the Sixth VAT Directive. [13] For that reason, the grant of such aid requires the authorization given, by way of derogation from the Sixth Directive, by the Twentieth VAT Directive. [14] It follows that the grant of VAT relief outside the limits specified in the Twentieth Directive would be contrary to the provisions of the Sixth Directive. It will be recalled that the derogation given by the Twentieth Directive is limited to the special aid permitted by Regulation No 55/84 and Decision 84/361.

Conclusion

19. I am accordingly of the opinion that the questions referred by the Finanzgericht Baden-Württemberg should be answered as follows:

(1) Article 3 of Council Regulation (EEC) No 855/84 and Article 1 of Council Decision 84/361/EEC cannot be interpreted as authorizing the grant of special aid in the form of VAT relief to a producer in a Member State other than Germany, notwithstanding that the producer imports its products into Germany and sells them there.

(2) The grant of such aid to a producer in a Member State other than Germany is accordingly precluded, in particular, by Council Directive 77/388/EEC in conjunction with Council Directive 85/361/EEC.

12 — See paragraph 5 above.

13 — Cited above, note 4.

14 — Cited above, note 5.